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NOTE: Excerpts from The State Bar of California New Attorney Training Requirement e-learning course appendix for course entitled "Lawyer as an Officer of the Court – Civility and Pro Bono Legal Services"

Lawyer as an Officer of the Court – Civility and Pro Bono Legal Services

As an officer of the court, you have the privilege and responsibility to promote public confidence in the administration of justice and the legal profession. This includes practicing law with dignity, courtesy, and integrity.

Attorney Oath

In becoming a California attorney, each admittee must affirm that, "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity." While dignity, courtesy, and integrity are not mandatory duties found in the Rules of Professional Conduct, the fact that these principles are included in the attorney oath means that civility and professionalism are an important responsibility of all attorneys. The content of the oath is provided for in both the statute and the California Rules of Court.

Importance of Public Confidence in the Administration of Justice

The civility portion of the attorney oath reflects the importance of interacting in a professional manner with clients, other parties and counsel, the courts, and the public. Attorneys should maintain civility, professional integrity, personal dignity, respect, courtesy, and cooperation, all of which are essential to the fair administration of justice and facilitate effective conflict resolution. The legal profession must strive for the highest standards of civility because uncivil or unprofessional conduct not only disserves the individuals involved, but also demeans the profession as a whole and causes doubts in the rule of law and the integrity of all attorneys.

California Attorney Guidelines of Civility and Professionalism

Because incivility can have adverse consequences, it is important to understand the California Attorney Guidelines of Civility and Professionalism and its purpose. Many bar organizations and courts, including the State Bar of California, have civility guidelines, which are described as aspirational standards of conduct. Attorneys are encouraged to make these guidelines their personal standard. The State Bar guidelines promote effective advocacy and reduce stress in the practice of law, lower costs to clients by encouraging cooperation among counsel, and are intended to complement codes of professionalism adopted by courts and bar associations in California, but are not intended for charging State Bar discipline. Although not binding in California, the American Bar Association or ABA Model rules address civility in a comment to the Model Rule on diligence. The comment to the American Bar Association Model Rule states that acting with reasonable diligence does not require offensive tactics. Attorneys can be diligent, and at the same time, treat everyone involved in the case with respect and courtesy.

How Incivility Can Harm a Client's Representation

With confidence in the administration of justice, clients approach their attorneys expecting them to engage in zealous advocacy. But many attorneys confuse zealous advocacy with incivility that may hurt, rather than help, your client.

Negative Rulings: If brought to the attention of a judge, unprofessional, offensive or extreme uncooperative behavior toward opposing counsel, an opposing party, or a witness can lead to an admonishment from a judge. In some circumstances the unprofessional conduct of an attorney might negatively impact the attorney's client, such as a denial for a request for an extension of time.

Increased Fees: Attorneys might seek to frustrate the discovery process or delay settlement discussions by raising hyper-technical objections and engaging in sharp practices. This may lead to unnecessary proceedings, such as costly motions to compel an adversary's compliance in circumstances where a judge could expect cooperation among the attorneys. As a result, the client is harmed due to increased fees and costs of litigation.

Sanctions: A court may impose monetary sanctions for unprofessional behavior. These sanctions might be directed at the attorney, the client, or both.

Offensive Litigation Tactics

Uncivil and unprofessional conduct can be employed through a variety of offensive litigation tactics.

Litigation as War: Attorneys can turn litigation into war by adopting an overly aggressive mentality in dealing with others when representing a client. This may involve assuming a harsh and demeaning attitude toward adverse parties or witnesses, or by acting contentiously toward judicial officers or court staff. An attorney should advise their clients that it is inappropriate for an attorney to engage in abusive behavior or other conduct unbecoming a member of the bar and an officer of the court.

Making Lives Miserable: An attorney might use depositions to make life miserable for opposing parties and witnesses without regard to any client benefit. Depositions are a common area where sound discretion is needed. Unnecessary depositions must not be used to harass opposing parties or witnesses or to delay the resolution of a dispute. Even when depositions are necessary, attorneys should consider the burden on the opponent when scheduling a deposition. Sometimes being mindful of how the legal process burdens parties or witnesses can get lost when an attorney is striving to be an overzealous advocate.

Confusing Response to Document Demands: An attorney may be tempted to produce documents in a manner that is unreasonably confusing and frustrating to a requestor. When an attorney receives a clear and unambiguous request for documents, an attorney should produce organized and well-written documents that does not hide or obscure the existence of other documents. Note that discovery should be conducted according to the California Civil Discovery Act, which defines misuse of discovery.

Filing unnecessary motions: Attorneys should not engage in unnecessary motion practice. When possible, before filing a motion, attorneys should attempt to speak with opposing counsel and engage in a good faith effort to resolve or informally limit the issue.

Contempt, Sanctions, and Self-Reporting

In addition to the harmful effects that uncivil and unprofessional behavior can have on a client's case, such behavior can result in consequences against the attorney in the form of sanctions, self-reporting, and disciplinary actions.

Sanctions: While the California Attorney Guidelines of Civility and Professionalism are aspirational standards of conduct, a judge might consider the guidelines in evaluating whether an attorney is being civil. This includes consideration of whether an attorney should be sanctioned for incivility. If a judge believes that an attorney's uncivil actions are interfering in the case, the judge can sanction the attorney, including imposing monetary sanctions, issuing adverse rulings, or holding the attorney in contempt.

Self-Reporting: An attorney sanctioned by a court to pay a thousand dollars or more is required, with limited exception, to report the sanctions to the State Bar, in writing, within 30 days.

Disciplinary Action: Engaging in uncivil conduct can be reported to the State Bar and might result in disciplinary action. By statute, a court must notify the State Bar of certain orders of contempt, reversals of judgments, and imposition of sanctions. Reports submitted to the State Bar are subject to investigation and might lead to a disciplinary proceeding against an attorney. The opposing counsel can also report incivility to the State Bar, however, it is important to recognize that the Rules of Professional Conduct prohibit attorneys from using the threat of a State Bar complaint to coerce the resolution of a civil dispute.

Duties Under the State Bar Act (Business and Professions Code section 6000 et seq.)

Unlike the aspirational standards of the civility guidelines, duties under the State Bar Act are mandatory. Some of these duties are related to civility and professionalism including: maintaining due respect toward the courts of justice and judicial officers; not advancing any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged; and not commencing or continuing an action or proceeding arising from corrupt motives.

Access to Justice

Access to justice should not be a privilege of only those who can afford it. A society cannot be considered equitable when legal services are not available to all. As officers of the court, you can promote access to justice by providing free legal services to the disadvantaged.

Access to Justice Crisis

Providing pro bono legal services is an urgent need. 71% of low income households experience a civil legal problem each year. In the past year, 86% of those received inadequate or no legal help for their civil legal cases. Of all those seeking assistance through a legal aid organization, more than half get limited or no legal assistance. The overwhelming reason for legal aid not providing services is lack of resources to provide the assistance. There are approximately 39 million Californians. There are about 180,000 attorneys practicing law in California. This means for every attorney, there are about 215 Californians. More than 7 million Californians are low-income and indigent people. There are about 960 legal service attorneys in California providing legal services to indigent people. This means there are more than 7,300 potential clients for each of these attorneys. In 81% of unlawful detainer cases, at least one party is unrepresented. In domestic violence cases, that number increases to 90%.

Benefits of Providing Pro Bono Legal Services

The crisis of access to justice can be partially addressed by providing pro bono legal services. Providing pro bono legal services has many benefits. As an attorney, you can build your skills and experience by working on various types of cases. You can earn a good reputation in your local legal community of attorneys and judges, and it is a good way to grow your professional network. This will also open up new avenues and opportunities for your career. Finally, using your knowledge to help the less fortunate can be a source of personal satisfaction in the practice of law. Pro bono legal services also benefits society. Attorneys hold the keys to the courthouse. It is only through attorneys that people can effectively access the courts and receive justice. Access to justice will strengthen trust in the legal system. In contrast, a legal system that is perceived as only available to a privileged segment of the population will cause doubt in the fairness of the system and might tempt people to resort to extralegal methods to resolve disputes.

Challenges to Providing Pro Bono Services

There are legal services organizations that can help attorney's overcome some of the common challenges in providing pro bono legal services. Some of these challenges include working for an employer that does not allow pro bono work because of potential conflicts, working for an employer that allows pro bono work, but does not value it, insufficient time to devote to pro bono representation, lack of professional liability insurance, not knowing where to begin, and not having the legal expertise in the areas of law needed by indigent clients.

Statutory Declaration

While pro bono legal services is not mandatory, it is a significant responsibility covered by California statutes and a resolution of the Board of Trustees. Business and Professions Code section 6073 states: "It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of an attorney. Every attorney authorized and privileged to practice law in California is expected to make a contribution..." Providing pro bono legal services is consistent with an attorney's duty to never reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed. Many attorneys provide pro bono services on a regular basis.

Definition of Pro Bono Legal Services

The State Bar Board of Trustees defines pro bono as providing or enabling "the direct delivery of legal services, without expectation of compensation other than reimbursement of expenses, to indigent individuals, or to not-for-profit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged, not-for-profit organizations with a purpose of improving the law and the legal system, or increasing access to justice." It is important to identify activities that can qualify as pro bono work. Working with clients referred from a qualified legal services program qualifies as pro bono work. But assisting friends or family who are not indigent, does not qualify as pro bono work. Also, continuing to work for clients who are unable to pay the agreed-upon fees does not qualify as pro bono work. The State Bar has proposed a change to the Rules of Professional Conduct to emphasize the value of pro bono legal services.

How to Engage in Pro Bono Services

Attorneys can engage in pro bono activities by searching for programs specific to age groups, subject areas, geographic areas, and demographics. Attorneys can also visit the California pro bono website, which can provide the right direction for participating in pro bono opportunities. Using the California pro bono website is helpful because it will direct you to programs where the clients are already screened by the organization, malpractice insurance is available, attorneys can get training in the necessary areas of law, and the legal services organization provides available guidance and support. Visit Californiaprobono.org and click on "Pro Bono Programs Guide" to find volunteer opportunities tailored to your specific interest.

Contributions of Financial Support

Some attorneys might be precluded from providing pro bono legal services. Other attorneys might be looking for ways to contribute in addition to doing pro bono work. In either situation, attorneys can contribute financially to programs that provide legal assistance to low-income individuals. For example, attorneys can provide financial support to organizations like the Justice Gap fund.

ABA's Model Rules of Professional Conduct

Providing pro bono legal services is a duty required by the American Bar Association's Model Rules of Professional Conduct. The pro bono rule has been adopted in every state, except California. Although not binding in California, the American Bar Association Model Rules can be used for guidance. Attorneys licensed both in California and in a state that has adopted the Model Rule should consult the American Bar Association Model Rules in addition to California statues, the Board of Trustees resolution, and other California references.

Providing Legal Services to the State of California or Statutory Contracting Guideline

Government contracts are generally awarded to large law firms. One factor California considers when awarding government contracts for legal work is a law firms' commitment to providing pro bono legal services. This is pursuant to applicable statutory law. If a law firm does not encourage pro bono activities, new attorneys may consider informing senior attorneys about the opportunity of qualifying for government work by making a commitment to pro bono legal services. In addition, if a firm is worried about potential conflicts, the Limited Legal Services rule should be consulted as that rule mitigates the impact of imputed conflicts of interests when only limited legal services are involved.

Filed 6/11/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANGELE LASALLE, Plaintiff and Respondent, v. JOANNA T. VOGEL, Defendant and Appellant.	G055381 (Super. Ct. No. 30-2016-00836641) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Law Offices of Dorie A. Rogers, Dorie A. Rogers and Lisa R. McCall for Defendant and Appellant.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiff and Respondent.

Here is what Code of Civil Procedure[1] section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.

Yet the principle the section dictates has somehow become the *Marie Celeste* of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance."[2] In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

FACTS

From 2011 to 2015, Appellant Attorney Joanna T. Vogel (Vogel) represented plaintiff/respondent Angele Lasalle (Lasalle) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. Lasalle repeatedly failed to provide discovery in that case, and the court defaulted her as a terminating sanction. She said her failure to provide discovery was caused by Vogel not keeping her informed of discovery orders, so she sued Vogel for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, Lasalle's attorney sent Vogel a letter and an

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1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2 Hamlet, Act I, Scene 4, ll. 15-16.

email – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against Vogel unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the email was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching Vogel in Friday's post except to say it was slim.

Counsel did not receive any response from Vogel by 3 p.m. the following Monday, April 11. He filed a request for entry of default and emailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she emailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an attorney by Friday April 15th,[3] and that attorney had a motion to set aside the default on file a week later. We quote the entirety of Lasalle's declaration in support of the set aside motion in the margin.[4]

Vogel's set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial court's discretion in

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[3] It took Vogel four days because she initially contacted an attorney who had just decided to represent one of the codefendants – other attorneys who had represented Lasalle, but are not parties to this appeal.

[4] "I am an attorney at law, and the defendant in this matter. [¶] When I was served with the summons and complaint, I was in the middle of a number of family law matters in court as the attorney. [¶] I was also involved in my own divorce, wherein I had just discovered my husband had failed to pay the taxes on our property, and it had gone into default. Also he failed to pay the mortgage on the family residence and it went into default. [¶] I received the summons and complaint and the discovery and had met with an attorney to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter. [¶] I therefore, determined to find a new attorney and contacted the plaintiff's attorney to request a brief extension to respond to the complaint. While waiting to hear back and without having the courtesy of the extension, I received the notice of default. [¶] I was served with discovery before I even answered the complaint, and had begun to work on that as well. [¶] I am a single mother and between taking care of the family, the practice of law, and trying to revive [*sic*] the files of from the plaintiff, I did fail to timely file my answer. [¶] As soon as I could, I contacted [the attorney who filed the motion] and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint. [¶] I have attached hereto my proposed answer. [¶] I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's counsel at the time is not Vogel's appellant's counsel on appeal.

cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an attorney confesses fault.

In opposing relief, respondent's counsel asked the trial court to take judicial notice of state bar disciplinary proceedings against Vogel stemming from two unrelated cases, which had resulted in a stayed suspension of Vogel's license to practice. The court denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of Vogel's prior discipline. A year later, a default judgment was entered against Vogel for $1 million. She has appealed from both that judgment and the order refusing to set aside the default.

We sympathize with the court below and opposing counsel. We have all encountered dilatory tactics and know how frustrating they can be. But we cannot see this as such a situation, and cannot countenance the way this default was taken, so we reverse the judgment.

DISCUSSION

Three decades ago, our colleagues in the First District, dealing with a case they attributed to a "fit of pique between counsel," addressed this entreaty to California attorneys, "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.)

In 1994, the Second District lambasted attorneys who were cluttering up the courts with what were essentially personal spats. In the words of a clearly exasperated Justice Gilbert, "If this case is an example, the term 'civil procedure' is an oxymoron." (*Green v. GTE California* (1994) 29 Cal.App.4th 407 408.)

In 1997, another appellate court urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17.)

By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case, which they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, the First District tried again. They said, "We close this discussion with a reminder to counsel – all counsel, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth,' nor does it mean lack of civility. [Citations.] Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

Six months later, our court said this, "Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time

lamenting the loss of a golden age when lawyers treated each other with respect and courtesy. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned counsel $10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293 (Kim).)

This is not an exhaustive catalogue. Were we writing a compendium rather than an opinion, we could include keening from every state, because, "Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement*. Since 2014, new attorneys have been required to vow to treat opposing counsel with "dignity, courtesy, and integrity."

That was not done here. Dignity, courtesy, and integrity were conspicuously lacking.

We are reluctant to come down too hard on respondent's counsel or the trial court because we think the problem is not so much a personal failure as systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law

is *not* a business. It is a profession. And those who practice it carry a concomitantly greater responsibility than businesspeople.

So what we review in this case is not so much a failure of court and counsel as an insidious decline in the standards of the profession that must be addressed. "The term 'officer of the court,' with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance." (*Kim, supra,* at p. 292.) We reverse the order in this case because that significance was overlooked.

An order denying a motion to set aside a default is appealable from the ensuing default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*).) We acknowledge the standard of review for an order denying a set aside motion is abuse of discretion. (*Ibid.*) But there is an important distinction in the way that discretion is measured in section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme Court has repeatedly reminded us that in this area doubts must be resolved *in favor of relief*, with an order denying relief scrutinized more carefully that an order granting it. As Justice Mosk put it in *Rappleyea*, "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136.)" (*Id.* at p. 980.)[5]

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both apropos to our case and indicative of how law ought to be practiced, said,

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5 Indeed, some cases go so far as to say "'very slight evidence will be required to justify a court in setting aside the default.' [Citation.]" (*Miller v. City of Hermosa Beach, supra,* at p. 1136.) More on this point below.

"The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500 (*Bookbinders*).)[6]

In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702 (*Fasuyi*), quoting section 15 of the California Attorney Guidelines of Civility and Professionalism (2007).) Accordingly, it is now well-acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default. (*Id.* at pp. 701-702.)

In that regard we heartily endorse the related admonition found in The Rutter Group practice guide, and we note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19 (rev. #1, 2008) as quoted in *Fasuyi, supra*, 167 Cal.App.4th at p. 702.)

To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038 (*Bellm*). Indeed, it was the most recent case cited by the trial court's minute order denying Vogel's set aside motion.

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6 Disapproved *on other grounds* in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551.

Bellm was written at a time when incivility was surfacing as a problem in the legal profession.[7] "Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors and John McEnroe." (Gee & Garner, *The Uncivil Lawyer:* (1996) 15 Rev. Litig. 177, 190.) Thus the majority opinion in *Bellm* lamented the "lack of professional courtesy" in counsel's taking a default without warning (See *Bellm, supra*, 150 Cal.App.3d at p. 1038 ["we decry this lack of professional courtesy"]) but deemed it an ethical issue rather than a legal one and affirmed the trial court's denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm, supra,* 150 Cal.App.3d at p. 1040 (dis. opn. of Haning J.).)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* court did not have the benefit of the statute. The statute was passed to curb what the Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the Law Revision Commission phrased it:

"Over the years the attitude of the courts and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the courts were strict in requiring dismissal. In 1969, an effort was made in the Legislature to curb discretionary court dismissals, but ended in authority for the

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[7] The incivility lamentations we quoted earlier began in 1989, although this case certainly falls into the voice-crying-in-the-desert type of entreaty that grew louder a few years later.

Judicial Council to provide a procedure for dismissal. In 1970, the courts brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continued to the early 1980's. The judicial attitude in the latter time was stated by the Supreme Court: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds.'" (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see also *Hocharian v. Superior Court* (1981) 28 Cal.3d 714.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. The ethical obligation to warn opposing counsel of an intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to trial or other disposition." (§ 583.130.) Quiet speed and unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the courts.

We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive. First, it has led to increased litigation. Unintended defaults inevitably result in motions to overturn them (this case, exemplary in no other way, demonstrates well the resources consumed by such motions) or lawsuits against the defaulted party's attorney (who thought enough of his client's position to agree to represent him and then bungled it). There are plenty of demands on our legal resources without adding such matters.

But worse than that, it forces practitioners to sail between Scylla and Charybdis. They are torn between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their

client as effectively as possible. We ask too much of people with families and mortgages – not to mention ex-spouses who fail to make tax and mortgage payments – when we ask them to choose "dignity, courtesy, and integrity" over easy "fish in a barrel" victories that are perceived to have statutory support. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

With that in mind, we conclude that by standards now applicable to such motions, the trial judge here abused his discretion in not setting aside the default. Several factors combine to convince us of that.

The first is the use of email to give "warning." Email has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, email is ill-suited for a communication on which a million dollar lawsuit may hinge.[8] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a "delete" command can result in a speedy communication being merely a failed one.

We all learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318.) While there is no due process problem in the case before us now (Vogel has not complained she wasn't actually served), emails are a lousy medium with which to warn opposing counsel that a default is about to be taken. We find it significant that by law emails are insufficient to serve notices on counsel in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b).)

Indeed, the sheer ephemerality of emails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the

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8 The default judgment obtained against Lasalle by respondent was exactly $1,000,000.

merits. While some emails seem to live on for years despite efforts to bleach them out, others have the half-life of a neutrino. We ourselves have learned the hard way that spam filters can ambush important, non-advertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – us. We have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by email got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach us.

The choice of email to announce an impending default seems to us hardly distinguishable from stealth. And since the other course adopted by respondent's trial attorney was mailing a letter on Thursday in which he demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor we consider is the short-fuse deadline given by respondent's counsel. It was *unreasonably* short. It set Vogel up to have her default taken immediately. "[T]he quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy which, under [*Bookbinder*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616 (*Robinson*).)

The third factor is the total absence of prejudice to Lasalle from any set-aside, given the relatively short time between respondent seeking the default and Vogel asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.'" (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249.) Setting aside *this* default would have involved little wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the unusual nature of the malpractice claim in this case. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751 [discussing dynamics bearing on whether a defendant might elect to default a given claim].) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the spectrum.

Because of the facts alleged in the complaint – namely that Vogel had been responsible for losing Lasalle's *entire* dissolution case – Lasalle's damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418, fn. 2 ["every item of marital property presents a host of challenging issues"].) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [plaintiff must prove that "*but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred."].) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the presence of a plainly meritorious defense to at least part of Lasalle's default judgment. That judgment eventually included emotional distress damages of $100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, this court squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if we were not directing the trial court to set aside the default, we would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

Next, there was the trial court's taking judicial notice of, and reliance on, Vogel's two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited to criminal cases by its terms,[9] though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176 ["The purpose of this evidentiary rule 'is to assure that a defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.]".) Nonetheless, the point is the same: judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. The fact Vogel had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.

And finally, we are disappointed that Vogel's explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the

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9 Subdivision (a) of which provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." By their terms all four statutory exceptions are limited to criminal actions.

inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex- has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, Vogel's declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As we have noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing*." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740, italics added.) Vogel's declaration crossed that threshold.

We do not hold that every section 473 motion supported by a colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, we can hold only that *this one* should have been granted. As we have said, Vogel was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on another case* – would have prevented her from meeting it), and she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson, supra,* 67 Cal.App.3d at p. 616 [noting short period of time to respond, press of business, limited office hours during a holiday period and defense counsel's preoccupation with other litigated matters made failure to timely file an answer "excusable"].) We hope the next attorney in these straits will not have such a compelling set of facts to offer . . . and that opposing counsel will act with "dignity, courtesy, and integrity."

CONCLUSION AND DISPOSITION

Supreme Court Chief Justice Warren Burger long ago observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . to the administration of justice. . . . [¶] . . . [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215.) In recognition of this fact, section 583.130 says it is the policy of this state that "all parties shall cooperate in bringing the action to trial or other disposition." Attorneys who do not do so are practicing in contravention of the policy of the state and menacing the future of the profession.

The judgment is reversed. Appellant will recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.

NOTE: Excerpts from The State Bar of California New Attorney Training Requirement e-learning course appendix for course entitled "Attorney-Client Relationship 101"

Ethics and Money

Formation of an attorney/client relationship
An attorney-client relationship, including the important duty of confidentiality, may be created by contract, either express or implied.

Consider this. An attorney is contacted on a social media site by a friend who shares confidential information about a legal problem that the friend is facing. The attorney has no intention of representing the friend but in an effort to be helpful, the attorney shares some basic legal information and offers generalized observations that are not intended to be legal advice. Does this limited exchange pose a risk of an unintended formation of an attorney-client relationship?

Attorneys can get into trouble for not realizing that they are in a position of owing fiduciary obligations to another individual. You could be mingling with strangers at a party, chatting with a friend on social media, or holding a meeting at your law office. If you present yourself as a lawyer then give legal advice and receive confidential information, you could be forming an attorney-client relationship. This means you may have fiduciary obligations to uphold, such as the duty of confidentiality. This can happen even without a retainer agreement, payment of any attorney fees, or similar formalities. You might be surprised by how many attorneys face disciplinary complaints and malpractice actions because they assume no retainer means no attorney-client relationship. You can avoid this situation by learning to discern how, when, and whether an attorney-client relationship has been formed. This is all the more critical for you and your career, when you consider that the Rules of Professional Conduct and the State Bar Act assign a vast majority of an attorney's duties and obligations in service to clients. So, first things first. Who actually qualifies as a client. Let's find out.

Who is a Client? Who is a Lawyer?
A client is a person or entity who, directly or through an authorized representative, consults a lawyer for the purposes of retaining the lawyer or securing legal service or advice in his or her professional capacity. A lawyer is a person authorized or reasonably believed by a client to be authorized, to practice law in any state or nation.

Types of Attorney-Client Relationships
An attorney-client relationship may be formed when a client has reason to believe that the attorney is representing the client's legal interests. This "reason" can be created expressly, through a written contract; or, it can be implied-in-fact based on the conduct of the attorney and the client.

Express Formations: In an express attorney-client relationship formation, a client signs a contract with an attorney indicating that the attorney will represent them. Typically, Express formation of the relationship is contractual, based on mutual assent; easy to identify, and has well-defined duties and obligations. An express formation clearly defines fee arrangements, responsibility for costs and expenses, and the scope of services to be provided.

Implied-in-Fact Formations: Identification of an implied-in-fact attorney-client relationship formation depends, in large part, on the prospective client's expectations. This can be assessed based on how the situation appears to a reasonable person in the individual's position. The following questions might be asked to help determine the relationship in a given situation: Did the attorney volunteer their services to the prospective client? Did the attorney indicate by action or statement that they were representing the prospective client? Did the attorney previously represent the prospective client, particularly where the representation occurred over a period of time, or in several matters, or without an express agreement? The prospective client's behavior also helps determine the relationship. Did the prospective client seek and receive legal advice from the attorney or disclose confidential information? Did the prospective client reasonably believe he or she was consulting the attorney in the attorney's professional capacity, pay fees, or other consideration? Did the prospective client consult the attorney in confidence? An additional factor is how much contact occurred between the attorney and the prospective client.

Implied-in-Fact Attorney-Client Formations
Individuals with legal questions sometimes approach lawyers on a casual basis, in non-office settings, and in unexpected ways. What can you do to ensure such situations do not result in the unintended formation of an attorney-client relationship?

Scenario 1: You are standing in a main courthouse hallway. A stranger comes to you and asks if you are a lawyer. As soon as you say yes, he says "John and I have been charged with two burglaries, but I did the first one alone. What should I do?"

How should you respond? You should decline to represent him and suggest he contact the public defender's office.

Scenario 2: An individual approaches you at a party after learning from the host that you are an attorney. During a casual conversation, she says, "My insurer won't provide coverage to replace my office roof even though my business flooded last year during a rain storm. I even paid all the premiums! Do you think there's anything I can do about it?"

How should you respond? Politely listen to the individual, then state that you can't answer her question but give her your contact information and invite her to schedule an appointment. This will ensure you are in a controlled environment, while having a conversation with a prospective client.

Scenario 3: You receive a phone call at home from a relative. Your relative says, "I know you do legal work with wills and estates. Well, after Grandma passed away, I borrowed her car and wrecked it. Turns out the car wasn't insured. Do you think that will be a problem when her estate gets resolved? Should I do anything?"

How should you respond? Listen without interrupting, and then tell your relative that you cannot represent him and that he should consider calling a referral service for a lawyer.

Explanation: Ordinarily, an express attorney-client relationship cannot exist unless an attorney gives express assent. However, if you happen to express an interest in situations similar to the three cases described in the previous tabs, you may have just implied assent. Statements such as "your case sounds awesome", "I have a few questions", or "let me research this a bit before I get back to you", could create

an implied-in-fact attorney-client relationship, without you realizing. Remember, implied-in-fact relationships are risky for both parties. Express attorney-client relationships are the best way to set clear expectations and avoid unanticipated problems. In the three scenarios described, the attorney's response communicated an intent to decline representation. If the attorney was interested in actually representing the prospective client, the attorney should proceed by taking steps to enter into an express attorney-client relationship.

Risks of Implied-in-Fact Relationships
Once an implied-in-fact attorney-client relationship is created, the attorney owes certain duties to their client. If an attorney fails to fulfill these duties, the attorney is at risk of facing conflicts of interest and disqualification, breach of fiduciary duty or malpractice liability, and/or disciplinary action by the State Bar.

Conflicts of Interest and Risk of Disqualification: Unintended client relationships exacerbate the potential for conflicts of interest. If a lawyer unknowingly establishes an implied-in-fact attorney client relationship, that client could have standing to seek disqualification to remedy the conflict.
Breach of Fiduciary Duty or Malpractice Liability: An attorney owes fiduciary duties, such as a duty of confidentiality, to individuals who consult the attorney in confidence. Failure to perform your duties exposes you to potential civil liability.

Disciplinary Actions from State Bar: Failure to comply with duties owed to an implied-in-fact client can result in a complaint being filed with the State Bar. An attorney's belief that no duties are owed to this type of client because no express attorney-client relationship exists, is not a defense to the charge that an attorney has failed to perform their duty.

Avoiding the Risks Arising from Implied-in-Fact Relationships
Depending on the specific circumstances, you can consider the following measures to minimize the risk of forming an unintended attorney-client relationship. You may clearly state that you are not providing legal advice and refer them to a certified lawyer referral service. Or you may deflect a request for legal advice by explaining that you cannot give legal advice before you conduct a conflicts-check. You may also follow-up in writing by clearly stating that you are not agreeing to represent the prospective client. With respect to using social media, you should not give legal advice and use disclaimers, clarification notices, reminders and non-representation notices. For example, you might add a disclaimer on your social media profile page such as "nothing posted here should be considered as legal advice." In addition, here are things to avoid. Do not share legal information that can be presumed as legal advice. Do not undermine an attorney-client relationship disclaimer by giving advice even after disclaiming the relationship. Do not use your office letterhead or signature block to write letters or emails on behalf of anyone who is not a client.

An attorney-client relationship can ONLY be formed when a client signs a contract to be represented by an attorney. True or false?

In which of the following cases is there a risk of an implied-in-fact attorney-client relationship?

First option: In the elevator in your office building, a man who knows you are a lawyer is standing next to you and, when you are alone, he expresses his concerns about getting caught stealing from his company and asks what you think he should do.

Second option: A friend asks for your business card so she can give it to someone she knows who has a property dispute with a neighbor. The friend says that she will tell the person to make an appointment to meet with you during your normal office hours
Third option: The owner of your favorite coffee shop pulls you aside for a brief, private conversation about his interest in suing an online store for copying their branding. You offer your encouragement.

Key Considerations for Express Relationships
Although the Rules of Professional Conduct do not require a written fee agreement to form an attorney-client relationship, a writing may be required by statute for certain types of representations, such as representation of a client on a contingent fee basis.

Formation in Private Practice – Written Fee Agreement
Although the law doesn't impose a strict requirement to have a written fee agreement for every client representation, using a written fee agreement is a prudent practice. Consider the following.
First, note that the Business and Professions Code requires a written fee agreement for any non contingency fee arrangement where the total expense to a client, including attorney's fees, will exceed $1,000. Second, note that the Business and Professions Code requires a written fee agreement for all contingent fee arrangements. All written fee agreements required by statute must include the following: You and the client (or client's guardian or representative) must sign the contract. You must provide a duplicate copy of the contract. And, the language of the written fee agreement should be understood by the client (this is also a statutory requirement in the civil code applicable to many types of contracts.)

The State Bar *of California*

For Attorneys

Quick Links

- 2019 Fee Statement FAQs
- Guidelines for attorney mandatory reportable actions
- State Bar ethics hotline for attorneys: 800-238-4427
- My State Bar Profile
- Minimum Continuing Legal Education (MCLE)
- Client Trust Accounts and IOLTA
- The Sections are now the California Lawyers Association

Ethics Rules Updates

On May 10 the California Supreme Court issued an order approving new Rules of Professional Conduct that had been proposed by the State Bar. The new rules went into effect on November 1, 2018.

- Rules of Professional Conduct
- State Bar has implemented new ethics rule addressing prosecutor misconduct

Important Dates

June 1 New Fingerprinting Rule took effect

The State Bar *of California*

Ethics

Encouraging ethical practices is an important way for the State Bar to prevent and discourage attorney misconduct. This is where you'll find many resources, including ethics opinions, education programs and research tools that can aid attorneys in the course of practicing law.

Ethics Hotline

The Ethics Hotline is a confidential research service for attorneys seeking guidance on their professional responsibilities.

Attorneys may request a call by completing the online Ethics Hotline Research Assistance Request Form or by calling the Ethics Hotline at: 800-238-4427 (800-2-ETHICS) within California or 415-538-2150 from outside of California. Your call will be returned in the order your request is received. Our staff will return your call between the hours of 9:00 a.m. - 4:00 p.m., Monday through Friday.

Rules and Statutes on Attorney Conduct

- California Rules of Professional Conduct
- The State Bar Act - Business & Professions Code §§ 6000 et seq.
- Selected Statutes Regarding Professional Conduct, Discipline of Attorneys and Duties of the State Bar of California
- California Rules of Court
- Rules of Procedure of the State Bar and Rules of Practice of the State Bar Court (Rules of the State Bar, Title 5)
- Law Corporation Rules (Rules of the State Bar, Title 3, Division 2, Chapter 3)
- Legal Specialization Rules (Rules of the State Bar, Title 3, Division 2, Chapter 2)
- Pro Bono Rules (Rules of the State Bar, Title 3, Division 2, Chapter 6)
- Rules and Regulations Pertaining to Lawyer Referral Services (Rules of the State Bar, Title 3, Division 5, Chapter 3)
- Out-of-State Attorney Arbitration Counsel Program (OSAAC) Rules (Rules of the State Bar, Title 3, Division 3, Chapter 2)
- Mandatory Fee Arbitration Rules (Rules of the State Bar, Title 3, Division 4, Chapter 2)
- MCLE Provider and Attorney Rules
- Supreme Court Order S158605 Regarding the State Bar IOLTA Program

Research and Resources

- California Rules of Professional Conduct and Other Related Codes (known as Publication 250)
- Index to the California Compendium on Professional Responsibility
- Handbook on Client Trust Accounting for California Attorneys
- Guidelines on Indigent Defense Services Delivery Systems
- Practical Training of Law Students
- State Bar Court
- Closing a Law Practice
- FAQ: Disclosure of Prohibition Liability Insurance (Rule 3-410)

Client Trust Accounts

The State Bar has plenty of information that can help you manage your client's trust account.

- Client Trust Accounting Resources
- Client Trust Account Guidelines
- Client Trust Account Handbook

The State Bar *of California*

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

Current Rules

Rules of Professional Conduct

Rule 4-210 Payment of Personal or Business Expenses Incurred by or for a Client

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

(1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or

(2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or

(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

(B) Nothing in rule 4-210 shall be deemed to limit rules 3-300, 3-310, and 4-300. (Amended by order of Supreme Court, operative September 14, 1992.)

NOTE: Excerpts from The State Bar of California New Attorney Training Requirement e-learning course appendix for course entitled "Lawyer as a Fiduciary of Funds and Property of Clients and Others"

The Lawyer as a Fiduciary of Funds and Property of Clients and Others

Client: When referring to an attorney's fiduciary duties in the context of client trust accounting, a client should be regarded as a beneficiary similar to any other beneficiary in a fiduciary relationship. When handling client funds and property, attorneys must act with the best interest of their client in mind.

Trust: A client's trust and confidence in his or her attorney is fundamental to the attorney-client relationship. Everything that an attorney does for the client impacts the client's trust in his or her attorney. An attorney's handling of a client's funds and property can make or break the trust in the relationship.

Accounting: Clients should be able to depend on your ability and diligence to fully and accurately account for all the money they've given to you to hold or pay out on their behalf. The key to client trust accounting is the integrity of your recordkeeping and compliance with the essential requirements of holding and disbursing of client funds.

Attorney's Duties for Client Trust Accounting

In maintaining client trust accounts, you have 10 specific duties to uphold. This includes opening a client trust account, properly depositing client funds, segregating and labeling other property of the client, and maintaining records. You will also be responsible for disbursing, paying, and delivering funds and property, avoiding the commingling and misappropriation of funds, providing required notices, responding to clients' requests for accounting, resolving disputes of funds or disbursement, handling unclaimed trust funds or property, and responding to the State Bar when the bank reports an insufficient funds transactions on a client trust account.

Opening a Client Trust Account

The client trust account is a special type of an account that is created for the benefit of the client to hold client funds. It must be designated as a client trust account. The trust account must be maintained in California, or with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the attorney or the attorney's firm should be deposited in the client trust account. The funds placed in this account should have limited accessibility. For example, a trust account should not be accessible by ATM. The client trust account may include automatic overdraft protection, as long as the bank's terms do not result in a commingling of funds.

Opening a Client Trust Account: IOLTA

The client trust account may be a single account in which you deposit the funds of all your clients.

Your recordkeeping responsibilities enable you to keep track of each client's funds. The account should be an interest-bearing checking account. It may also be an investment sweep product or an investment product authorized by California Supreme Court rule or order. For more information consult, Business and Professions Code section 6213, subdivision (j). Often the client's funds deposited into the account are a nominal amount or deposited for a short period of time. Interest collected on these funds are governed by statutes, which provide for the funding of legal services programs. This statutory program is referred to as Interest on Lawyers Trust Accounts (otherwise known as IOLTA). For more information consult, Business and Professions Code section 6211 et seq. There are client funds that should not be placed in an IOLTA account. For example, if your client has given you either a significant amount of money or if the money needs to be held for an extended period of time, those funds should be deposited in a separate account. When the interest collected from these funds is greater than the cost to maintain those funds in an account, you have a fiduciary duty to collect that interest for the benefit of the client. See Business and Professions Code section 6211, subdivision (b).

Avoiding Misappropriation and Commingling

Misappropriation: Misappropriation occurs when an attorney does not maintain clients' funds in trust. When an attorney receives funds that are for the benefit of the client, the attorney must deposit those funds into a client trust account. An attorney is culpable of misappropriation if the attorney does not deposit and maintain those funds in a client trust account. It is also misappropriation when the attorney uses client funds to pay the attorney's own obligations, or those of another separate from a client.

Commingling: Commingling occurs when a client's funds and an attorney's funds are mixed in the client trust account. An attorney cannot maintain his or her own personal funds in a client trust account because it places a client's funds at risk of claims by creditors of the attorney. An attorney who becomes entitled to funds held in a trust account must promptly withdraw those funds to keep the attorney's funds separate. If the funds belonging to the attorney are left in the client trust account, the attorney and client's funds are commingled.

Diligent client trust accounting practices is critical. In addition, even if an attorney restores the funds to the client trust account, and the client is unaware and suffers no financial harm, an attorney who commingles or misappropriates may still be subject to discipline.

Handling Clients' Funds and Property

All funds and property held for the benefit of a client must be deposited into a client trust account. This includes advances for costs and expenses. However, this does not include fees paid in advance.

Your trust accounting duties require you to differentiate between the types of funds: funds that MUST go into your client trust account; funds that MAY go into your client trust account; and funds that MUST NOT go into your client trust account. Failure to differentiate among these different types of funds may result in commingling or misappropriation.

Must Go: Any money received for the benefit of the client must be deposited into the client trust account and cleared before it can be paid out. This includes: money that belongs to the client outright (for example, funds from a sale of the client's property); money in which the attorney and

the client have a joint interest (for example, settlement proceeds that includes the attorney's contingency fee); money in which the client and a third party have a joint interest (for example, funds from the sale of community property); and money that doesn't belong to the client at all but which the attorney is holding as part of carrying out the attorney's representation of the client (for example, when the attorney represents a client who is a fiduciary for funds owned by a beneficiary).

May Go: There are only two kinds of money that may be deposited into your client trust account: money to cover bank charges, and advance fees. Everything else either must or must not be deposited into the account. From your own money you may deposit "funds reasonably sufficient to pay bank charges." This is permitted because you must prevent bank charges from being debited against your client's funds. Some attorneys arrange with the bank to have those charges assessed against their general office accounts instead of the client trust account. An "advance fee" is money your client gives you upfront to pay the cost of legal representation. While you aren't required to hold advance fees in the client trust account, it is a good risk management practice to hold advance fees in your client trust account and draw them out as you earn them. Ideally, withdrawal of your earned fees should be done on a regular basis perhaps when you do your monthly reconciliation.

Must Not Go: Funds that belong to an attorney or an attorney's law firm must never be deposited into your client trust account. You should never put your personal or office money, including funds like employee payroll taxes, into your client trust account.

Segregating and Labeling Client Funds or Property

The client or the court asks you to take possession of jewelry, the characterization of which is in dispute. As an attorney, when you receive property belonging to your client, you must promptly identify the items upon receipt and add it to your written records, label the items to identify their owner, and, as soon as practicable, store them in a safe deposit box or some other place to safeguard them and to avoid commingling.

Disbursing, Paying, or Delivering Funds and Property and Notifying Client

As an attorney, you must promptly notify a client of the receipt of the client's funds, securities, or other properties. You must also promptly disburse, pay, or deliver funds or property once you identify the person entitled to the disbursement. There are three key steps for disbursements. First, an attorney must deposit the funds in the client trust account and wait for them to be cleared by the bank. Second, an attorney must ascertain that the entitlement to a disbursement is clear and undisputed, whether the entitlement is that of a client or another party to whom funds are owed, such as a lienholder. Third, an attorney must disburse the funds promptly.

Handling Disputed Trust Funds

If a dispute arises regarding the entitlement of funds held in a client trust account, an attorney must take certain steps to promptly resolve the dispute. These steps depend on the circumstances. Two common examples of disputed trust funds include attorney fee disputes and third-party disputes.

Attorney Fee Dispute: Typically, an attorney sends a disbursement sheet to a client listing how the client's funds will be distributed. After the client reviews and signs off on the disbursement, the attorney makes the disbursements from the client trust account pursuant to the sheet.

However, what happens if the client reviews the disbursement sheet and disputes the attorney's fees before the fee is withdrawn from the trust account? The attorney must proceed carefully to resolve the dispute and properly handle the trust funds while the dispute is pending. The attorney's fee must not be withdrawn from the trust account until the dispute is resolved. If the client disputes only a portion of the fee, then the attorney must withdraw the portion of the fee that is agreed upon and leave the disputed portion in the trust account, until the dispute is resolved. If the dispute occurs after the disbursement is made, an attorney may be required to return those disputed funds to trust. The attorney must promptly seek to resolve the dispute. For example, the attorney should consider fee arbitration. (See, Business & Professions Code section 6200 et seq.)

Third-Party Dispute: An attorney may have a duty to promptly pay expenses due to a third-party incurred on behalf of a client. In some cases, the client may dispute a third-party's claim to the money. In such cases, the attorney should inform all parties of the problem and hold the disputed funds in a client trust account until the dispute is resolved. If the parties cannot resolve their dispute, the attorney should advise them of the attorney's intent to file an interpleader action. In no case should the attorney withdraw or use the disputed funds, which would constitute misappropriation.

Maintaining Records and Responding to Client's Request for an Accounting

Maintaining records and communicating with the client concerning trust funds are key components of your fiduciary duties. You might hire consultants to set up an accounting system or buy accounting software to help you with maintaining records. Whichever tool you use, ensure that your client trust accounting system will allow you to uphold your fiduciary responsibility that you have to your clients.

Recordkeeping Standards: The State Bar Board of Trustees adopted recordkeeping standards that require an attorney to create and maintain: a written ledger for each client on whose behalf funds are held; a written journal for each bank account; all bank statements and cancelled checks for each bank account; and a monthly reconciliation.

Responding to Client Inquiries: Your system should also allow you to promptly respond to any client inquiries about their funds. At the client's request, the attorney must promptly provide the client with an accounting. If, for example, the client's inquiry pertains to bills for fees or costs, the attorney shall provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request.

Handling Unclaimed Trust Funds or Property

The goal of recordkeeping is to account for all funds in the client trust account. In maintaining your records, you may discover small, inactive balances in the trust account. These balances might be the result of a mathematical error, a portion of a fee you neglected to withdraw, or a check that you wrote to a client or another person which has not yet been cashed. Regardless of the reason, as long as those funds remain in your trust account, you are responsible for them. The longer these funds stay in the bank, the harder it is to account for them. Therefore, you must resolve the issues as soon

as possible. If you are careful with these small balances and are still unable to pay out the funds, you should consider whether the unclaimed monies escheat to the state pursuant to the Civil Code statute.

Reporting Insufficient Funds Transactions on a Client Trust Account to the State Bar

The State Bar receives a large number of reports from banks concerning insufficient funds activity on trust accounts each year. The banks are required to report overdrafts from client trust accounts. Banks report both checks that are rejected due to insufficient funds and checks that are paid against insufficient funds. The statute also requires financial institutions to notify the State Bar when a check is written from a client trust account that is closed. These reports may result in a State Bar disciplinary investigation. In addition, if the bank is debiting the client trust account due to insufficient funds activity, these charges may result in misappropriation of your other clients' money that are in the account.

Common Disciplinary complaints

Allegation	2012	2013	2014	2015	2016
Advertising / Solicitation	363	423	454	442	467
Unconscionable / Illegal Fees	1838	1795	1235	1361	1310
Failure to Refund Unearned Fees	3433	2943	2326	2017	1830
Dividing Fees	111	125	124	140	352
Commingling	252	225	243	228	138
Misappropriation	747	630	765	721	784
Other Trust Account Violations	1841	1851	1767	1558	1919
Failure to Perform	8373	7202	6348	6168	6304
Failure to Communicate	4088	3966	3790	3731	3981
Conflicts / Business Dealings w/Clients	768	828	930	845	1066
Misrepresentation to Client/Court	1378	1523	1823	1876	2425
Improper Withdrawal	1941	1919	2157	1954	2356
Disobedience of Court Order	269	309	326	288	302
Pursuit of Unjust Cause	747	626	803	986	1174
Aiding UPL	311	321	392	278	435
Practice While Not Entitled	554	490	439	421	305
Sexual Relations with Client	22	15	23	24	26
Schemes to Defraud / Moral Turpitude	3112	2539	2594	2502	2909
Loan Modification Complaints	3147	3011	1479	1023	593
Debt Resolution Complaints	55	37	12	25	28

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 14-0004

ISSUE:

Issue #1: What are the attorney's duties when the attorney suspects, but does not know, a client's witness who is expected to testify at a civil trial has testified falsely, albeit favorably, for the attorney's client.

Issue #2: What are the attorney's duties when the attorney knows, rather than merely suspects, the same witness has committed perjury and yet the client instructs the attorney to use the witness's known false testimony at the upcoming civil trial?

Issue #3: The facts are the same as Issue #2, except the attorney first learns of the perjury after the witness has testified at trial. Thus, what are the attorney's duties, if any, after gaining knowledge of the witness's perjury at trial, the client nonetheless has instructed the attorney to continue to use the perjured testimony in the remainder of the trial?

DIGEST:

Because an attorney must vigorously represent a client, the attorney may offer testimony of questionable credibility; however, because of the duty of candor to the court, an attorney must not present or use perjured testimony known by the attorney to be false even if the client has instructed the attorney to do so. If testimony known to be materially false has already been offered, the attorney must take reasonable remedial measures to correct the record without violating the duty of confidentiality. If such measures fail, the attorney may have a duty to seek to withdraw from the representation.

AUTHORITIES INTERPRETED:

Rules 1.6, 1.16, and 3.3 of the Rules of Professional Conduct of the State Bar of California.[1/]

Business and Professions Code sections 6068, 6106, and 6128.

[1/] Rules of Professional Conduct citations in this opinion are to the rules that became effective November 1, 2018. Each cited rule existed, prior to November 1, 2018, in similar or somewhat similar form, as follows: rule 1.6 previously as rule 3-100; rule 1.16 as rule 3-700; and rule 3.3 as rule 5-200. Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

STATEMENT OF FACTS

Attorney ("Attorney") represents plaintiff ("Client") in a sexual harassment case against her immediate supervisor ("Supervisor") and her employer. Before the lawsuit is filed, Attorney interviews Client's co-worker ("Witness"), who corroborates, as an eyewitness, evidence of Supervisor's sexual harassment directly supporting Client's key claims. The eyewitness testimony is crucial; without it, Client may well lose the case.

Attorney files the lawsuit and during discovery discloses Witness as a percipient witness supporting Client's allegations. The defense deposes Witness, who testifies, under oath, consistent with the statements he earlier made to Attorney. When the case is set for trial, Attorney lists Witness as a trial witness.

Scenario #1: Shortly before trial, Attorney reviews Witness's deposition testimony, and, based on newly obtained and seemingly credible testimony from other sources, begins to have doubts about the truthfulness of Witness's eyewitness testimony. Attorney forms the opinion, but does not know with certainty, that Witness may have lied about being an eyewitness and may have come forward only as a favor to help Client as a fellow employee and friend.

Scenario #2: Shortly before trial, Client tells Attorney that Witness recently admitted to fabricating his claim to having been an eyewitness to the sexual harassment. Attorney promptly contacts Witness, who admits to having given the false deposition testimony. Attorney informs Client, who nonetheless instructs Attorney to use Witness's false testimony at trial.

Scenario #3: Unlike Scenario #1 or #2, Attorney does not know before trial that Witness's deposition testimony was perjured. At trial, during opening statements, Attorney refers to the importance of Witness's eyewitness testimony. Witness testifies on Client's behalf, claiming to be an eyewitness to the sexual harassment. Attorney cross-examines Supervisor, seeking to impeach him with Witness's eyewitness account. Before trial concludes, however, Client tells Attorney that Witness has admitted to lying in his trial testimony. Attorney promptly contacts Witness, who admits that his testimony claiming to be an eyewitness to the harassment was willfully false. Client instructs Attorney not to reveal the perjury to the court and insists that Attorney continue to use the perjured testimony in the remainder of the trial.

DISCUSSION

These scenarios address progressing situations in which an attorney must balance advocacy with the duties of candor to the court and client confidentiality.

Scenario #1

This scenario poses the question regarding what an attorney is ethically obligated to do if the attorney comes to suspect, but does not know, the client's witness may have testified falsely on a material matter at deposition. The deposition testimony has not yet been presented to the court.

In evaluating their duties in this context, attorneys must keep in mind their duty to vigorously represent their clients within the bounds of the law. In so doing they are entitled to resolve all doubts about the credibility of evidence in their client's favor. *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [194 Cal.Rptr. 462]; *People v. Crawford* (1968) 259 Cal.App.2d 874 [66 Cal.Rptr. 527] ("attorney should represent his client to the hilt"); *McCoy v. Court of Appeals of Wisconsin* (1988) 486 U.S. 429, 444 [108 S.Ct. 1895] ("In searching for the strongest arguments available, the attorney must be zealous and must resolve all doubts and ambiguous legal questions in favor of his or her client.").[2/]

In this scenario Attorney lacks actual knowledge that the testimony was untruthful. Rather, Attorney is merely skeptical about Witness's veracity. A mere suspicion that the testimony could be false will not preclude Attorney from using it. "Although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally know, is false .... Presenting incredible evidence may raise difficult tactical decisions – if counsel finds evidence incredible, the fact finder may also – but, as long as counsel has no specific undisclosed factual knowledge of its falsity, it does not raise an ethical problem." (*People v. Bolton* (2008) 166 Cal.App.4th 343, 357 [82 Cal.Rptr.3d 671], citing *People v. Riel* (2000) 22 Cal.4th 1153, 1217 [96 Cal.Rptr.2d 1]).[3/] See also, rule 3.3(a)(3) ("A lawyer shall not: . . . offer evidence the lawyer knows to be false.").[4/]

Thus, Attorney's mere skepticism over the Witness's truthfulness, standing alone, does not ethically preclude the use of the testimony. Attorney may present this evidence and, consistent with the duty of vigorous advocacy, forcefully argue Client's cause based on it. However, under rule 3.3(a)(3) "a lawyer *may* refuse to offer evidence . . . the lawyer reasonably believes is false" in a civil case. (Emphasis added).

[2/] See also, *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 [16 Cal.Rptr.3d 374] (as modified Oct. 13, 2004) (counsel has "very wide" latitude to discuss the merits of a case, both as to law and facts); *Nishihama v. City & Cty. of San Francisco* (2001) 93 Cal.App.4th 298, 305 [112 Cal.Rptr.2d 861] (Counsel "is entitled to argue his or her case vigorously and to argue all reasonable inferences from the evidence"); *Risley v. Lenwell* (1954) 129 Cal.App.2d 608, 659 [277 P.2d 897] ("Counsel in summing up a case are given wide latitude and may indulge in all fair arguments in favor of their client's case.").

[3/] See also, *Nguyen v. Knowles* (E.D. Cal. Aug. 3, 2010) 2010 WL 3057678 *12 ("Precedent in this and other circuits suggests that an attorney should have a "firm factual basis" for believing that a client will testify falsely before acting on such a belief"); Orange County Bar Association Formal Opn. No. 2003-01 ("actual knowledge" standard should apply in criminal cases).

[4/] Rule 1.0.1(f) defines "knows" as "actual knowledge of the fact in question" and adds: "A person's knowledge may be inferred from circumstances." Because witnesses rarely admit to having committed perjury, it can be difficult to determine whether perjury has occurred. The "materiality" element of the crime of perjury "may not become apparent until the close of all testimony .... It is not a simple matter for an attorney to conclude . . . that he/she knows [the witness] has committed perjury." Cal. State Bar Formal Opn. No. 1983-74.

Scenario #2

In this scenario, Attorney's state of mind as to Witness's veracity has advanced from skepticism to actual knowledge of falsity. The testimony is perjured, it is willfully false and material, because, as stated above, "The eyewitness testimony is crucial; without it, Client may well lose the case."[5/] Nonetheless, Client, has instructed Attorney to use the perjured testimony at trial.

This scenario concerns an attorney's duty of candor to the court, found in rule 3.3 ("Candor Toward the Tribunal") and Business and Professions Code section 6068. The former provides in part, "A lawyer shall not: . . . offer evidence the lawyer knows to be false." Likewise, Business and Professions Code sections 6068(b) and (d) provide, "It is the duty of an attorney . . .: (b) To maintain the respect due to the courts of justice and judicial officers. . . . [and] (d) To employ . . . means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

Because Attorney knows the testimony is false, rule 3.3 and section 6068 would bar its presentation as would Business and Professions Code section 6106, which proscribes "the commission of any act involving, moral turpitude, dishonesty or corruption." In addition, Business and Professions Code section 6128 provides: "Every attorney is guilty of a misdemeanor who either: (a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party." It is well established in case law as well that "[a]n attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution . . . as well as severe disciplinary action." *In re Branch* (1969) 70 Cal.2d 200, 211 [74 Cal.Rptr. 238].

Therefore, Attorney's ethical mandate is clear. Attorney, knowing of the perjury, may not solicit or otherwise seek to introduce the testimony in question.

In this civil case setting, Attorney also has the authority to refuse to follow Client's instruction to submit the perjured testimony.[6/] The Supreme Court addressed the question of an

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[5/] Perjury is defined as testimony under oath which is "willfully" false on a "material" matter. California Penal Code section 118. "Materiality" means a false statement that "could probably influence the outcome of the proceeding." *People v. Rubio* (2004) 121 Cal.App.4th 927, 933 [17 Cal.Rptr.3d 524].

[6/] In contrast the defendant-client's sixth amendment right to testify in their own defense in a criminal proceeding reserves to the client, not the attorney, ultimate control over whether to personally testify. *Rock v. Arkansas* (1987) 483 U.S. 44, 49-52 [107 S.Ct. 2704]. Thus, the "criminal defendant has the right to take the stand even over the objections of his trial counsel." *People v. Johnson* (1998) 62 Cal.App.4th 608, 618 [72 Cal.Rptr.2d 805]. In that setting, the attorney's options, even if the attorney is aware the client intends to commit perjury, include allowing the testimony to go forward in a narrative format. (*Id.* at p. 629-630.) See also, rule 3.3, Comment [4] (In criminal trials a defense lawyer may offer the defendant's testimony "in a narrative form if the lawyer made reasonable efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16. The obligations of a lawyer under these rules and the State Bar Act are

attorney's authority to refuse to call a particular witness in *Blanton v. Womancare* (1985) 38 Cal.3d 396 [212 Cal.Rptr. 151]: "Considerations of procedural efficiency require . . . that in the course of a trial there be but one captain per ship. An attorney must be able to make such tactical decisions whether to call a particular witness, and the court and opposing counsel must be able to rely upon the decisions he makes, even when the client voices opposition in open court." (*Id.* at p. 404 [citations omitted]).[7/] Thus, an attorney may refuse to call a witness even though the client requests that the witness testify. *Nahhas v. Pacific Greyhound Lines* (1961) 192 Cal.App.2d 145, 146 [13 Cal.Rptr. 299].[8/]

Here, Attorney must refuse to follow Client's instruction to offer the false testimony at the upcoming trial. Attorney must remonstrate with Client, explaining to her the illegality of perjury, the potential consequences to her sponsoring perjured testimony[9/] and Attorney's ethical duty to refuse to be party to any such offering. Rule 3.3, Comment [4] ("If a lawyer knows the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence.").

If, despite remonstration, Client persists with the instruction, Attorney must again refuse to carry out the instruction. Attorney may continue in the representation but, consistent with Attorney's authority to control witness presentation in civil cases, may not offer Witness's testimony at the upcoming trial.

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subordinate to applicable constitutional provisions.") (citations omitted). Use of the narrative approach in a criminal trial has been accepted where a third-party witness is committing perjury. See, *People v. Gadson* (1993) 19 Cal.App.4th 1700, 1712 [24 Cal.Rptr.2d 219].

7/ "[I]n both civil and criminal matters, a party's attorney has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters." *In re Horton* (1991) 54 Cal.3d 82, 94, 102 [284 Cal.Rptr. 305]. Encompassed in this is the authority to control matters of ordinary trial strategy, such as which witnesses to call, the manner of cross-examination, what evidence to introduce, and whether to object to an opponent's evidence. *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138 [95 Cal.Rptr.3d 799]. However, a decision on any matter that will affect the client's substantive rights is within the client's sole authority. *Maddox v. City of Costa Mesa* (2011) 193 Cal.App.4th 1098, 1105 [122 Cal.Rptr.3d 629].

8/ In addition, if Witness's only purpose at trial would be to testify as an alleged eyewitness on matters now known to be false, Witness should not be mentioned in pretrial disclosure documents; for example, pretrial witness lists or trial briefs.

9/ Penal Code section 127: "Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured."

Another option for Attorney, rather than continuing to trial, is to request that Client allow Attorney to withdraw as counsel under the rule of "permissive withdrawal" in rule 1.16(b).[10/] Attorney should also consider whether the disagreement with Client has caused a deterioration in their relationship so significant that Attorney "can no longer competently and diligently represent the client" in which case Attorney may have a mandatory duty to seek to withdraw. Rule 3.3, Comment [8]. If Client refuses, then Attorney may move the court to withdraw as counsel without disclosing the perjured testimony. *People v. Brown* (1988) 203 Cal.App.3d 1335, 1339-1340, fn. 1 [250 Cal.Rptr. 762]. See also, Cal. State Bar Formal Opn. No. 2015-192 (attorneys may disclose to the court only as much as reasonably necessary to demonstrate the need to withdraw and without violating the duty of confidentiality).[11/] However, Attorney may only withdraw after taking reasonable steps to avoid reasonably foreseeable prejudice to Client's rights. Rule 1.16(d).

Scenario #3

In this scenario, Attorney first learns of the perjury after Witness has testified at trial. Witness has been presented to the trier of fact as possessing crucial information. Client, nonetheless, has instructed Attorney not to take any corrective action and insists that Attorney continue to use the perjured testimony through the remainder of the trial, including closing argument. Attorney's duty of candor to the court is immediately implicated.

Attorney's statutory duties of candor are found in Business and Professions Code sections 6068(b) and (d), 6106, and 6128(a) discussed in Scenario #2. Attorney's ethical duty of candor after learning that previously presented evidence is false is found in rule 3.3(a)(3), which states that "If . . . a witness called by the lawyer, has offered material evidence, and the lawyer comes to know of its falsity the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6." Because the witness's testimony is material and known to be false, the duty to take such measures has arisen.

[10/] Rule 1.16(b) presents several circumstances allowing for permissive withdrawal that may be implicated under these facts: the client seeks to pursue a course of conduct the lawyer reasonably believes was a crime or fraud, the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent, or the client's conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively or the representation is likely to result in a violation of the Rules of Professional Conduct or the State Bar Act. Rule 1.16(b)(2)-(4) and (b)(9).

[11/] Additional facts, not explicitly present under this scenario, may impose a mandatory duty upon Attorney to withdraw from the employment. Rule 1.16(a)(1) & (2) (attorney "shall" withdraw if he knows or reasonably should know the client is presenting a claim or defense without probable cause and for the purpose of harassing or maliciously injuring any person or attorney knows or reasonably should know the representation will result in violation of the Rules of Professional Conduct or the State Bar Act).

The problem here is the collision between the duty of candor and the duty of confidentiality. This is because Attorney's knowledge of Witness's perjury constitutes a "client secret."

"'Client secrets' covers a broader category of information than do confidential attorney-client communications; confidential communications are merely a subset of what are considered client secrets. Indeed, 'client secrets' include not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication." Cal. State Bar Formal Opn. No. 2016-195, p. 2-3. Thus, "'Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.'" *Id.* at p. 2. Further, rule 1.6(a) states, "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent. . . ." And Business and Professions Code section 6068, subdivision (e)(1) provides that attorneys must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This prohibition is reinforced by rule 1.8.2 which provides: "A lawyer shall not use a client's information . . . protected by section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent, except as permitted by these rules or the State Bar Act."

Here, all elements of a "client secret" are present. Revelation of the fact – a key witness proffered by Client has committed perjury on a crucial issue – is likely to be embarrassing and detrimental to Client. Attorney acquired knowledge of the perjury from Client, and confirmed by Witness, all of which occurred within the course of the representation. Further, Client has instructed Attorney not to take corrective action. Rules 1.6 and 1.8.2, therefore, prohibit Attorney from disclosing that the Witness's testimony was false.[12/]

The Rules of Professional Conduct encourage the attorney, where there are perjury concerns, to remonstrate with the client, first and foremost, rather than seeking to withdraw. See rule 3.3 in its entirety, including Comments. The policy underpinnings for the "remonstration first" preference must stem from the recognition that withdrawing from the representation may not cure the problem that the perjury may remain in the case.[13/]

[12/] If the ABA rules were applicable, Attorney might have the option of withdrawing or correcting the testimony over the client's objection. Under the ABA rules, the duty of candor trumps the duty of client confidentiality. See, ABA Rule 3.3(a)(3) (if lawyer has knowledge of client or client-witness perjury, the duty to take remedial measures includes, "if necessary, disclosure to the tribunal.") As discussed above, however, in California, the duty of candor does not override the duty of confidentiality.

[13/] See *People v. Johnson* (1998) 62 Cal.App.4th 608, 623 [72 Cal.Rptr.2d 805] ("[W]e note that permitting defense counsel to withdraw does not necessarily resolve the problem. That approach could trigger an endless cycle of defense continuances and motions to withdraw as the accused informs each new attorney of the intent to testify falsely. Or the accused may be less candid with his new attorney by keeping his perjurious intent to himself, thereby facilitating the presentation of false testimony. Lastly,

Thus, in this scenario, Attorney must employ "reasonable remedial measures" available under the Rules of Professional Conduct and the State Bar Act "which a reasonable attorney would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal." Rule 3.3, Comment [5]. Such remonstration measures "include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw." *Id.* Corrective action would include striking or correcting Witness's false testimony by stipulation or motion. Cal. State Bar Formal Opn. No. 1983-74. Or, Client could testify to Witness's admission.

Here, however, Attorney's attempts at remonstrating with Client have failed. Client will not authorize Attorney to move to strike the testimony. Further, Client instructs Attorney to continue to use the perjured testimony.

Attorney may analyze whether it would be appropriate to strike the testimony over Client's objection under the theory, as discussed in Scenario #2, that Attorney, as "captain of the ship," has the ultimate control over evidentiary decisions in civil cases. This course may be perilous because it is questionable whether the metaphorical "ship's captain" has the authority, even in a civil case, to take action, against the client's instructions, that would sink the ship. Such would be the concern here because, as the hypothetical states, "the eyewitness testimony is crucial; without it, Client may well lose the case."[14/] In addition, depending on the circumstances, a motion to strike the testimony could effectively result in the disclosure of information protected by the duty of confidentiality.

Because remonstration has failed, Attorney must consider as well whether it is appropriate, or even required, to seek to withdraw as counsel. Under rule 1.16(b), which authorizes permissive withdrawal, Attorney has valid grounds to seek to withdraw. See discussion of this rule's pertinent subsections in footnote 10, *supra*.

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there is the unfortunate possibility that the accused may find an unethical attorney who would knowingly present and argue the false testimony. Thus, defense counsel's withdrawal from the case would not really solve the problem created by the anticipated perjury but, in fact, could create even more problems.").

[14/] *Blanton v. Womancare, Inc., supra*, 38 Cal.3d at 404-405 ("An attorney is not authorized, however, merely by virtue of his retention in litigation, to 'impair the client's substantial rights or the cause of action itself.' . . . [A]n attorney may not stipulate to a matter which would eliminate an essential defense. . . . Such decisions differ from the routine and tactical decisions which have been called 'procedural' both in the degree to which they affect the client's interest, and in the degree to which they involve matters of judgment which extend beyond technical competence so that any client would be expected to share in the making of them.") (internal citations omitted).

However, whether seeking to withdraw has become mandatory under rule 1.16(a) requires a deeper analysis. Rule 3.3, Comment [8] provides: "A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation." However, the Comment goes on to state, "The lawyer, may, however, be required by rule 1.16 to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules."

The facts in this scenario strongly suggest a deteriorating lawyer-client relationship. This is not a disagreement over a minor strategy decision. Client disagrees with Attorney's remonstration to her on matters fundamental to our judicial system and Attorney's ethical duties. Client insists on proceeding despite knowing her case relies on perjured testimony which will not be corrected. Client instructs Attorney to continue to use the false testimony.

But Comment [8] to rule 3.3 does not make withdrawal mandatory merely because of a deteriorating client relationship. Standing alone a substantial disagreement with a client does not require an attorney to seek to withdraw. Rule 1.16(b) (withdrawal is permissive when client "renders it unreasonably difficult for the lawyer to carry out the representation effectively"). Instead, Comment [8] mandates that the deterioration also must adversely affect Attorney's ability to competently and diligently represent the Client or will cause the continued employment to violate the Rules.

Here, Attorney still has the option to take remedial action by refusing to refer to or rely upon the perjured testimony in all remaining aspects of the trial. As discussed in Scenario #2 above, Attorney can and must do so even despite Client's instructions to the contrary. Under these facts, Attorney following the "never mention or use it again" approach may continue to competently and diligently represent Client.[15/]

Never referring to or relying upon the testimony again, however, will be insufficient according to Comment [8] if the continued employment *will* cause Attorney to violate the Rules. Note well, the use of "will," which derives from the mandatory withdrawal provision of rule 1.16(a): "the lawyer knows or reasonably should know that the representation will result in a violation of these rules or of the State Bar Act."/ On the other hand, under rule 1.16(b)(9) withdrawal is

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[15/] Additional facts might cause Attorney to be concerned whether the duties of competent and diligent representation may still be satisfied. Does Client's intransigence, including Client's clearly improper instruction to use the perjured testimony, signal the end of further cooperation on other significant issues that might arise during the trial such that Attorney's ability to control the representation will suffer? Is the breakdown so severe Attorney will lose the necessary motivation to appropriately represent Client's lawful interests?

permissive if continuation of the representation is only "likely" to result in a violation of the rules or State Bar Act.

The difference between what "will" cause a rule violation (mandatory withdrawal) versus what is "likely" to cause a rule violation (discretionary withdrawal) is not always clear. In seeking to trace this line, Attorney must consider whether Attorney's continued involvement in the case could be construed to be Attorney's consent to or endorsement of the perjury. Here, although Attorney used the perjured testimony in opening statement and examination and cross-examination of witnesses, Attorney did so without knowledge of the falsity and going forward will make no further reference to it. Attorney will not be explicitly endorsing or consenting to the perjury in the remaining aspects of the trial.

On the other hand, the perjured testimony is, as stated above, "crucial," and Client likely will lose the trial without it. Attorney should evaluate whether the perjury will continue to materially influence the outcome and benefit Client, despite that Attorney will make no further explicit use of it. The central question for Attorney is whether the representation of Client may continue through the rest of the trial without putting Attorney in the position of having impliedly endorsed or consented to the perjury.

In this regard, Attorney should examine several questions, such as: Is Attorney able to effectively argue and present other aspects of the case which are untainted by the perjury? For example, did Witness provide other testimony not known to be perjured which is a benefit to Client? How can Attorney vouch for any aspect of Witness's testimony knowing of the perjury? Did other witnesses, including experts, rely upon the perjured testimony in some way and refer to it favorably? To effectively represent Client must Attorney continue to vouch for those witnesses in some way? Is the perjured testimony embedded in exhibits which have been admitted into evidence? Did the court make, or will it make, rulings (for example, on motions in limine, to dismiss or for nonsuit) relying upon the perjured testimony which may affect the outcome?

The analysis of these and other factors may lead Attorney to conclude that, remaining on the case, without mentioning or relying upon the perjured testimony again, nonetheless *will* constitute implied consent to or endorsement of the perjury and "will" cause a rule violation. See again the citations to rule 3.3, Business and Professions Code sections 6068(b) and (d), 6106, and 6128(a), and *In re Branch* discussed under Scenario #1 above.[16/] If an attorney of

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[16/] See also Cal. State Bar Formal Opn. No. 1983-74 ("Attorney may not remain silent and is required to take action to ensure that he/she does not give his/her implicit consent to the deception. Silence and inaction would not be consistent with truth and would constitute, albeit indirectly, an attempt to mislead the judge by an artifice, to wit, the client's false testimony of a material fact.").

reasonable prudence and competence would reach such a conclusion, then Attorney's mandatory duty to seek to withdraw from the representation will have been triggered.[17/]

If the decision is to withdraw, Attorney should forewarn Client that withdrawal may negatively impact Client's credibility. In seeking to withdraw, Attorney cannot disclose the specific reasons due to the duty of confidentiality still owed to Client (Cal. State Bar Formal Opn. 2015-192; rule 1.16, Cmt. [4]) and shall not withdraw from employment until he has "taken reasonable steps to avoid reasonably foreseeable prejudice." *Id.* at 1.16(d).

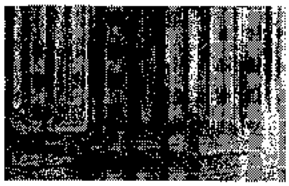
If a withdrawal motion is unsuccessful then Attorney must not refer to or rely upon the perjured testimony throughout the rest of the case. See Cal. State Bar Formal Opn. No. 1983-74 ("[T]he attorney may not thereafter rely upon or refer to any of the perjured testimony. To do so would constitute a willful misrepresentation by the attorney of matters that he/she knows to be untrue, which could subject the attorney to discipline. The attorney must conduct the balance of the trial as if such testimony had been stricken from the record.") (Citations omitted.).[18/]

CONCLUSION

An attorney should be an assertive advocate and may ethically argue that evidence with questionable credibility should be considered. Yet, an attorney may not use, and must refuse to submit, evidence known to be false. When the attorney has actual knowledge during a trial that a witness has committed perjury, the duty of candor to the tribunal requires the attorney to take reasonable remedial measures consistent with the duty of confidentiality. Those measures include remonstrating with the client to take corrective action. If the client refuses, the attorney may be required to seek to withdraw from the representation.

[17/] Under rule 1.16(a)(1) and (2) the duty to withdraw is mandatory where the lawyer "knows or reasonably should know" of the required facts. To "know" means actual knowledge of the fact in question although knowledge may be inferred from circumstances. "Reasonably should know" means that "a lawyer of reasonable prudence and competence would ascertain the matter in question." Rule 1.01(f) and (j).

[18/] An attorney violates the duty of candor, even where the fabrications are the work of another, if the attorney, after learning of their falsity, continues to assert their authenticity. *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321; *Olguin v. State Bar* (1980) 28 Cal.3d 195, 198-200 [167 Cal.Rptr. 876].



CALIFORNIA BAR JOURNAL
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June 2007

Credit Card Payments For Legal Fees

A new ethics opinion might require many lawyers to change how they accept payment for fees and costs

By Ellen R. Peck

Peck

Call, my clients are clamoring to pay me by credit card!" Every Lawyer, a partner in Thomas & Lawyer, LLP, and California Joan's long- standing client, called for help. "My bookkeeper talked to credit card companies and suggested some procedures but my partner, Dowting Thomas, wants to do things differently. I don't even know if it is ethical to accept credit card payments from clients . . ." Eve's voice trailed off in confusion.

California Joan chuckled. "Eve, I have good news. Last month the State Bar Committee on Professional Responsibility and Conduct published Formal Opinion 2007-172 ("COPRAC Fml. Op. 2007-172") concerning ethical issues in accepting client credit card payments for fees and costs. (To view or download the opinion online, go to www.calbar.ca.gov and link to Attorney Resources>Ethics Information>Ethics Opinions.)

"I understand that typical credit card transactions work like this . . ." Eve offered. "Issuing banks are members of not-for-profit associations of member banks, like VISA, MasterCard, American Express or Discover, that operate a worldwide communication system for financial transfers using credit cards. An issuing bank may issue a credit card to a consumer, by which the consumer can make credit card purchases with participating businesses. In order for a business to accept the consumer's credit card, the business must open an account with a merchant bank. The merchant bank, like an issuing bank, is a member of the associations issuing credit cards such as VISA, MasterCard, American Express or Discover." (*United States v. Ismoila* (5th Cir. 1996) 100 F.3d 380, 385-386)

"But the merchant bank has the account with the business, not the consumer," Cali jumped in. "When the business is electronically connected with a merchant bank, the business can receive credit card payments by processing the credit card and the business' terminal provided by the merchant bank. When merchant bank accepts the credit card charge, it immediately credits the business for the amount of the consumer's purchase. The merchant bank then transmits the information regarding the charge to the non-profit association, which then forwards the information to the issuing bank of the purchasing consumer. When the issuing bank authorizes the sale, it notifies the non-profit association and pays the merchant bank at the end of the business day. The issuing bank carries the debt until the cardholder pays the bill." (Id.)

Eve remarked, "My bookkeeper told me that the business had to pay fees, typically from 1 to 2 1/2 percent, with American Express having the highest fees. Usually, the fees are deducted automatically on a monthly basis from the business' merchant account by the merchant bank, based upon the total of each consumer's purchases."

"That's not all!" Cali said, "Some contracts between a credit card issuer and a business authorize the credit card issuer, when the consumer disputes a charge, to automatically debit the merchant account electronically."

"If the merchant bank may invade the merchant account at its discretion to impose debits, can I have the credit card payments be deposited directly into my client trust account?" Eve asked.

"You can't," Cali said. "If your merchant account is subject to the credit card issuer's invasion, you can not use it as a client trust account." (COPRAC Fml.Op. 2007-172; see also *Matter of McKiernan* (Rev. Dept. 1995) 3 Cal. State Bar Ct.Rptr. 420 – Professional misconduct to relinquish control of a trust account to a third party by permitting him to deposit and withdraw

funds in the trust account without supervising such transactions and by failing to supervise the trust account operations generally.)

"So, I must ethically set up my merchant account to receive credit card payments from clients in connection with my business account?" Eve asked. "Exactly!" Cali answered.

"Suppose that I bill my client for services already performed. Can I ethically accept payment of those earned fees by credit card?" Eve wondered.

"Yes," Cali reassured her, (COPRAC Fml. Op. 2007-172, fn. 4), "provided that you take care to comply with other professional standards."

"Like what?" Eve quizzed Cali.

"One example cited by the opinion involved the description one writes on the credit card charge slip, required by credit card issuers, regarding the goods or services provided. In preparing such a description, you should not disclose confidential information without the

client's informed consent. (Bus. & Prof. Code, §6068(e); Rule 3-100, Rls. Prof. Cond., State Bar of California ("CRPC")) Because the fact that you are representing a client may fall within the protection of the attorney-client privilege, (Cf. *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1005) the opinion suggests that "the description should be general in nature, such as 'for professional services rendered.'" (COPRAC Fml. Op. 2007-172)

"If I accept credit card payments for earned fees, the client is then subjected to potential interest and late charges imposed by the credit card issuer. Does that involve any implication of charging an unconscionable fee?" Eve inquired.

"If you were attempting to subject a client to interest and late charges," Cali said, "you would be ethically obligated to obtain a client's in-formed consent and comply with applicable law, including unconscionable fees prohibited by CRPC 4-200. (COPRAC Fml. Op. 2007-172, fn. 8) However, a client's voluntary election to pay by credit card, thereby potentially incurring interest and late charges imposed by the credit card issuer, does not constitute a violation of CRPC 4-200."

"Must I advise the client that the client should determine any interest rates or late charges that may be applicable before using the credit card?" Eve wondered.

"You can if you want to, but the opinion said you have no ethical obligation to do so," Cali told a relieved Eve.

"By accepting credit card payments for earned fees and then paying service charges to the credit card issuer, will I be fee splitting with a non-lawyer?" Eve queried queasily.

"The opinion reasoned that a service charge debit, to facilitate the payment and receipt of funds owed to you, does not frustrate any of the purposes of CRPC 1-320: 'to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount.' Therefore, accepting credit card payments does not constitute unlawful fee splitting," Cali replied.

She added, "You may also ethically absorb a service charge debited by the credit card issuer, so long as you are careful to discharge your duty of confidentiality to clients."

"I assume that, consistent with the ethical issues we have discussed, I can also accept credit card payments for costs and expenses I have advanced and which have been incurred by the client," Eve said.

"You are correct," Cali answered.

"If there are no other ethical issues in accepting payments for earned fees, my partner, Dowting Thomas, just walked in and wants to be on the call too," Eve said.

"One of the most important issues in our practice is advance fees not yet earned. Is it ethical to accept advances for fees not yet earned by credit card?" Eve asked while her partner settled in.

"Yes," Cali answered, "COPRAC opined that an attorney may ethically accept payment from a client by credit card, for fees not yet earned, so long as the deposit does not include advanced payment for potential costs and expenses."

"I thought we were ethically required to place advanced fees in our clients' trust account. If the merchant account is connected to our business account, with credit card payments for advanced fees being deposited in that business account, aren't we violating trust account duties?" Dowting Thomas probed.

Cali countered, "Generally, CRPC 4-100 has been interpreted by the courts to ethically permit, but not require, the deposit of unearned fees paid in advance into a clients' trust account. (COPRAC Fml. Op. 2007-172, fn. 11) Since you are not required to deposit unearned fees paid in advance into a clients' trust account, you may accept such a deposit through a merchant account established as your general business account for your law office."

"You said 'generally.' There are undoubtedly exceptions?" Dowting asked dubiously.

"Examples of exceptions are in federal bankruptcy proceedings in California *(In re Dividend Development Corporation, a California corporation, Debtor* (1992) 145 B.R. 651, *In re GOCO REALTY FUND I* (1993) 151 B.R. 241, 23 Bankr.Ct.Dec. 1703, *In re Montgomery Drilling Co.* (Bankr. E.D. Cal.1990) 121 B. R. 32) or where a lawyer and a client contractually agree that the unearned fees paid in advance will be deposited into a clients' trust account *(Securities and Exchange Commission v. Interlink Data Network of Los Angeles Inc.* (9th Cir. 1996) 77 F.3d 1201, 1204-1205). In these examples, acceptance of credit card payments would not be proper, since a merchant account cannot be a trust account and alternatively, the credit card funds cannot be deposited into the general account," Cali said.

"Are there any risks in maintaining the unearned fees paid in advance by credit card in the general account?" Eve pondered.

"Yes," Cali responded. "If you are terminated by a client before you have fully earned the fees paid in advance, CRPC 3-700(D)(2) requires you to promptly refund any part of a fee paid in advance that has not been earned. If the funds are in the general account, there is a risk that they will be spent and unavailable for a prompt refund."

"To avoid this risk, after the funds are deposited in a merchant account by a credit card issuer, such fees may ethically be transferred into your clients' trust account. Then, if you withdraw the fees when they are earned and fixed (see COPRAC Fml. Op. 2006-171), you can ensure that any unearned fees are available for refund in the event you are asked by a client for the refund," Cali opined.

"I suppose that, as with payments for earned fees, we may ethically absorb service charges debited by the credit card issuer relating to payments for unearned fees paid in advance," Dowting assumed.

"Yes," Cali said.

"Well," Dowting went on, "what about whether we may ethically accept client credit card payments as a deposit for advances for costs and expenses."

"No," Cali said. "Credit card payments for advances for costs or expenses may not ethically be accepted."

"This makes no sense. What's the rationale?" Dowting was even more dubious.

"Here is why you may not ethically accept credit card payments for advances of costs and expenses:

"First, the credit card issuer deposits the funds into a merchant account, which, as we have previously discussed cannot be a trust account;

"Second, CRPC 4-100(A) expressly requires advances for costs and expenses to be deposited into your clients' trust account;

"Third, you must take reasonable care to protect the funds deposited into a clients' trust account; and

"Fourth, if you had the merchant account as your clients' trust account, there is a risk that before you could assert control over the funds, the credit card issuer may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney's protection.

"For these reasons, you may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses," Cali concluded.

"Except for the advanced costs issues, this is mostly good news. What can we do about the advances for fees and costs?" Eve asked.

"There are several things that you can do: You can separate advanced fees from advanced costs and expenses. The former can be paid by credit card and the advanced costs and expenses can be paid by cash or check payments and then deposited to the clients' trust account," Cali began.

"What if the client does not have the cash to write a check for advanced costs and expenses?" Dowling asked.

Cali listed other alternatives:

- "You can agree with the client to advance costs and expenses on a monthly basis, provided that the client pay the incurred costs promptly, which could include payment by credit card.
- "Alternatively, after you transfer advances for fees from the general account to the clients' trust account, you can ask that the client agree in writing that a portion of the advanced fees be reallocated as advanced costs and expenses."
- "After you bill a client for costs and expenses advanced by you, you may ask the client if you can apply the fees paid in advance to the incurred costs. Make sure you obtain the client's consent in writing to ensure that the client does not forget this authorization later in your relationship."

"Cali, thanks to this new opinion, we have an understanding of our ethical obligations concerning client payments of fees and costs by credit cards. I think we are ready to start accepting payments," Eve and Dowling agreed.

About five seconds after Cali hung up the telephone, it rang again. A raspy, barely audible whisper hissed, "Cali, I just read COPRAC Formal Opinion No. 2007-172. I have been taking credit card payments for years. The merchant account is my trust account. I've just found out I've been doing everything unethical. What do I do?"

Cali, who recognized the voice, said, "Don't panic! There are many lawyers who, in the absence of guidance from the State Bar, have done exactly what you have. Now that you know what your obligations are, the professionally responsible approach is to come into compliance as soon as possible. Therefore: "

"1. As soon as you possibly can, cancel your merchant account that is connected with your trust account.

"2. Reopen a merchant account in connection with your general business account.

"3. Until you make the switch, stop taking any credit card payments."

Cali heard the tension release, as the lawyer said, "Thanks, Cali. I am going to call my merchant bank right now and fully comply with the opinion."

After California Joan hung up, she thought about the changes that many California lawyers might have to make in light of the new opinion. She realized that changing procedures for credit card payments by clients would create some short-term bumps in the road for many practitioners who were already using credit cards. In the long run, she had high hopes that most would appreciate having clear guidance and being on firm ethical ground, rather than the confusion that had existed when there had been no guidance.

• Ellen R. Peck, a former State Bar Court judge, is a sole practitioner in Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.

Certification

- This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

Self-Assessment Test

Indicate whether the following statements are true or false after reading the MCLE article. Use the answer form provided to send the test, along with a $25 processing fee, to the State Bar. If you do not receive your certificate within four to six weeks, call 415-538-2504.

1. If a merchant account enabling client credit card payments directly into a clients' trust account permits the merchant bank to invade the trust account without supervision of the lawyer, it is unethical.
2. A lawyer may be disciplined for relinquishing control of a trust account to a third party, by permitting the third party to deposit in and withdraw funds from a clients' trust account without supervising such transactions and for failing to supervise management of trust account operations in general.
3. It is unethical to set up a merchant account to receive credit card payments from clients in connection with a lawyer's business account.
4. It is unethical to accept payment of earned fees by credit card.
5. The fact that a lawyer is representing a client may fall within the protection of the attorney-client privilege.
6. A statement on a credit card charge slip as "for professional services rendered" is an ethical means of protecting client confidentiality regarding the types of legal services rendered.
7. Because a credit card payment for earned fees potentially subjects a client to interest and late charges imposed by the credit card issuer, such payments are unconscionable and in violation of CRPC 4-200.
8. A lawyer has no duty to warn a client that the client should determine any interest rates or late charges that may be applicable before using the credit card to pay for earned fees.
9. Accepting credit card payments for earned fees and then paying service charges to the credit card issuer involves fee splitting with a non-lawyer in violation of CRPC 1-320.
10. A lawyer may ethically pay the service charge debited by the credit card issuer, as long as the lawyer discharges the duty of confidentiality to clients.
11. A lawyer can never accept credit card payments for costs and expenses that the lawyer has already advanced on behalf of the client.
12. An attorney may ethically accept payment from a client by credit card for fees not yet earned, so long as the deposit does not include advanced payment for potential costs and expenses.
13. Generally, a California lawyer is not ethically required to place unearned fees paid in advance in a clients' trust account.
14. A lawyer may place unearned fees paid in advance in a general business account.
15. There are no risks in maintaining unearned fees paid in advance by credit card in a general business account.
16. After funds paid by a client's credit card are deposited in a merchant account by a credit card issuer, such fees may not ethically be transferred into a clients' trust account.
17. Lawyers may not ethically absorb service charges debited by the credit card issuer relating to payments for unearned fees paid in advance.
18. Credit card payments for advances for costs or expenses may not ethically be accepted.
19. Advances for costs and expenses must be deposited into a clients' trust account upon receipt.
20. When a law practice is electronically connected with a merchant bank, the business can receive credit card payments by processing the credit card at the business terminal provided by the merchant bank.

Panel 2

Self-Represented Litigants and Unbundling

A judge's view on the benefits of 'unbundling'

By Judge Mark A. Juhas

Common wisdom tells us that upwards of 80 percent of the parties in family law courtrooms are unrepresented. The number of unrepresented litigants in housing court and small claims appeals is no doubt higher. Anecdotally, unrepresented litigants are becoming more common in civil matters as well.

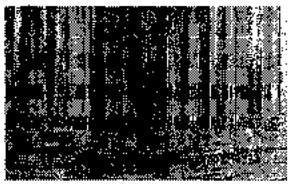
Full access to justice in the court system demands that 100 percent of court users get the level of legal assistance they need to properly resolve their legal problems. A few litigants have simple, straightforward matters and can navigate the legal system with only self-help; on the other hand, some litigants require full representation. The vast majority of court users, however, are best served if an attorney provides them with at least some assistance. In California, attorneys have been able to provide this help and advice to citizens facing civil matters through "unbundling" or limited scope representation for a number of years.

Limited scope representation is invaluable to both the litigant and the court. Although many court procedures are second nature to a trained lawyer, they can be confusing and difficult for a litigant. Specific and targeted assistance can prevent unnecessary trips to the courthouse to file papers or appear in court. It goes without saying that the work done in a court is personnel-intensive. Virtually every trip to court requires interaction with one or more court employees. With a limited scope attorney's assistance, every time a litigant is able to smoothly conduct business, both the court and the litigant "win." The litigant quickly goes on about his or her business, and court staff can serve other court users. Judicial officers are also well served; a litigant does not repeatedly return to a courtroom over and over before resolving the problem at hand.

Civil litigation relies on paperwork; courts use all this paper to gather the information needed to make the appropriate decision. Both California law and the code of professional responsibility support a limited scope attorney "ghostwriting" forms and pleadings for a litigant. Judicial officers review files well before a case is called. How the judge views a party's position after initially reading the pleadings may or may not carry the day, but it certainly has an impact on how the case is ultimately resolved. When a judicial officer reads a request that was attorney drafted, it makes all the difference in framing the issues and making any ultimate hearing more efficient. Additionally, a skilled attorney is familiar with the law and with what facts the judge will need to decide the matter. A cogent and well-written brief could be the difference between prevailing and not prevailing in court.

Judicial officers statewide enthusiastically welcome limited-scope attorneys to the counsel table. Limited-scope attorneys not only provide the opportunity for better outcomes, they make the court process run smoother from start to finish, resulting in more efficient hearings. This is a "win-win" for both the court and the litigant. Whether it is due to fewer court appearances, fewer rejected pleadings or better outcomes, it is a result that we all support.

Los Angeles County Superior Court Judge Mark A. Juhas has presided in family court since he was appointed to the bench in 2002. He also chairs the California Commission on Access to Justice and teaches extensively in the areas of family law, self-represented litigants and access to justice.



CALIFORNIA BAR JOURNAL

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January 2005

Ethics experts offer primer on limited representation

With legal services unaffordable for thousands of litigants, many attorneys limit the scope of their representation to specific tasks, providing clients with much-needed expertise and reducing the burden pro pers place on the courts. However, such "limited scope" representation can pose ethical pitfalls for lawyers.

According to ethics experts, lawyers who offer such services must ask the client the right questions, identify the issues, make necessary disclosures and develop procedures to facilitate the proper handling of the matter. To help them do that, the State Bar Committee on Professional Responsibility and Conduct has issued a primer on the ethics of limited scope representation.

The primer spells out the nature of the fee agreement in limited scope representation, as well as four particular attorney duties: competence, avoiding prejudice to the client's interest upon withdrawal, loyalty and confidentiality, and the duty to the administration of justice.

The primer recommends that all attorneys considering or engaging in limited scope representation determine whether their practice area can accommodate limited representation on particular matters and if so, they should establish procedures that reduce the cost of representation and foster compliance with the lawyer's duties.

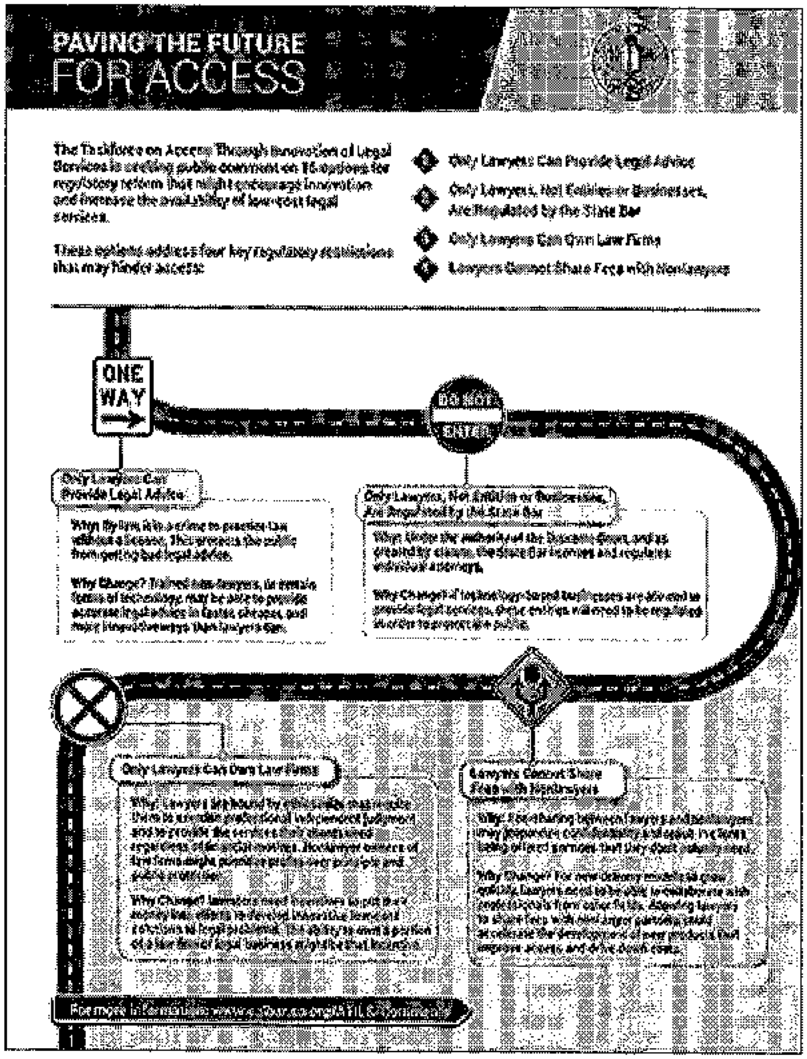
The primer can be found at http://www.calbar.ca.gov/ethics.

The State Bar *of California*

Options for Regulatory Reforms to Promote Access to Justice

The State Bar seeks public comment on proposals for regulatory reforms developed by the Task Force on Access Through Innovation of Legal Services (ATILS)

Deadline: September 23, 2019



Background

Under the authority of the Supreme Court of California, the State Bar of California regulates attorneys and the practice of law in California. The State Bar maintains rules of professional conduct for attorneys and enforces those rules as well as coordinates with law enforcement to enforce laws prohibiting those without a law license from providing legal services.

The State Bar is governed by a Board of Trustees. In 2018, the Board received a Legal Market Landscape Report suggesting that some of the rules and laws governing the legal profession may be hindering innovations that could expand the availability of legal services. The Board appointed a Task Force on Access Through Innovation of Legal Services (ATILS) and assigned it to identify possible regulatory changes to remove barriers to innovation in the delivery of legal services by lawyers and others. ATILS was charged with balancing dual goals: consumer protection and increased access to legal services.

Discussion/Proposal

ATILS has developed 16 concept options for possible regulatory changes, and the Task Force is now seeking public input to help evaluate these ideas.

The 16 options include some that overlap and some that represent alternative approaches to a particular regulatory change. For example, ATILS is considering two different rule changes addressing whether a lawyer should be allowed to share a fee with a nonlawyer and would like public input on both of them. The key regulatory issues addressed by the options on which ATILS is seeking public comment include:

- Narrowing restrictions on the unauthorized practice of law (UPL) to allow persons or businesses other than a lawyer or law firm to render legal services, provided they meet appropriate eligibility standards and comply with regulatory requirements;
- Permitting a nonlawyer to own or have a financial interest in a law practice; and
- Permitting lawyers to share fees with nonlawyers under certain circumstances and amending other attorney rules regarding advertising, solicitation, and the duty to competently provide legal services.

The potential benefit of these changes could include:

- Improving the ability of new providers to enter the legal services market;
- Creating incentives for innovators to collaborate with lawyers to develop technology-driven solutions; and
- Expanding options for entities and individuals other than lawyers to support and participate in these developments through business ownership and capital investment.
- Limiting the new UPL exceptions to only those providers who meet eligibility qualifications and become regulated;
- Requiring the establishment of ethical standards comparable to those imposed on lawyers and law firms;
- Conditioning the new system on the establishment of equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality; and
- Including in the revised fee-splitting rule a provision prohibiting interference with a lawyer's independent professional judgment.

ATILS carefully considered public protection in developing the proposed concept options by:

- Limiting the new UPL exceptions to only those providers who meet eligibility qualifications and become regulated;
- Requiring the establishment of ethical standards comparable to those imposed on lawyers and law firms;
- Conditioning the new system on the establishment of equivalent protections afforded by the attorney-client privilege and a lawyer's ethical duty of confidentiality; and

- Including in the revised fee-splitting rule a provision prohibiting interference with a lawyer's independent professional judgment.

Some of the proposals would require that a subsequent implementation body evaluate and plan implementation strategies and details. Further work might, for example, involve pilot programs or changes in statutory laws with sunset provisions.

After considering any public comment received, the task force will prepare a final report to be submitted to the Board no later than December 31, 2019.

Any fiscal/personnel impact

None

Background material

- Paving the Future for Access Infographic
- Overview Memo and Full List of Concepts for Regulatory Changes Under Consideration
- Board of Trustees Agenda Item 701 JULY 2019: State Bar Task Force on Access Through Innovation of Legal Services Report: Request to Circulate Tentative Recommendations for Public Comment
- Task Force on Access Through Innovation of Legal Services

Source

State Bar Standing Committee on Professional Responsibility and Conduct

Deadline

September 23, 2019

Direct comments to

Comments should be submitted using the online Public Comment Form. The online form allows you to enter your comments directly and can also be used to upload a comment letter and/or other attachments. Please target comments to a specific option or proposal where possible. In cases where alternative options are offered, comments specific to each of the alternatives would be most useful.There is also a place in the form to offer general comments on the proposed options.

However, if you cannot use the online form, comments may be submitted by mail to the address indicated below.

Angela Marlaud
Office of Professional Competence, Planning and Development

State Bar of California
180 Howard Street
San Francisco, CA 94105
Phone: 415-538-2116
E-mail: atils-pc@calbar.ca.gov

FALL 2004

ETHICS HOTLINER

▪ KEEPING AN EYE ON ETHICS ▪

An Ethics Primer on Limited Scope Representation

By The State Bar of California
Committee on Professional Responsibility and Conduct

Have you ever asked yourself this question: If I needed to hire a lawyer, could I afford to pay someone the fees I charge my clients? For many of us, the cost of legal services to handle even a routine legal matter is a "luxury" we simply cannot afford. For the indigent, getting the services of an attorney is often out of the question when, despite their eligibility for legal aid, they are unable to obtain representation due to the shortage of legal services attorneys. Thus, resorting to self-representation has become an economic necessity, not just for indigent individuals, but for large numbers of middle class litigants who find the cost of legal representation prohibitive. Moreover, while many litigants opt for partial self-representation because they have no financial alternative, others who have the resources to pay a lawyer to handle all aspects of their legal matter are choosing limited scope representation either to exert greater control and input, or to hold down the cost of legal services.

Therefore, it is not surprising that self-represented litigants (also called *pro per* or *pro se* litigants) are increasing in numbers and placing a strain on the limited resources of our judges and court system. Self-represented litigants are frequently unaware of the issues or procedures necessary to adequately represent their own interests, and repeatedly clog the courts with inaccurately prepared or inappropriately filed documents. As such, the courts and the legal profession have been challenged to find solutions to promote access to justice while at the same time limiting the burdens self-represented litigants place on the administration of justice.

One approach that has been increasingly utilized to bring down the costs of legal services is for lawyers and clients to allocate the duties and responsibilities for handling a legal matter between themselves, thereby limiting the scope of the lawyer's representation to specific services or discrete tasks. Such "limited scope" or "discrete task" representation can provide the layperson with much-needed legal expertise and advice and limit the burdens placed on the courts by self-represented litigants, while keeping the cost of legal representation at an affordable level.[1]

While limited scope representation promotes the core value of improving access to justice, attorneys who attempt to limit the scope of their representation must be mindful of their

[1] Throughout this article, the terms "limited scope representation" and "discrete task representation" are used interchangeably. Limiting the scope of legal representation is also sometimes referred to as "unbundling" a lawyer's legal services.

professional obligations, and must take care to communicate fully with the client and put appropriate procedures in place to ensure that the client receives competent representation and is not prejudiced. Thus, lawyers engaging in limited scope representation need to ask the right questions, identify the issues, make the necessary disclosures, and develop the procedures that facilitate the proper handling of the client's legal matter.[2]

Some of the most important questions facing lawyers who provide limited scope or discrete task representation are:

(1) *Have I carefully evaluated whether limited scope representation is appropriate in my area of practice?*

We want to emphasize that not every type of practice is conducive to limited scope representation. Attorneys should carefully consider whether their practice lends itself to limited scope representation. For example, in family law limited scope representation has been successfully used for years. As a result, the Judicial Council has promulgated new forms to facilitate limited scope representation in family law cases. Others areas in which limited scope representation has proven effective include landlord-tenant disputes and consumer advocacy. Legal services providers have also utilized discrete task representation very effectively in a variety of matters in order to provide at least limited assistance to indigent clients who cannot afford the services of an attorney. Many of these efforts have been directed toward assisting self-represented litigants to navigate the legal system and conform to court practice and procedures. On the other hand, it is wise to avoid limited scope representation in very sophisticated and/or complicated litigation. In fact, attorneys practicing in some areas (e.g., immigration law) may not be allowed to limit their representation for a particular aspect of a judicial or quasi-judicial proceeding.

(2) *Have I adequately communicated the risks as well as the benefits of this type of legal service to the client?*

Attorneys engaging in limited scope representation should endeavor to fully advise their clients of the limitations on the representation, including the matters the attorneys are *not handling*. Clients also should be advised of the possible adverse implications of the limited scope representation, and to consult with other counsel about legal matters their attorney is not handling. It also may be advisable to recommend against a proposed allocation of responsibility or even to decline the representation if the attorney believes the client's proposed split of responsibility is a prescription for disaster.

(3) *Have I put procedures in place to ensure that in limiting the scope of representation I am still providing the client with competent representation?*

As noted, attorneys need to communicate with their clients regarding not only the limitations on the scope of the representation, but the risks and benefits arising from the arrangement. Amongst the most important procedures to ensure competent representation are written fee

[2] In this article the authors do not intend to set or to define the standard of care or the duties of attorneys with respect to any of the issues discussed.

agreements and other written risk management tools designed to ensure that clients understand the specific nature and ramifications of their specific arrangement. Some suggested materials have already been prepared for family law practitioners and can be adapted by attorneys in other practice areas as a checklist to ensure that all matters relating to the limited scope representation are covered either by the attorney or the client or both, and that both parties fully understand their respective assignments and responsibilities.

(4) *If my scope of work does not include representing the client from start to finish, have I put procedures in place to avoid prejudice to my client upon my withdrawal?*

In many limited scope or discrete task representations, the attorney and the client have an understanding from the outset that the lawyer is not going to see the matter through to its conclusion. However, in withdrawing from representation before the conclusion of a client's matter, an attorney must take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. (Cal. Rule of Prof. Conduct 3-700.) These obligations apply irrespective of whether the client and attorney agreed at the outset that the attorney's representation would not extend through the conclusion of the matter. Thus, from the beginning of the representation, the attorney should pay particular attention to the need to educate and inform the client in order to avoid reasonably foreseeable prejudice to the client's rights upon the completion of the attorney's services. In many situations this will include informing the client about matters pending at the time of the attorney's withdrawal, applicable deadlines, etc. The attorney should also check California Rule of Professional Conduct 3-700 as well as applicable statutes and rules of court to ensure compliance with the law in connection with the termination of the relationship.

(5) *Have I put procedures in place to ensure that I am treating limited scope clients the same as all other clients for purposes of fulfilling my duties of undivided loyalty and confidentiality?*

Attorneys who offer limited scope representation are required to comply with the same fiduciary duties of undivided loyalty and confidentiality as lawyers providing full service representation for a legal matter. Therefore, conducting conflicts checks and avoiding the disclosure of confidential client information remain the attorney's responsibility.

(6) *Have I fulfilled my duties to the ethical administration of justice?*

Each limited scope representation is different, and these questions should be answered in the context of each client matter. The following discussion highlights the issues which each attorney should carefully consider before undertaking a limited scope representation.

A. Agreements Defining the Limited Scope of Legal Representation

In California, most attorney-client arrangements involving payment for the attorney's services must be memorialized in writing. [See Bus. & Prof. Code §6147 (pertaining to contingency fee agreements) and §6148 (pertaining to non-contingency fee agreements)].[3] These statutory mandates apply whether the attorney is providing full service representation for a particular matter, or has, instead, limited the scope of his or her representation. However, because of the nature of discrete task representation and the importance of educating the client concerning the scope, risks and benefits of that representation, it is of paramount importance that any fee agreement that purports to limit the scope of the attorney's representation be in writing, and be clear, unambiguous, and reasonable regarding the services to be performed by the attorney and client, respectively.

Thus, in limited scope representation, no part of the written fee agreement is more important than the provision defining the scope of the attorney's representation – what the attorney will be doing -- and often, even more importantly, what the attorney will ***not*** be doing -- and what the client will be doing. It is easy enough for clients and attorneys to develop misunderstandings about their respective responsibilities when the attorney is providing full service representation for a transaction or litigated matter. In limited scope representation, the potential for misunderstandings, serious adverse consequences and malpractice exposure increases dramatically when the agreement is not memorialized in a writing signed by both the attorney and client. In addition, agreements regarding the scope of the representation may change over the course of the representation, and it is equally essential that these changes be memorialized in writing as well.

Because of the particular risks created when attorneys limit the scope of their representation in any specific matter, we recommend incorporating language in the agreement to the effect that the client has read the provisions of the agreement defining the limited scope of the engagement, that the scope of the attorney's services has been limited by express agreement (and at the client's request if that is the case), that the attorney has fully explained the nature and risks of the arrangement, and that the client understands the potential adverse consequences of limiting the scope of the attorney's representation.

While the definition of scope is generally included in the fee agreement, it can be set forth in a separate document. If a separate document is used, it should be prepared and signed by both the attorney and the client contemporaneously with the fee agreement as well as when changes in the scope of representation are agreed to by the attorney and client.

[3] Failure to comply generally renders the agreement voidable at the option of the client and limits the attorney to recovery of the reasonable value of the services rendered.

B. The Duty of Competence

Once you have determined that limited scope representation is appropriate to handle your client matter, you must be prepared to comply with California Rule of Professional Conduct 3-110 by performing competently. The competency of an attorney's performance can become an issue in limited scope matters when the client and attorney disagree over whether the attorney has performed (a) as agreed or (b) as otherwise required. The latter issue is highlighted in the case of *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, in which an attorney desiring to limit the scope of his representation of an injured client to prosecuting a workers' compensation claim drafted an agreement so limiting the scope of representation. The agreement made no mention of a potential third party tort claim, and when the client learned that his tort case was time barred, he sued his attorney for negligently failing to put him on notice of that potential remedy.

In analyzing the malpractice claim, the court of appeal addressed an attorney's duty to advise clients, stating:

> One of an attorney's basic functions is to advise. Liability can exist because the attorney failed to provide advice. ***Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. The attorney need not advise and caution of every possible alternative, but only of those that may result in adverse consequences if not considered.***"
>
> *Nichols v. Keller, supra,* 15 Cal.App. 4th 1672, 1683-1684 (emphasis added).

In explaining the rationale for its decision, the court stated: "A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is the reason a party seeks out and retains an attorney to represent and advise him or her in legal matters." (*Nichols v. Keller, supra,* 15 Cal.App.4th 1672, 1686.)

In the specific context of a lawyer representing a client in a workers' compensation matter, the *Nichols* court held that the lawyer could limit the scope of services to the workers' compensation action, but to avoid exposure to the client for negligence, the attorney had to inform the client of: (1) the limitations on the scope of the attorney's services; and (2) the possible adverse implications of the limited scope representation.

As to explaining the possible adverse implications of the limited scope representation, the court noted that the attorney should disclose: (a) that there may be other remedies or issues pertaining to the client's legal matter that the attorney is not investigating (e.g., third party tort claims); (b) apparent legal problems pertaining to the limited scope of services (e.g., time deadlines would impact the client's ability to pursue other claims); and (c) the advisability of consulting different counsel for other aspects of the client's legal matter. (*Nichols v. Keller, supra,* 15 Cal.App. 4th 1672, 1686-1687.)

Nichols teaches that because we, as attorneys, have greater knowledge than lay clients about the law and the potential pitfalls our clients may encounter, we have an obligation to alert our clients

to matters that may result in adverse consequences if not considered. Although *Nichols* involved a situation where it was the attorney, rather than the client, who sought to limit the scope of the legal services being provided, the case provides a helpful roadmap for attorneys entering into limited scope or discrete task representation agreements with clients, particularly with respect to the fact that in defining a limited scope of representation it can be as important to *alert the client to what the attorney is not doing* as it is to identify the tasks the attorney is doing.

There are additional authorities to which attorneys may look for guidance in defining the limited scope of legal services. In the family law arena, Judicial Council Form FL-950 (July 1, 2003) entitled "Notice of Limited Scope Representation" specifies whether the attorney or the client will be "attorney of record" with respect to the following general issues and matters, each of which is then broken down in more detail: (a) Child Support; (b) Spousal Support; (c) Restraining Orders; (d) Child Custody and Visitation; (e) Division of Property; (f) Pension Issues; (g) Contempt; and (h) Other. The form also requires the attorney to verify the existence of a written fee agreement. As this Judicial Council form has been approved for use in family law cases, attorneys can consider the panoply of services provided in their own areas of practice and adapt forms that reference those specific services, leaving a place for "other" to cover matters that might be unique to a specific legal representation. The Limited Scope Representation Committee of the California Commission on Access to Justice also has created helpful and critical Risk Management Materials for attorneys to utilize in family law limited scope representation that may be adapted to your particular limited scope representation matters. These forms may be obtained by contacting the State Bar of California Office of Legal Services or online from a link to the Commission on Access to Justice, which can be reached through http://www.calbar.ca.gov.

It is also important to keep in mind that there are contexts in which the duty of competence prohibits limiting the scope of representation in a particular manner. [See, *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 521 ("there is no 'limited' appearance of counsel in immigration proceedings.") and *Janik v. Rudy, Exelrod & Zieff* (2004) 119 Cal.App.4th 930 (an attorney's obligations may extend beyond a document purporting to limit scope to include the duty to assert claims arising out of the same facts that the client would reasonably expect to be asserted to accomplish the objectives of the representation.)]

C. The Duty to Avoid Prejudice to the Client's Interests Upon Withdrawal

Before withdrawing from representation of a client in any matter, whether the representation is full or limited in scope, an attorney must comply with California Rule of Professional Conduct 3-700, and therefore must take:

> reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with all applicable laws and rules."[4]
>
> [Cal. Rule of Prof. Conduct 3-700 (A)(2).]

[4] Rule 3-700(D) pertains to the release of client papers and property, and to the return of unearned fees.

In addition, if an attorney is of record in a litigated matter, permission of the client and/or tribunal is generally required. [Cal. Rule of Prof. Conduct 3-700(A)(1)].

In the context of a limited scope representation in which the attorney and client agree the representation will cease before the conclusion of the client's matter, the obligations of the withdrawing attorney pursuant to subdivisions (A)(1) and (A)(2) of California Rule of Professional Conduct 3-700 should be addressed in the initial agreement between the attorney and client. In the context of limited scope representation, the avoidance of prejudice to the client is apt to depend upon the extent to which the attorney has disclosed: (1) the limitations on the scope of the attorney's services; (2) apparent legal problems that are reasonably likely to exist at the projected time of withdrawal; and (3) the advisability of consulting different counsel for those aspects of the client's legal matter the parties expect to be pending at the time of completion of the attorney's services. Litigation attorneys, particularly those practicing in the tort arena, have included such limitations in their fee agreements for years by explaining that their scope of representation does not include an appeal or collection of a judgment.

If the circumstances pertaining to the conclusion of the attorney's services have been adequately addressed at the outset of the attorney-client relationship, and there have been no unforeseen developments that have materially altered the situation, an advance agreement between the attorney and client setting forth the parameters for withdrawal may be sufficient to prevent reasonably foreseeable prejudice to the rights of the client. On the other hand, if these issues have not been adequately addressed in advance, the attorney will need to take precautions prior to the proposed withdrawal to ensure compliance with California Rule of Professional Conduct 3-700(A)(2).

Another related issue is whether a client can agree in advance to execute a substitution of attorney form upon the conclusion of a limited representation. There is no case law to suggest that it would be unethical for an attorney and client to agree at the outset to execute the documents necessary to formalize the conclusion of the relationship, such as a substitution of attorneys, when the terms of the engagement have been completed. The ability to enter into such an agreement also furthers the personal autonomy of a client to choose limited scope, rather than full service, legal representation for a particular matter.

However, an attorney who obtains a pre-signed substitution *for filing in the attorney's sole discretion* will run afoul of California Rule of Professional Conduct 3-700. (See, Los Angeles County Bar Association Formal Opinion 371.) This is particularly true when the client disagrees that the services were completed and the timing of the withdrawal prejudices the client's rights. In Family Law matters, the Judicial Council has created a form that permits the attorney to request an order relieving him or her as counsel because the limited scope representation has been completed as agreed. This application is served on the client, and if the client disagrees, he or she has the right to file an objection with the court.

If an attorney providing limited scope representation in a litigated matter desires to withdraw and the client does not agree to sign a substitution of attorney, the attorney must seek permission from the tribunal to withdraw, and in so doing, should note completion of the limited

scope representation. Because written fee agreements are confidential communications under California Business and Professions Code section 6149, there is a question as to whether it is permissible for an attorney to use a written fee agreement limiting the scope of services as a basis for a motion to withdraw. In order to assure that there is an understanding between the attorney and client as to the attorney's intention to place the agreement before the court, the attorney can obtain an advance waiver of California Business and Professions Code section 6149 from the client. (See, e.g., Cal. Rule of Prof. Conduct 3-310(C)(1) and (2); *Zador Corp. v. Kwan,* (1995) 31 Cal.App.4th 1285; California State Bar Formal Opn. No. 1989-115.) However, because submission to a court or other tribunal can result in dissemination of the agreement to the adversary and the public, an *in camera* production or protective order may be appropriate in certain circumstances.

Even if the attorney has not obtained the client's consent to disclose the agreement in advance, if the agreement defines the limitations on the scope of representation, and the client is nevertheless unwilling to sign a substitution when the scope has been completed, the attorney can use the limited scope agreement without violating California Business and Professions Code section 6068, subdivision (e) or the attorney-client privilege, on grounds that the issue for which it is offered is the client's breach of the agreement. (Cal. Evid. Code §958; *Fox Searchlight v. Paladino* (2001) 89 Cal.App.4th 294, 313).) However, to protect client confidentiality, *in camera* review or a protective order may be warranted.

D. The Duties of Loyalty and Confidentiality

The fiduciary duties of loyalty and confidentiality apply with equal force and effect whether an attorney is providing full service representation for a transactional or litigation matter, or representing the client only on a limited scope basis. The duty of confidentiality is "fundamental to our legal system" and attaches upon formation of the attorney-client relationship, or even in the absence of such a relationship where a person has consulted an attorney in confidence. (See, Cal. Bus. & Prof. Code, § 6068, subd. (e); Cal. Evid. Code, §§950 et seq., *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal. 4th 1135; California State Bar Formal Opn. No. 2003-161.)

For conflict of interest purposes, the duty of undivided loyalty attaches whenever "the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result." (*People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc., supra,* 20 Cal. 4th 1135, 1148; *see also, Flatt v. Superior Court* (1995) 9 Cal. 4th 275, 284; Cal. Rule of Prof. Conduct 3-310.) Thus, this core value of the legal profession must be honored irrespective of the limited scope of the representation.

E. The Duty to the Administration of Justice

Pursuant to California Rule of Professional Conduct 5-200 (A) & (B), an attorney has a duty to be truthful and not to "mislead the judge, judicial officer, or jury by an artifice." Self-represented litigants are often given more latitude by the court in the preparation of pleadings. Thus, federal courts have expressed concern that if an attorney has authored pleadings and guided the course of litigation for a self-represented litigant it may improperly disadvantage an

adverse party. (*Ricotta v. State of California* (S.D. Cal. 1998) 4 F.Supp.2d 961.) Thus, if a "behind the scenes" attorney providing limited scope representation in the form of coaching or ghostwriting appears to be "guiding the course of the litigation with an unseen hand," (*Id.* at 986) or preparing a brief "in any substantial part," some courts have suggested that the attorney is obligated to advise the court of his or her role in the matter. (*Ellis v. State of Maine* (1st Cir. 1971) 448 F.2d 1325, 1328.) While indicating concern, the *Ricotta* court found no case law or local rules prohibiting ghostwriting in California.

Due to the overwhelming number of *pro per* litigants (approximately 80% in family law matters alone), the courts are finding new ways to encourage greater attorney participation to alleviate the strain on judicial resources caused by self-represented litigants. For example, in 2003, the California Judicial Council adopted Rule of Court 5.70 specifically providing that an attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the document that he or she was involved in preparing the documents.

F. Conclusion

Most attorneys either have been, or soon will be, faced with client requests for limited scope legal representation. As our initial question suggested, it is not difficult to understand why consumers of legal services are increasingly seeking this flexible, economical and empowering option from attorneys.

All attorneys who are considering or engaging in limited scope representation should carefully consider the issues raised in this article (1) to determine whether their practice area can accommodate limited representation on particular matters, and if so (2) to establish procedures that not only reduce the cost of legal representation through limiting the attorneys role, but also foster compliance with all of the duties attorneys owe their clients. Those attorneys who provide limited scope representation responsibly and ethically will not only increase the public's access to justice, but should also experience increased client satisfaction flowing from the collaborative effort of achieving the client's desired goals.

A PUBLICATION OF THE STATE BAR OF CALIFORNIA ETHICS HOTLINE

As many as 80% of litigants in family law courts represent themselves. Many would like the assistance of an attorney for parts of their cases even if they cannot afford full representation. The Board of Governors of the State Bar recently adopted recommendations made by the California Commission on Access to Justice aimed at encouraging attorneys to provide limited scope representation of pro per litigants. The Judicial Council also adopted new rules and forms to enable limited scope representation, effective July 1, 2003.

20 things judicial officers can do to encourage attorneys to provide **Limited Scope Representation**

How judges can get more attorneys to draft intelligible declarations and enforceable orders for self-represented litigants.

Limited Scope Representation Committee of the California Commission on Access to Justice

Support the General Idea

1) **Make positive comments** about limited scope representation and how it's great to have attorneys involved in self-represented cases—you appreciate getting forms you can understand, orders you can enforce, and having attorneys for appearances. Let it be known that you think it is not only okay, but beneficial for attorneys to provide limited scope representation. Let litigants know that they may get limited scope assistance if they are unable to afford (or choose not to have) full representation.

This is a win/win/win (court, litigant and attorney) and it helps everyone if done correctly.

2) **Hold a training for other judicial officers** on the issue of limited scope representation. Offer similar sessions to the local bar.

Consider an annual training in limited scope representation put on by the local bar in each county so that new forms, procedures and "bugs" can be addressed. This can also serve as a vehicle to address concerns that arise between bench and bar and train new lawyers.

3) **Mention 'unbundling'** as you also mention pro bono when doing public speaking to lawyers or the public.

4) **Encourage the Bar Association** to set up a limited representation panel and have at least a listing of persons who will help with preparing and negotiating judgments, especially in low asset cases.

5) **Get the local Bar Board of Directors** to pass a resolution in favor of Limited Scope of Representation and have it publicized in their newsletter. Having it come from the Bench will add credibility to the resolution. Consider a joint resolution.

6) **Educate.** Rather than complaining of problems with the narrow scope of the work, make suggestions to help counsel improve the quality of the "package" of services they supply in certain areas.

7) **Show that you understand** and believe that partial representation is helpful to the court. (Tell the lawyers that the years they spent sweating through law school do make a difference.)

Modify Courtroom Conduct

8) **If the client has agreed to limited** representation, you've got to let the attorney out once the scope of the representation is completed. If the word gets out that you are not honoring these agreements, attorneys will feel they're being held hostage for their good intentions and attempts to help, and won't want to make limited appearances in the future. That means you won't be able to get attorneys to assist when you need them to.

9) **If an attorney is appearing on only one** issue in a matter, try to bifurcate that in the hearing so that the attorney isn't either sitting through issues he or she is not authorized to address (and not getting paid for) or being tempted to expand the scope of representation beyond that which the attorney and client have negotiated. If the attorney decides that he or she can't keep quiet on the other issues, consider taking a break in the hearing and giving the attorney the opportunity to revise the scope of the representation with his or her client.

10) **Recognize that clients** who have consulted with an attorney may not present that attorney's advice fully or even accurately. Trust that it is unlikely that the attorney told them "not to bother with service" or similar misconceptions. If there appear to be consistent problems, consider addressing them as general issues with the local bar.

11) Resist attempts by opposing counsel to broaden the scope of the representation.

12) Be open to discussing with counsel, when necessary, clarification of the issues so that opposing counsel will know which issues require contact through counsel and which issues permit contact with the client..

Review Forms, Papers and Processes

13) Review your local rules to modify any that may contradict limited scope of representation rules.

14) Work out procedures with the court clerk's office to make sure they know how to reflect the representational status of the litigant in their case management system. They are on the front line in dealing with many of the issues surrounding limited scope representation and need to be aware of the issues and techniques for dealing with them.

15) Use the Judicial Council form or a similar draft while that form is in the comment process. Have a copy provided to the other side. Get a clear understanding of the limitations on scope from the attorney.

16) Send comments on the proposed Judicial Council form so that it can be made as useful as possible. Let the Administrative Office of the Courts staff attorneys know as issues and problems come up so that they can be considered and addressed with the State Bar.

17) When problems arise, work with the local bar to develop practical solutions. For example, if you want to be sure that settlement conferences don't have to be continued so the self-represented litigants can consult with their advisory counsel, let them know that they are responsible for notifying their consulting/advisory counsel and making arrangements for them to be available on standby or otherwise as appropriate. It is most effective if you meet periodically with the bar to discuss these issues and work out solutions which work for both of you.

Monitor Quality

18) Convene meetings of the family law bar and legal service programs to discuss limited scope representation and suggest that they continue a working group to develop standards of care (as in Contra Costa), informational materials for litigants, fee agreements and office tools, and develop working relationships, referral systems and protocols.

Financial Issues

19) Award attorneys fees for limited scope services when otherwise appropriate and let attorneys know what forms or information they need to provide to substantiate the claim for fees. This is especially important if the attorney is not appearing of record, but assisting in the preparation of forms, declarations and the like.

20) Be sensitive to the economic issues. For example, if an attorney is in court for limited scope, even a routine continuance can impose a real hardship by pricing the service outside the client's reach. If there's only money for one appearance, and it is wasted, no net benefit is acquired and the funds which might have been properly applied to a limited appearance are wasted. Likewise, be sensitive when opposing counsel is delaying or otherwise obstructing for tactical reasons.

Lawyers and litigants are looking to you for guidance and approval, and they will pick up on subtle signals. By letting them know that you are aware of the practical problems they face, you are creating a climate of creative innovation and mutual problem solving. ■

Reprinted from *The Bench*, news journal of the California Judges Association, Summer 2003.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR *(name)*:		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF:		
DEFENDANT:		CASE NUMBER:
OTHER:		
NOTICE OF LIMITED SCOPE REPRESENTATION ☐ Amended		JUDGE: DEPT.:

[Note: This form is for use in civil cases other than family law. For family law cases, use form FL-950.]

1. Attorney *(name)*:
   and party *(name)*:
   who is the ☐ petitioner/plaintiff ☐ respondent/defendant ☐ other *(describe)*:
   have an agreement that the attorney will provide limited scope representation in this case to the party.

2. The attorney will represent the party
   a. ☐ at the hearing on *(date)*:
      ☐ and at any continuance of that hearing
      ☐ until submission of the order after hearing
   b. ☐ at the trial on *(date)*:
      ☐ and at any continuance of that trial
      ☐ until judgment
   c. ☐ other *(specify nature and duration of representation)*:

3. By signing this form, the party agrees to sign *Substitution of Attorney–Civil* (form MC-050) at the completion of the representation described above.

Form Adopted for Mandatory Use
Judicial Council of California
CIV-150 [Rev. September 1, 2018]

Cal. Rules of Court, rule 3.36
www.courts.ca.gov

PLAINTIFF: DEFENDANT: OTHER:	CASE NUMBER:

4. During the limited scope representation, parties and the court must serve papers on both the attorney named above and directly on the party. (Cal. Rules of Court, rule 3.36.) The party's name and address for purpose of service are as follows:

   Name:
   Address *(for the purpose of service):*

   Telephone:
   Fax:

This notice accurately states all current matters and issues on which the attorney has agreed to serve as an attorney for the party in this case. The information provided on this form is not intended to state all of the terms and conditions of the agreement between the party and the attorney for limited scope representation.

Date:

(TYPE OR PRINT NAME OF PARTY) ▶ (SIGNATURE OF PARTY)

Date:

(TYPE OR PRINT NAME OF ATTORNEY) ▶ (SIGNATURE OF ATTORNEY)

PLAINTIFF: DEFENDANT: OTHER:	CASE NUMBER:

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served copies of the *Notice of Limited Scope Representation* (form CIV-150) by enclosing each of them in a sealed envelope with first-class postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelopes with the United States Postal Service.
   b. ☐ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. Copies of the *Notice of Limited Scope Representation* (form CIV-150) were mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelopes were addressed and mailed as follows:

   a. Name of person served:

      Street address:
      City:
      State and zip code:

   b. Name of person served:

      Street address:
      City:
      State and zip code:

   c. Name of person served:

      Street address:
      City:
      State and zip code:

   d. Name of person served:

      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION ☐ Proposed ☐ Final	CASE NUMBER:

1. In accordance with the terms of an agreement between *(name)*: ☐ petitioner ☐ respondent ☐ other parent/claimant and myself, I agreed to provide limited scope representation.
2. I was retained as attorney of record for the services described in the attached ☐ *Notice of Limited Scope Representation* (form FL-950) ☐ Other *(specify)*: *(Do not include your fee agreement.)*
3. I completed all services within the scope of my representation on *(date)*:
4. The last known address for the ☐ petitioner ☐ respondent ☐ other parent/claimant *(for the purpose of service)* is
   Mailing address:
   Telephone number:
   E-mail address:

NOTICE TO PARTY/CLIENT:

Your attorney has served this *Notice of Completion of Limited Scope Representation* stating that he or she has completed the tasks that you agreed the attorney would perform. For more information, read *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

IF THIS FORM IS MARKED " ☒ PROPOSED"

You have the right to object if you believe that the attorney has not finished everything that he or she agreed to do. To object, you must do the following:

(1) Complete the enclosed *Objection to Notice of Completion of Limited Scope Representation* (form FL-956).

(2) Have the *Objection* served on your limited scope attorney and the other parties in the case by a person who is at least 18 years of age and not a party in the case.

(3) File the *Objection* and proof of service with the court.

(4) Have the *Objection* filed and served by the following date: _____

IF THIS FORM IS MARKED " ☒ FINAL"

You did not object to the proposed *Notice of Completion*, which was served on *(date)*: _____
by *(specify type of service)*: _____

(1) The attorney no longer represents you in your limited scope action.

(2) YOU NOW REPRESENT YOURSELF IN ALL ASPECTS OF THIS CASE.

(3) All legal documents will be directed to you at your last known address, shown above in item 4.

If that address is incorrect, you need to let the court and the other parties in the case know your correct mailing address as soon as possible. You may use *Notice of Change of Address or Other Contact Information* (form MC-040) for this purpose.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY)

Form Adopted for Mandatory Use
Judicial Council of California
FL-955 [Rev. September 1, 2017]

NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

CEB ceb.com | Essential Forms

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PROPOSED** ☐ **FINAL** **NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action.**

2. I served a copy of *(specify):*
   ☐ Proposed *Notice of Completion of Limited Scope Representation* (form FL-955), a blank *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956), and *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

   ☐ Final *Notice of Completion of Limited Scope Representation* (form FL-955).

3. I served the above forms as follows:
   a. ☐ **Personal service.** The documents listed above were given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:
   b. ☐ **Mail.** I placed a copy of the forms listed above in the U.S. mail in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the forms were mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   c. ☐ **Overnight delivery.** I placed a copy of the forms listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the forms were deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).

4. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON SERVING NOTICE)

FL-955-INFO Information for Client About Notice of Completion of Limited Scope Representation

(1) Why did I get this Proposed *Notice of Completion of Limited Scope Representation* (form FL-955)?

When you and the limited scope attorney signed the *Notice of Limited Scope Representation* (form FL-950), you agreed to sign the *Substitution of Attorney—Civil* (form MC-050) when the attorney completed the tasks listed on form FL-950.

You have not yet signed that *Substitution of Attorney* form. By serving you a Proposed *Notice of Completion* (form FL-955), your attorney is telling you that he or she has completed the tasks agreed to and is taking action to be removed from your case.

(2) Why is it marked "Proposed"?

The attorney wants to give you a chance to respond if you agree or disagree that he or she completed the work for you.

(3) What do I do if I agree?

You can contact the attorney and say that you agree. But you don't have to to take any action.

(4) What if I don't take any action?

After the 10th day, the attorney will serve you and the other party a *Notice of Completion* form marked "Final." It will then be filed with the court along with the proofs of service of the "Proposed" and "Final" *Notices of Completion*. When the "Final" *Notice* is served on you, the attorney no longer represents you. Unless you have a new attorney, you now represent yourself.

(5) What if I don't agree and think that the attorney is not finished with the work we agreed to?

Contact the attorney right away and see if you can work it out. But, if you can't, YOU MUST ACT RIGHT AWAY to file papers and ask for a court hearing.

(6) How fast do I have to act?

You have only **10 days** from the date that form FL-955 was personally served on you to file papers with the court. If the form was served another way, the time to act is increased slightly.

Look at the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956). The attorney is required to fill in the date by which you have to file the form. To understand how that date was calculated, read (7).

(7) What do I have to do by the 10th day if I disagree?

- ☑ Fill out form FL-956, *Objection to Proposed Notice of Completion of Limited Scope Representation.*
  You should have been served with a blank form FL-956 along with the *Notice of Completion of Limited Scope Representation* that was marked "Proposed." Form FL-956 is also available online at *courts.ca.gov/documents/fl956.pdf.*
- ☑ Next, make 2 copies of the completed *Objection* (form FL-956).
- ☑ File the original *Objection* with the court clerk by the following deadlines:

10 calendar days	from the date that form FL-955 was personally served on you
10 calendar days, *PLUS* *2 court days*	from the date that form FL-955 was served on you by e-mail, facsimile, express mail, or other overnight delivery
10 calendar days, *PLUS* *5 calendar days*	from the date that form FL-955 was served to you by mail within the state of California

Note: The court clerk may reject your *Objection* if it is not served and filed by the correct deadline.

- ☑ The court clerk will set the hearing no later than 25 court days from the date you file the *Objection* and give you filed copies of the *Objection* so that they can be served as described in item (11).

(8) Is there a filing fee for the *Objection*?

Yes, a fee is due when you file the *Objection* (form FL-956) because the court will have to set a hearing on the *Objection*. If you cannot afford to pay and do not yet have a fee waiver order for your case, you can ask the court to waive the fee by completing and filing form FW-001, *Request to Waive Court Fees* and form FW-003, *Order on Court Fee Waiver.*

9 What else needs to be done?

Copies of the filed *Objection* have to be "served" on your attorney and the other party in the case, or the other party's attorney. Someone else who is at least 18 years old must do it (for example, a friend, relative, sheriff, or professional process server). The server must complete a proof of service, which must be filed with the court.

10 How can the *Objection* be served?

A copy of the filed *Objection* can be served by:

- *Personal service*. The server hand delivers the papers. The server may leave the papers near the person if he or she will not take them.
- *Mail service*. The server places a copy of all documents in a sealed envelope and mails them to the address of each person being served. The server must be at least 18 years old and live or work in the county where the mailing took place.
- *Electronic* service. If you and your attorney have agreed in writing that you can send each other documents by e-mail or other electronic transmission, you can serve each other that way.
- *Service by express mail or overnight delivery*. An authorized courier or driver authorized by the express service delivers the papers to a person's business or residence.

11 When does the *Objection* need to be served?

Everyone in the case needs to be served with the *Objection*, as described below, unless otherwise ordered by the court.

16 court days before the hearing	if personal service is used
16 court days *PLUS* *2 court days* before the hearing	if service is by fax, electronic service, or overnight delivery
16 court days *PLUS* *5 calendar days* before the hearing	if service is by mail within California. *For service outside of California, see item* 15

12 What does my limited scope attorney do if I file the *Objection*?

The attorney may file form FL-957, *Response to Objection to Proposed Notice of Completion of Limited Scope Representation,* with the court at least nine court days before the hearing, and serve a copy on you and all the parties (or their attorneys) in the case. The hearing will go forward even if the attorney does not file and serve a *Response*.

13 How should I prepare for my hearing?

- ☑ Take at least two copies of your documents and filed forms to the hearing.
- ☑ Write down the tasks that the attorney agreed to do but has not completed and bring that list to court.
- ☑ Bring any paperwork that helps prove that the work is incomplete.

Important! Your agreement with your attorney is private and should not go into the court file. Letters between you and your lawyer are also private. If you want to bring these documents to court to show why you don't think the tasks are completed, make two copies. Keep the original and give one copy to the judge and the other to the attorney at the hearing. These documents will help the judge make the decision, but they should not be filed with form FL-956, *Objection*.

14 What will happen at the hearing?

The judge will decide if your attorney has finished the work agreed to or not. You will get an *Order on Completion of Limited Scope Representation* (form FL-958) signed by the judge. The attorney will usually prepare the order, unless the court decides otherwise.

15 Do you have questions or need help?

Talk to a lawyer or contact the Family Law Facilitator or Self-Help Center for information and assistance about any subject included in this form. Go to www.courts.ca.gov/selfhelp-courtresources.htm.

PARTY: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS:	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION	CASE NUMBER:
HEARING DATE: TIME: DEPARTMENT OR ROOM:	

1. I am the ☐ petitioner ☐ respondent ☐ other parent/claimant in this case.
2. I object to the proposed *Notice of Completion of Limited Scope Representation* (form FL-955) that I received from my attorney. *(Attach a copy if available.)*
3. I believe that my attorney has not finished everything he or she agreed to do in the *Notice of Limited Scope Representation* (form FL-950). I understand that this is the only reason that I can object to my attorney's proposed notice of completion.
4. My attorney has not completed these specific services:

5. ☐ Before I filed this *Objection*, I attempted to contact the attorney and resolve our difference of opinion about whether the representation was complete. That effort was unsuccessful.
6. I request that the court not allow the attorney to withdraw from representation until those services have been completed.

NOTICE

If you want to object to the proposed *Notice of Completion of Limited Scope Representation* (form FL-955), you must complete this *Objection* and file it with the court clerk by **10 calendar days** after the date that the attorney served the proposed *Notice of Completion*.

Protect the confidentiality of the communications between you and your attorney! This form serves as your declaration to the court in support of your *Objection*. Do not file any other declarations with this form. Do not file any other papers that you received or sent to your attorney about your case! Instead, you may bring the papers or other evidence with you to the court hearing.

I declare under penalty of perjury under the laws of the State of California that the above information is true and correct.

Date:

▶ _____ _____

(TYPE OR PRINT NAME) (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
FL-956 [Rev. September 1, 2017]

OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

INFORMATION FOR SERVING FORM FL-956
(This page does not need to be filed with the *Objection*.)

A copy of the filed *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) must be served on the limited scope attorney and the other parties in the case (or on their attorneys). The document must be served by a person who is at least 18 years of age and not a party in the case, unless electronic service is used. For more information, read *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

1. The *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) can be served on the limited scope attorney and on the other parties in the case (or their attorneys, if they have one) by:

a.	**Personal service.**	The server hand delivers the *Objection*. The server then fills out a proof of service and gives it to you. *Proof of Personal Service* (form FL-330) may be used for this purpose. If the server needs instructions, give him or her *Information Sheet for Proof of Personal Service* (form FL-330-INFO).
b.	**Mail**	The server places a copy of the *Objection* in the U.S. mail, in a sealed envelope with postage fully prepaid and addressed. The server must live or work in the county where the form was mailed. The server then fills out a proof of service and gives it to you. *Proof of Service by Mail* (form FL-335) may be used for this purpose. If the server needs instructions, give him or her an *Information Sheet for Proof of Service by Mail* (form FL-335-INFO).
c.	**Overnight Delivery/Express Mail**	The server places a copy of the *Objection* in a sealed envelope, with Express Mail postage fully prepaid, and deposits it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. *Proof of Service—Civil* (form POS-040) may be used for this purpose.
d.	**Electronic Service**	If you and your limited scope attorney have agreed in writing that you can send each other documents by e-mail or other electronic transmission, you—the client/party in the case—can serve the *Objection* that way. You would then fill out a proof of service. *Proof of Electronic Service* (form POS-050) may be used for this purpose.

2. The deadline for service depends on how the *Objection* was served. See item (11) in *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO) for a list of filing deadlines.

3. Make at least two copies of the completed proof of service. Take the original and two copies to the clerk's office (or e-file it, if available in your court) at least five court days before your hearing.

ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(name)*:	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
RESPONSE TO OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION	CASE NUMBER:
HEARING DATE: TIME: DEPARTMENT OR ROOM:	

1. I am the limited scope attorney for ☐ petitioner ☐ respondent ☐ other parent/claimant in this case.
2. In response to the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) *(select one)*
   a. ☐ I agree to continue representation.
   b. ☐ I request an order to be relieved as the limited scope attorney in this matter.

Notice: Protect the confidentiality of the communications between you and your client!

Do not attach declarations to the *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957).

If you choose to do so, attach only a copy of the proposed *Notice of Completion of Limited Scope Representation* (form FL-955) that was served on the client. Do not attach or file any other papers that you received or sent to your client about the case. Instead, you may bring the papers or other evidence with you to the court hearing.

Following the hearing on the *Objection*, you must file and serve an *Order on Completion of Limited Scope Representation* (form FL-958) as soon as possible, unless otherwise directed by the court.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

▶ _____

(SIGNATURE OF PERSON SERVING NOTICE)

Form Adopted for Mandatory Use
Judicial Council of California
FL-957 [New September 1, 2017]

RESPONSE TO OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

CEB | Essential Forms
ceb.com

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PERSONAL SERVICE** ☐ **MAIL** ☐ **OVERNIGHT DELIVERY** ☐ **ELECTRONIC SERVICE**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action** (not applicable to electronic service).
2. I served a copy of *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957) as follows:
   a. ☐ **Personal service.** The document listed above was given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:
   b. ☐ **Mail.** I placed a copy of the form listed above in the U.S. mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   c. ☐ **Overnight delivery.** I placed a copy of the form listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).
3. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PERSON SERVING NOTICE)

CALIFORNIA BAR JOURNAL
OFFICIAL PUBLICATION OF THE STATE BAR OF CALIFORNIA - JANUARY 2002

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Read this article and take the accompanying test to earn one hour of MCLE credit in ethics.
Follow instructions on test form

This month's article and test provided by
California Bar Journal
West Group

MCLE SELF-STUDY

Unbundling: A Hot-button Ethical Issue

California Joan gives more advice on what offering limited legal services means to lawyers

By ELLEN R. PECK

"Cali!" exclaimed the unmistakable voice of Polly Person, a Riverside solo practitioner who had recently consulted ethics maven California Joan about ethical issues in expanding her family law practice to include unbundled legal services serving as a lawyer scrivener. "I can't believe a whole month has gone by without talking with you again about how to implement limited legal services as a lawyer scrivener. Can you tell me what risk management principles I should consider in providing these services?"

"Polly, let me begin with some generalities. Offering unbundled or limited legal services is just like expanding your practice to include a new field of substantive law. In both areas, important risk management tools are to prepare substantively to offer the particular legal services, to prepare in advance any forms that you might need to provide the services, to formulate guidelines or office procedures which will help keep you from straying into services that you do not want to offer or perform and to build a

Discipline

- Ethics Byte - Ethics lawyers work in the ER of the profession
- Former Michigan judge is disbarred in California, too
- Attorney Discipline

routine which will assist you in maintaining quality control of your services," Cali started.

"What is the claims experience in the insurance industry regarding un-bundled legal services?" asked Polly.

"My friends in the insurance industry advise me that there have been few if any claims arising solely from delivering unbundled legal services. Be cautious, though. Remember that the insurance industry does not distinguish between limited and 'full-service' representation.

"Moreover, while providing limited legal services has become increasingly common, there has been insufficient time to develop particularized claims experience in this area. The insurance industry has expressed concerns that lawyers providing unbundled services may be held liable for acts and omissions which lie outside the agreed upon scope of representation. (Report on Limited Scope Legal Assistance with Initial Recommendations, prepared by the Limited Representation Committee of the California Commission on Access to Justice, October 2001, pp. 23-25 and 42.)

"Gosh Cali, how can we manage the risk if we don't have claims experience?" asked Polly with some alarm.

A little guidance

"We are not shooting completely in the dark. We do have a handful of California appellate published decisions and ethics opinions which give guidance identifying areas of risk in failing to limit the scope of representation properly. We also have some cases discussing risks as a lawyer scrivener and still others discussing risks in failing to make appropriate disclosures in the representation of joint clients for a single purpose," Cali answered.

"Can I ethically limit the scope of my legal services to serving as a scrivener in preparing a marital settlement agreement?" Polly queried.

"Yes," answered Cali. "There is nothing per se unethical about an attorney limiting a professional engagement to one or more unbundled services. (Los Angeles County Bar Association ethics opinions 502 and 483.) As we discussed last time, there are three California cases generally supportive of an attorney's legal services as a scrivener, provided that the clients consent after adequate disclosure. (Marriage of Egedi; (2001) 88 Cal.App.4th 17, 105 Cal.Rptr.2d 518. Blevin v. Mayfield (1961) 189 Cal.App.2d649, 11 Cal. Rptr.882; and Buehler v. Sbardellati (1995) 34 CalApp.4th 1527, 41 Cal.Rptr.2d 104.)"

Polly then asked, "How do I limit the scope of my legal services in preparing a marital settlement agreement to the lawyer scrivener role?"

"Nichols v. Keller (1993) 15 Cal.App.4th 1672, 1687 stated that 'if counsel elects to limit or prescribe his representation of the client . . . then counsel must make such limitations in representation very clear to his client.' Ethics opinions have suggested that the client must be fully informed about and expressly consent to the limited scope of the representation. Any limitations on work to be performed should be stated explicitly and completely. (Los Angeles County Bar Association formal ethics opinions 483 and 502.)

"Does the agreement limiting the scope of the legal services have to be in writing or can it be oral?" asked Polly.

"There is no legal requirement that it be in writing. However, if the fee agreement requires a writing pursuant to Business & Professions Code §6148, then the services to be performed by the lawyer must also be in writing along with the client's responsibilities," Cali responded. (Bus. & Prof. Code §6148(a)(2) & (3); L.A. Co. Bar Ass'n. Form. Op. 502.)

"Also," Cali continued, "if you are going to perform scrivener services for two or more individuals and are required to make written disclosures because of potential or actual conflicts between the parties, describing the limitations of the scrivener role should be part of the written disclosures. (Rules 3-310(A), (C)(1) & (2), Rls. Prof. Cond.)

Put it in writing

"There are two important reasons why, even if not required, that the scope of services should be in writing:

"First, to ensure that the scope of your scrivener role is clear, explicitly stated and that the client is fully and completely informed and expressly consents to the limitations. (See Nichols v. Keller, supra; L.A. Co. Bar Ass'n. Form. Op. 502.) Even if you have the best oral communications skills in the universe, (1) a writing assists in client comprehension because it repeats what you said about limitations on your representation; (2) rereading gives the client opportunity for further reflection and clarification with you; and (3) a writing provides subsequent memory support for the client.

"Second, as a risk management tool, a writing (1) focuses you upon clarifying the specific legal tasks you want to perform for the client; (2) focuses you upon identification of the limitations

upon your representation; (3) will assist you in remembering the limitations on your scope so that you will not stray in performing services outside the scope; and (4) should a dispute arise over the limitations or scope of your services, will provide proof to the client and third parties about the nature and extent of your agreement with the client to limit the scope," Cali finished.

"How should I structure a written 'scope of services' provision?" Polly asked.

"There are generally two structures lawyers use. First, some lawyers providing unbundled legal services prefer to have a checklist defining and outlining specific tasks which the lawyer will perform and those for which the client will have responsibility. A very fine model for this structure is set forth in A Client's Guide to Limited Legal Services by Sue M. Talia (1997 San Ramon: Nexus Publishing). Others prefer to set forth the limited scope of their services in traditional prose, particularly when they are limiting their services to one particular area of the law, to a particular remedy (e.g., workers' compensation) or task (e.g., serving as a scrivener to prepare the legal documentation arising out of a business transaction)," answered Cali.

Outside the scope

"If I limit the scope of my legal services to a client, am I responsible for performing any services outside of the scope of those services?" Polly asked.

"Yes! A lawyer has a further duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. This duty does not extend to remote or tenuous alternatives, but rather to those that are reasonably apparent.

"The public policy underlying this duty is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. While the lawyer is not required to represent the client on matters outside the scope, the lawyer should inform the client of the limitations of the lawyer's representation and of the possible need for other counsel," Cali explained. (Nichols v. Keller, supra, 15 Cal.App. 4th at pp. 1683-1684; Davis v. Damrell (1981) 119 Cal.App.3d 883, 889, 174 Cal.Rptr. 257.)

"Can you give me examples of how this would come up in a business transaction or family law matter?" asked Polly.

"Typically, a marital settlement agreement in a family law matter may have tax or estate planning consequences to the parties. The

form of the business operation (e.g., an S corporation or a limited partnership) may have tax consequences to individual partners.

"The lawyer is not required to advise about tax estate planning matters, but is required to flag the potential consequence for the client and alert the client to the possible need for other counsel," responded Cali.

"So, I should not only define the scope of my legal services, but also should identify any other legal services that appear to be implicated by the client's matter, outside of that scope, and suggest that they seek counsel on those matters," Polly said.

"Exactly!" Cali responded. "In providing scrivener services, consider the following checklist of issues to integrate into your scope and 'outside the scope' provisions:

- "That the parties have already come to an agreement regarding the terms of a dispute or proposed enterprise; the date upon which they came to that agreement and that the lawyer had no part in the negotiation.

- "That the lawyer's services would be limited to memorializing the parties' agreement in a legal document and encompass only the following tasks: (a) setting forth the terms that had already been agreed to; and (b) adding any standard legal provisions normally found in the type of agreement requested (e.g., marital settlement agreement, general partnership).

- "That the lawyer would not advise the parties about the consequences the terms would have upon their personal individual interests and that they were encouraged to seek independent counsel to advise them of those consequences.

- "That the lawyer would not advise the parties jointly about the pros and cons of their agreement and would not negotiate any further terms or provisions of the agreement.

- "Any areas of law which might be implicated by the agreement about which the lawyer would not advise and which the parties should seek independent counsel. (See Marriage of Egedi (2001) 88 Cal. App. 4th 17, 20-24, 105 Cal.Rptr.2d 518.)

"Assuming that I represent two or more people in providing services as a scrivener, what kinds of written disclosures should I give?" asked Polly.

"Let's start with the rules," Cali began. "You cannot represent two or more clients on a common matter in which the interests of the

clients potentially or actually conflict without the informed written consent of all clients after written disclosure. (Rules 3-310(C)(1) & (2), Rls. Prof. Cond.)

"Disclosure requires the lawyer to inform a client of the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client. Informed written consent is defined as the client's written agreement to the representation following written disclosure." (Rule 3-310(A)(1) & (2), Rls. Prof. Cond.)

Typical conflicts

"Are there typical conflicts which arise between jointly represented clients?" asked Polly.

"Generally, six conflict situations may potentially arise or may already actually exist between the jointly represented clients:

"1. Inconsistent expectations of confidentiality in which one client expects the lawyer not to disclose information the lawyer would be required to impart to the other client.

"2. Conflicting instructions from the clients in which the lawyer cannot follow one client's instruction without violating another client's instructions.

"3. Conflicting objectives of the clients in which the lawyer cannot effectively advance one client's objective without detrimentally affecting another client's objective.

"4. Advocacy of antagonistic positions of the clients in which the lawyer is called upon to advocate both sides of the negotiation or a legal position at the same time.

"5. A pre-existing relationship with one client that would adversely affect the lawyer's independent judgment on behalf of the other client.

"6. Conflicting demands by the clients for the original file once the representation has ended.

(California State Bar Standing Committee on Professional Responsibility and Conduct formal opinion no. 1999-153 and authorities cited therein.)

Other issues to consider

• "Joint clients can have disputes about aggregate settlements, including what the total amount should be or disputes about each client's proportional share. (Rule 3-310(D), Rls. Prof. Cond.)

• "Where joint clients are contributing to their joint lawyers' legal fees and/or costs, potential or actual conflicts can arise concerning whether clients should share equally or proportionally in the payments of fees and costs, and if proportionally, the basis for proportional division (e.g., based upon damage claims or awards, time represented, extent of injury, etc.).

• "In the event of future arbitration or litigation between the parties and one or both parties desired the lawyer to give evidence, the attorney-client privilege would be waived. (Evid. Code, §962; Marriage of Egedi (2001) 88 Cal.App.4th 17, 24, 105 Cal.Rptr.2d 518.)

• "If one of your clients is an organization, you should ensure that the appropriate disinterested agent consents on behalf of the organization. (Rule 3-600, Rls. Prof. Cond.)

• "There may be actual or potential conflicts which are unique to your prospective clients' situation, which you should also include.

"In the initial or subsequent interview, the lawyer should review each of these areas of potential conflict with each client to determine whether any conflicts in these areas are actually present or are only potential. Actual or potential conflicts should then be discussed in writing in terms that can be understood by the client. Many lawyers use the above list as a checklist for both the client discussion and as a template for their written disclosures."

"Where can I find sample conflict disclosures, Cali?" Polly asked.

"The Rutter Group's California Practice Guide - Professional Responsibility, at the end of Chapter 4 has conflict of interest forms," she said.

Conflict disclosures

"Are there any other specific disclosures that I should make?" Polly asked.

"Yes! Marriage of Egedi [supra, 88 Cal. App. 4th at p. 24, fn 5] suggested that if a lawyer believed that the parties' agreement is grossly unfair or against public policy, the lawyer should decline to act as a scrivener. This would be a good disclosure to add.

"In holding that the agreement was enforceable, one of the favorable factors was the lawyer's recitation that the agreement had been entered into voluntarily, free from duress, fraud, undue influence, coercion or misrepresentation of any kind and that the parties were advised in writing to seek independent legal counsel and advice regarding the written disclosure and consent to joint

representation and the written agreement prepared by the lawyer. (Marriage of Egedi, supra, 88 Cal. App. 4th at pp. 20, 21.) You might consider adding these concepts to your disclosure or even in any agreement you prepare for joint clients," Cali said.

"Also, remember that if the clients ask you to provide other services, you should memorialize the expanded scope of representation as well as any limitations, in writing, and evaluate whether you need a further disclosure and consent under the conflict rules," she concluded.

"Cali, you have given me a lot of pointers I need to think about in preparing forms and procedures for providing unbundled legal services as a lawyer scrivener. I'm going to take these general concepts and apply them to my particular practice. While it is going to be some work to get everything ready, I know I will provide better services if I am prepared with forms and procedures to clarify the limitations of my representation to the client and I'll sleep better at night knowing that I have taken steps to manage the risk of providing unbundled legal services," Polly said.

"Good luck, Polly, and be careful out there!" Cali said as her friend hung up.

 A sole practitioner in Escondido, Peck limits her practice to lawyer law and lawyer professional responsibilities and ethics. She is a co-author of the "The Rutter Group California Practice Guide - Professional Responsibility" and a visiting professor on professional responsibility at Concord University School of Law.

Filed 3/10/17 (unmodified opn. attached)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE EX REL. JEFF W. REISIG, AS DISTRICT ATTORNEY, Plaintiff and Respondent, v. TIMOTHY ACUNA et al., Defendants and Appellants.	C068868 (Super. Ct. No. CVCV04002085) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on February 28, 2017, be modified as follows:

On page 4, near the end of the paragraph that started on page 3 with "Appellants argue evidentiary error" delete the sentence "For its part, the Attorney General offers this court no help, instead compounding the problem with a 458-page rambling respondent's brief plus 28-page addendum."

BY THE COURT:

RAYE, P. J.

HULL, J.

BUTZ, J.

Filed 2/28/17 (unmodified version)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE EX REL. JEFF W. REISIG, AS DISTRICT ATTORNEY, etc., Plaintiff and Respondent, v. TIMOTHY ACUNA et al., Defendants and Appellants.	C068868 (Super. Ct. No. CVCV04002085)

APPEAL from a judgment of the Superior Court of Yolo County, Kathleen M. White, Judge. Affirmed.

Law Office of Mark E. Merin and Mark E. Merin, Cathleen A. Williams and Paul H. Masuhara for Defendants and Appellants.

Kamala D. Harris, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Eric L. Christoffersen, Deputy Attorney General, Robert C. Nash , Deputy Attorney General, for Plaintiff and Respondent.

Eight individuals appeal from a civil judgment granting a permanent (seven-year) injunction enjoining public nuisance activities of a criminal street gang.

Yolo County District Attorney Jeff W. Reisig on behalf of the People of the State of California (plaintiff), filed this civil action against the Broderick Boys criminal street gang (a/k/a BRK a/k/a BSK a/k/a Norteno a/k/a Norte a/k/a XIV) and 23 of its members, to enjoin as a public nuisance (Civ. Code, §§ 3479-3480) activities in a 2.98-square-mile area (safety zone) of West Sacramento. The safety zone is bounded by Harbor Boulevard to the west, the Sacramento River to the north and east (but not including the area previously known as the Lighthouse Marina and Golf Course), and by Highway 50/Business Loop 80/State Route 275 to the south.

In a prior appeal, we affirmed, for the most part, a *preliminary* injunction. (*People ex rel. Reisig v. [Timothy] Acuna* (2010) 182 Cal.App.4th 866 (*Acuna I*).)

This appeal by eight individual defendants (appellants) comes after a bench trial during which the eight appellants were represented by various attorneys. The trial served as a prove-up hearing as to defaulting defendant Broderick Boys. The trial court issued a judgment and permanent (seven-year) injunction against defendant Broderick Boys, its a/k/a's, and its "active members" including but not limited to 17 individual defendants -- Timothy Acuna, Victor Dazo, Jr., Alex Estrada, Ramon Esquilin, Jesse Garcia, Michael Hernandez, Rainey Martinez, William McFadden, Robert Montoya, Michael Morales, Guillermo Duke Rosales, Robert Sanchez, Paul Savala, Abel Trevino, Felipe Valadez, Jr., Billy Wolfington, and Tyson Ybarra. Several of the original defendants were dismissed.[1]

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[1] The trial court dismissed Thomas Cedillo, Robert Cortez, Victor Ferreira, Rudy Tafoya, and William Ybarra, Jr. But the trial court found Ferreira, Tafoya, and Ybarra were active Broderick Boys members at relevant times. The court severed the case as against defendant Rudy Ornelas, finding him unavailable because of his pending criminal case and withdrawal of his attorney in this civil case. The judge considered Ornelas's activity on the question of Broderick Boys' pattern of criminal activity. The trial court found Ornelas was a Broderick Boys member, noted he was convicted of offenses including attempted murder in trial court case No. CRF 07-005385, and ordered plaintiff to proceed against Ornelas or dismiss him; it is not clear what choice plaintiff made.

The trial court found Broderick Boys is a criminal street gang which, through its members, creates a public nuisance in the safety zone by engaging in violent assaults, robberies, trespass, theft, illegal possession of weapons, possession of drugs for sale, "tagging" public and private property with gang symbols, displaying gang symbols and signals to intimidate residents, and threatening and retaliating against persons perceived to have disrespected the gang. The injunction enjoins the gang and its active members from engaging in nuisance activities and also restrains them from other activities including (1) associating with known members (standing, sitting, walking, driving, gathering, or appearing in public) except inside or traveling to or from school or church, and (2) being out in public between 10:00 p.m. and 6:00 a.m., subject to exceptions.

This appeal from the permanent injunction is limited to the eight defendants/appellants -- Timothy Acuna, Alex Estrada, Jesse Garcia, Robert Montoya, Michael Morales, Guillermo Duke Rosales, Felipe Valadez, Jr., and Billy Wolfington. We have no need in this appeal to address enforceability of the injunction as to anyone else.

Appellants argue evidentiary error, insufficiency of evidence, constitutional claims, and miscellany. They fail to show prejudicial evidentiary error, yet appear to assume in their substantial evidence argument that we should disregard the evidence they challenged. Appellants misstate facts and law (despite taking almost a year to prepare the opening brief) and fail to support each factual assertion in their brief with a citation to the record, as required by California Rules of Court, rule 8.204(a)(1)(C). Appellants' reply brief acknowledges the opening brief's factual misstatements and defects but dismisses them as inconsequential and nonprejudicial to plaintiff. Appellants thus miss the point that they have the duty on appeal to state the evidence fairly, in the light most favorable to the trial court's ruling, and record citations are for the benefit of the reviewing court as well as the respondent. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Foreman*); *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112-114

(*Lewis*).) Appellants' neglect is particularly burdensome, given that they submitted **380** pages of initial briefing (114-page opening brief plus 266 pages of addenda of purported facts and objections). For its part, the Attorney General offers this court no help, instead compounding the problem with a 458-page rambling respondent's brief plus 28-page addendum. Appellants' 71-page reply brief rounds out the mass. Despite appellants' defects, we nevertheless endeavor to address their contentions.

Appellants appear to advocate a standard whereby an individual cannot be subject to a gang injunction unless he personally commits multiple nuisance activities. We explain the correct standard is that an individual can be subject to the injunction if he is an active member of a gang whose members commit nuisance activities, and active membership does not mean personal commission of multiple nuisance activities.

Additionally, much of appellants' briefing hinges on the flawed premise, unsupported by authority, that the relative success of the *preliminary* injunction in reducing nuisance activity must inure to appellants' benefit, commanding a conclusion that there is no longer an ongoing need for injunctive relief. However, a permanent injunction is appropriate where the misconduct is ongoing or likely to recur and, while a permanent injunction may be inappropriate where the defendant discontinued the misconduct *voluntarily and in good faith*, compliance with a court order (here, the preliminary injunction) does *not* constitute voluntary discontinuation. (*Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1658-1659 (*Feminist*).)

While this appeal was pending, the California Supreme Court held a gang expert cannot base an opinion on the assumed truth of case-specific facts that are inadmissible hearsay for which no independent competent evidence is adduced. (*People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*), disapproving *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*).) This aspect of *Sanchez* concerning state evidentiary rules for expert testimony (Evid. Code, §§ 801-802) applies in civil cases such as this nuisance lawsuit. We allowed supplemental briefing, as we discuss *post*. To avoid potential

complications that might otherwise arise in light of *Sanchez*, we focus in this appeal on evidence that did *not* depend on experts' assuming the truth of case-specific hearsay not proven by independent competent evidence or subject to a hearsay exception --, e.g., records of criminal convictions, trial testimony or spontaneous statements by victims, and non-case-specific hearsay about gang culture. We reject *post* appellants' suggestion that evidence improperly admitted may have been the deciding factor in the trial court's decision.

We affirm the judgment.

PRIOR PROCEEDINGS AND APPEALS

Plaintiff filed the original complaint in December 2004, naming only Broderick Boys (with a/k/a's) as defendant. The trial court issued a *default* injunction in February 2005. (*People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506, 1514 (*Broderick Boys*).) On April 23, 2007, we reversed the default injunction, holding that (1) four individuals served with the injunction had standing to challenge it; (2) Broderick Boys was not an "unincorporated association" *for purposes of service of process* (Code Civ. Proc., § 416.40, subd. (b); Corp. Code, § 18220), because the gang had no "lawful purpose" (Corp. Code, § 18035); and (3) even if the gang were an unincorporated association, service of the complaint on only one member of unknown rank was insufficient. (*Broderick Boys*, at p. 1511.)

Plaintiff filed the operative amended complaint in July 2007, seeking an injunction against Broderick Boys (with a/k/a's) and 23 individuals. The court entered default judgments in 2007 against nine individuals (none of whom are appellants in this appeal) -- Victor Dazo, Jr., Ramon Esquilin, Michael Hernandez, Rainey Martinez, William McFadden, Robert Sanchez, Paul Savala, Abel Trevino, and Tyson Ybarra. The judgment at issue in this appeal finds these nine are still Broderick Boys active members responsible for the public nuisance.

After submission of declarations and a hearing, the trial court granted a *preliminary* injunction in May 2008. The court entered default against defendant Broderick Boys in October 2009. In an appeal from the *preliminary* injunction (*Acuna I, supra,* 182 Cal.App.4th 866), we upheld the preliminary injunction, except for (1) an overbroad restriction on controlled substances that would have prohibited gang members from entering pharmacies, and (2) a vague restriction on alcohol that would have barred members from being in the presence of someone drinking alcohol in a restaurant. (*Id.* at pp. 888, 892.) We held substantial evidence supported the trial court's conclusion that plaintiff was likely to prevail in showing Broderick Boys is a criminal street gang and engages in public nuisance activities. (*Id.* at p. 879.) We said defendants forfeited their challenge to the findings of their active membership, because they made no individualized arguments and did not explain how the evidence was insufficient. (*Ibid.*)

FACTS AND PROCEEDINGS OF CURRENT APPEAL

At the bench trial in 2010, plaintiff presented two criminal street gang experts -- Police Detective Joe Villanueva and Sergeant Jason Winger -- both of whom also had personal experience investigating gang-related crimes.

Villanueva worked for the West Sacramento Police Department (WSPD) and Yolo County's District Attorney between 2000 and 2007. He then transferred to Fairfield but keeps up with Broderick Boys' "goings-on" through continued communications with WSPD. Villanueva has a master's degree in criminal justice and did his master's thesis on gang injunctions. Winger testified to his 16 years of experience on the WSPD and was still working there at the time of trial. Since 2007, he has patrolled the field as part of the Community Response Team (CRT), which he now supervises.

Nortenos is a criminal street gang with primary activities of murder, assault, robbery, drug sales, and vehicle theft. Nortenos' rival is the Sureno gang. Nortenos use signs or symbols, such as wearing red and displaying "Norte," "N," "14," or "XIV."

Norteno gang members typically tattoo themselves with these symbols. The Norteno gang has subsets -- factions that come from designated areas separated by city or turf within a city -- who share the Norteno philosophy and use Norteno signs and symbols.

Broderick Boys is a criminal street gang and subset of the Nortenos. Broderick Boys' primary territory is the northern part of West Sacramento, including the Broderick neighborhood on the eastern side. Broderick Boys' primary activities are assaults, firearms offenses, drug sales, vehicle theft, and gang graffiti. They engage in violent assaults against rival Surenos and intimidate citizens to discourage cooperation with police and facilitate gang operations, including illicit drug trade. Victims have moved away.

In addition to using Norteno symbols, Broderick Boys uses "BRK," "BSK" (Broderick Scrap [Sureno] Killer), and adopts corporate logos as its own, e.g., a Boston Red Sox hat (a red hat with a B). Broderick Boys does not have a formal organization structure but has an informal structure, where senior members (original gangsters or OGs) have more influence than newer members and determine the course of the informal policy.

People typically join Broderick Boys through family connections with existing members or by being "jumped in" (submitting to beatings), and females can join by being "sexed in" (having sex with members). Members establish themselves by "putting in work" for the gang (committing violence or selling drugs) to earn respect. They show commitment to the gang by "patrolling" -- going out in groups looking for a fight or confrontation to show willingness to assault others and instill fear in the community.

Villanueva opined specific individuals were active Broderick Boys gang members at relevant times, including the eight appellants, the other named defendants who did not appeal, and numerous other individuals ultimately found by the trial court to be active members. We discuss specific evidence regarding the eight appellants *post* in our

discussion of their substantial evidence challenge to the trial court's finding of their active membership.

Villanueva based his opinions on his personal interactions with the individuals, their self-admissions, their gang tattoos, and his review of documents such as field interview cards, police reports, and jail classifications. Jail intake questionnaires ask new arrivals to check a box yes or no as to whether they are gang-affiliated, and to sign the intake form. Winger also opined specific individuals were active Broderick Boys gang members, based on Winger's personal contacts with them, involvement in criminal investigations, review of police records, and gang tattoos. Winger said that, in overall gang lifestyle, it is highly likely that if someone were to get a gang tattoo without being a gang member, that person would be "acted upon by actual members."

While the preliminary injunction was in place, Villanueva noticed a reduction in Broderick Boys crimes, self-admissions, and public association. Before the injunction, he regularly saw gang members hanging out in groups on street corners, but less so after the injunction. Broderick Boys members, including (defendant) Billy Wolfington, told Villanueva that the injunction was driving them "underground." Winger testified the practice of "flashing" gang tattoos (displaying them in a manner trying to attract attention) has diminished in the last five years, since the first iteration of the gang injunction. "Historically," Broderick Boys members hang out in public together, but not so much since the injunction.

Plaintiff adduced evidence of multiple public nuisance activities, through testimony of victims, witnesses, law enforcement officers, and judicial notice of criminal court records. These activities dated back to around 2001, diminished while injunctions were in effect (February 2005 to April 2007, and May 2008 to the present), yet occurred even in 2010 shortly before trial. The trial court acknowledged its duty to determine whether there was an ongoing need for injunctive relief but allowed older incidents to counter defendants' denial of the existence of a Broderick Boys criminal street gang.

A lot of evidence was adduced over defense objection, subject to plaintiff "connecting the dots" to show the individuals were active Broderick Boys members. We disregard evidence concerning individuals who did not make it onto the court's list of active members in the statement of decision. We also disregard evidence involving just one person, e.g., being found in possession of drugs, etc. After the bench trial, the California Supreme Court in a criminal case, *People v. Rodriguez* (2012) 55 Cal.4th 1125, held a defendant's commission of attempted robbery while acting alone did not fall within the elements of the gang participation offense under Penal Code section 186.22, subdivision (a), which requires willful promoting, furthering, or assisting in felonious criminal conduct by gang "members" (plural), though a gang enhancement (*id.* § 186.22, subd. (b)) might apply to such a person. (*Rodriguez, supra*, 55 Cal.4th at pp. 1130-1132.) While different concerns govern this civil injunction case, we focus on evidence of incidents involving more than one person and/or incidents resulting in final convictions of gang offenses or enhancements.

We set forth a sampling of recent activities within a few years of the 2010 trial, all involving persons found by the trial court to be active Broderick Boys members.

On February 17, 2007, police stopped (defendant) Timothy Acuna driving a stolen car, with (defendant) Alex Estrada as passenger. Acuna was convicted of vehicle theft with a gang enhancement in case No. 07-0982.

Cesar Lara-Morales was convicted of a March 2, 2007, assault with a firearm and a gang enhancement as well as battery and gang activity in case No. 07-1438.

Daniel Bonge, Austin Nunez, and Pauliton Nunez were convicted of assault with gang enhancements in case No. 07-2135, for their April 16, 2007, attack on an Amtrak train engineer. The engineer testified he stopped the train because a person was on the tracks. The engineer got off the train, saw a group of people, and told them to leave. They instead kicked the engineer and struck him with rocks, a fire extinguisher, and a vodka bottle, leaving him with a concussion, broken finger, bruised ribs, sprained ankle

and shoulder, and a head wound requiring 13 staples to close. They tried to take his wallet and cell phone. Appellants claim the record is unclear whether this incident occurred within the safety zone, but they fail to cite to the transcript where the location was described as "the eastern perimeter of the Safety Zone, right at the edge of the western bank of the Sacramento River and I Street" near the I Street Bridge. Plaintiff also submitted photos of Bonge and both Nunezes making the letters "B" and "N" with their fingers, and folding their arms to form "XIV." The Amtrak incident occurred after oral argument in *Broderick Boys, supra*, 149 Cal.App.4th 1506, and a week before we filed the April 23, 2007, opinion overturning the default injunction. (See *id* at pp. 1517, 1521 [referencing oral argument].)

On August 15, 2007, police photographed graffiti on houses under construction -- e.g., "BRK" in red paint, a red B painted on a door, X4 painted on a wall, "FUCK X3 [Surenos]," and "Don't fuck with BRK."

On September 28, 2007, police assisting a parole check found (defendant) Michael Hernandez in possession of marijuana and methamphetamine. He pleaded no contest to a drug offense and admitted a gang enhancement in case No. 07-5524.

In October 2007, police found drugs in a car driven by Daniel Orozco accompanied by Thomas Mendes and, in a separate incident found stolen property in a car driven by Orozco.

On November 9, 2007, police encountered in the street two wounded and agitated juveniles who reported they had just been attacked by Lorenzo Castanon (whom they knew) and another male, who demanded money from them. Police located Castanon in the company of Benito Morales, Jr., and Shawn Ruiz.

On December 11, 2007, police took photos of cars painted with graffiti including "BRK" and "X4."

In March 2008, gang graffiti was spray-painted on cars, public sidewalks, trees, and residences on Portsmouth Way in West Sacramento.

The preliminary injunction issued in May 2008.

A police officer testified that, on September 7, 2008, a victim reported that a person, later identified as Manuel Diaz, approached the victim, called him a "scrap," said, "I [Diaz] am a Norte," hit the victim several times with a wrench, kicked the victim when he fell to the ground, and stole the victim's bike. Manuel Diaz was convicted of grand theft with a gang enhancement.

Richard Dazo, Hillario Estrella, and Joshua Osborne were each convicted of a January 2009 assault with bodily injury and a gang enhancement in case No. 09-0110 for assaulting a female and stealing her backpack. A police officer asked Estrella if he "put in work" for Broderick Boys, which is a term of art in gang culture, meaning doing something to benefit the gang or further the gang, such as committing a criminal act like robbery, assault, or car theft. The officer did not define "put in work" when speaking with Estrella, but Estrella answered the question by saying he fought rival gang members.

On February 11, 2009, police conducted a parole search at the residence of Michael Fragoso and Joseph Freed and found marijuana, methamphetamine, cocaine salt, a red hat with the word "Norte," several hats with "B" or "N" on them, and red clothing. Freed had a "1" and "4" tattooed on his chest. Fragoso had a "B" with a crown tattooed on his arm and shoulder. (5RT 1388-1394)

Christopher Castillo was convicted of a March 6, 2009, gang activity offense in case No. 09-1349. He and his brother -- minor J.C. -- attacked the victim, leaving small puncture wounds on his back and lacerations on his torso. The following day, police responded promptly to a dispatch about a fight and spoke with victim J.R., who related that "Cricket" (Christopher Castillo) and two others approached the victim and his friends in the street and asked if they were "scraps" (Surenos). J.R. said no. Castillo or one of his companions said, "Well, this is Broderick, Homey," and all three struck J.R., leaving him with a swollen lip and forehead, and took his bicycle.

On March 18, 2009, Angel Sanchez and Jesse Sanchez assaulted a victim at his home. In this civil case, plaintiff called Angel Sanchez as a witness, but he invoked the Fifth Amendment on the witness stand. The trial court found him unavailable as a witness and admitted into evidence his testimony from his prior criminal trial for the March 2009 assault (case No. 09-1474). The defense in this case objected that Sanchez's prior testimony did not constitute declarations against interest because they were motivated by his desire to receive a lower sentence. The court ruled Angel's statements about being in a gang and getting tattoos were "part of the larger pattern that could be considered against his interests." In his testimony in the criminal case, Angel Sanchez said he was then a Broderick Boy and had gang tattoos on his face, arms, and hands, and one way to join was to be "jumped in" to the gang, though he was not jumped in but joined because he had family members involved in the gang. Angel Sanchez testified he "put in work" for the gang by fighting members of other gangs. Plaintiff's gang expert testified Angel Sanchez contributes to the nuisance but at the time of this trial was in custody awaiting sentencing on his criminal case.

On April 3, 2009, a probation search of the residence of Manuel and Carlos Guzman revealed a shotgun, ammunition, items with gang graffiti, and marijuana. In case No. 09-1660, Carlos Guzman pleaded no contest to active participation in a criminal street gang and was sentenced to 16 months in prison, and Manuel Guzman (who less than two years earlier told police he was a Broderick Boy), pleaded no contest to possession of a firearm with a prior conviction and active participation in a criminal street gang.

Shortly before trial began in July 2010, a series of incidents inside the safety zone culminated in a violent attack in March 2010 at a pre-arranged location outside the safety zone -- Memorial Park. Victim J.H. and his father Mr. H. testified about the initial events. In early January 2010, J.H.'s brother, minor R.H., got into a fight with Brandon Lanzi (identified as minor B.L. in the statement of decision), cousin of then-Broderick-

Boy Abel Morales. In mid-January 2010, R.H. got into a fight at school with the brother of validated Broderick Boys gang member Alexander Valadez. Mr. H., arrived at the school to pick up his sons. Alexander Valadez and his girlfriend, J.L., were standing nearby, and J.L. said to Mr. H., "what are you looking at n*****," and "we know you live [at a specified street and apartment number]." As the H. family headed home, Alexander Valadez drove past, with his brother, J.L., and Abel Morales in the car, yelling, "Broderick." They were sitting in their car outside the H. family's home when the H. family arrived. Alexander Valadez yelled, "it's on, n*****. We got clips. We got nines. I am going to call my uncle. I got my uncle, and he's bigger than you, you know." Alexander Valadez also said something about "kill" and "we all own this area; we are Broderick." Later that day, Valadez, J.L., and Abel Morales drove by again. A few days later, Valadez and a companion were sitting in a car when Mr. H. arrived home. Valdez made eye contact and then drove away.

Arrangements were made for a fight between R.H. and Abel Morales at Memorial Park -- outside the safety zone -- on March 19, 2010. On their way to the park, J.H. and R.H. were accosted by Broderick Boy Christopher Castillo, who rode up on his bike and said, "you got funk with my cousin." At the park, Castillo looked at R.H. and said, "this is Broderick." J.H. said Castillo, who was an adult, was too old to fight teen R.H. Castillo swung at J.H., and they did battle. Several cars arrived, and about 10 people got out and attacked J.H. and R.H. while using racial slurs and yelling, "this is Broderick." Abel Morales and Benny Hammond hit J.H. and, when he fell to the ground, hit and kicked him. J.H. got up, and Castillo hit him on the head with a hammer several times, causing bleeding. R.H. was kicked, stomped on, and had a knife thrown at him. The attackers drove away as police arrived. An officer testified that, of the crowd of bystanders, only two were willing to give a statement. Others said they were afraid to get involved. Victim J.H.'s father testified he had to move his family away from the home they loved, out of fear of the Broderick Boys gang.

The trial court took judicial notice that Charles Dalby Dykes, Benny Hammond, Brandon Lanzi, and Alexander Valadez were convicted of gang activity offenses or assault with gang enhancements in connection with the Memorial Park incident. Abel Morales was convicted of assault with great bodily injury. (Pen. Code, § 245.) On our own motion, we take judicial notice that Christopher Castillo was later convicted of conspiracy, assault with a deadly weapon by force likely to produce great bodily injury, participation in a criminal street gang, plus gang enhancements, and we affirmed the judgment in an unpublished opinion, *People v. Castillo*, C073250, filed June 11, 2015 (rev. denied).

On June 4, 2010, police contacted Jesse Contreras, a validated gang member, about his violating a probation condition that he not associate with gang members. Contreras had a fresh "BRK" tattoo on his stomach.

In early August 2010, police stopped Scott Delgado and two others, all of whom were subject to the injunction, violating the 10:00 p.m. curfew provision of the injunction.

The trial court allowed Officer Labin Wilson to testify as a gang expert in plaintiff's rebuttal case, regarding an assault that occurred in the safety zone on November 6, 2010 (during trial). As we discuss *post*, for purposes of this appeal, we will assume the trial court erred in allowing this evidence but will conclude any error was harmless.

The Defense Case

The defense presented gang experts who opined neither Nortenos nor Broderick Boys are a criminal street gang. A former prison warden testified that jail intake classification does not necessarily mean the person is a member of a criminal street gang. The defense called as witnesses numerous residents of the community, including

defendants' friends and family, who testified they did not witness any public nuisance activity in the safety zone and did not fear for their safety.

Statement of Decision and Judgment

In a statement of decision and judgment filed June 16, 2011, the trial court granted an injunction to restrain appellants' activities within the safety zone.

Applying the standard of clear and convincing evidence, the trial court found Broderick Boys is a criminal street gang whose members have created a public nuisance, and appellants are active members. The court found credible the testimony of plaintiff's witnesses. The court found "less credible" defense witness denials of the existence of the Broderick Boys gang, because of some witnesses' relationships to named defendants, apparent motive to minimize defendants' actions, lack of personal knowledge regarding certain events, and use of the phrase "I don't recall" and/or gaps in their knowledge or recollection.

The court found defendants' conduct "has obstructed the free use of property in the Safety Zone, interfered with the comfortable enjoyment of life and property in the Safety Zone, and unlawfully obstructed the free passage and use, in the customary manner, of public parks and places." The conduct "has affected and continues to affect a substantial number of people who live and work in the Safety Zone." "Without the injunction, defendants, and each of them, will continue to maintain the nuisance by participating in and encouraging their criminal and nuisance activities, irreparably harming the community and the individuals who live and work in the Safety Zone." "The nuisance is ongoing, and although attenuated somewhat since the issuance of the preliminary injunction, it still exists."

The court noted WSPD evidence that a process exists for persons to be removed from the list of active members by inactivity or by "opting out."

The court found it appropriate to limit the term of the injunction to seven years, because younger members typically "age out" of the youthful criminality; older members move away or are incarcerated long-term; and it is speculative whether new members will replace old members (in light of the decline in activity while the preliminary injunction has been in effect and absence of evidence of recruitment). The injunction has been in place in various iterations since February 3, 2005, and seven more years "is sufficient for law enforcement to use the injunction to further attenuate the nuisance activity in the Safety Zone until the injunction is no longer necessary, and the residents of the Safety Zone who oppose the injunction will not suffer what they perceive to be a permanent blemish on their neighborhood." The court retained continuing jurisdiction in equity over the terms and duration of the injunction. (Civ. Code, § 3424.) Unless modified, the injunction will expire in 2018 -- seven years after entry of judgment.

The judgment enjoined and restrained Broderick Boys and its active members from:

(1) appearing in public with any known member of Broderick Boys, except when in school on school business or church (the non-association order);

(2) intimidating any person known to be a witness or victim or complainant concerning Broderick Boys activity (the no-intimidation order);

(3) possessing or knowingly being in the presence of any gun, ammunition, or dangerous weapon (the no-weapons order);

(4) damaging, defacing, or marking any public or private property (the no-graffiti order);

(5) possessing or using any controlled substance without a prescription or selling or knowingly participating in the sale of any controlled substance (the stay-away-from-drugs order);

(6) possessing or knowingly remaining in the presence of anyone possessing an open container of alcohol, where such possession occurs in a place accessible to the

public, except on the premises of establishments licensed to serve or sell alcohol (the stay-away-from-alcohol order);

(7) remaining in a public place or establishment open to the public or vacant lot between 10:00 p.m. and 6:00 a.m., except when attending certain events, working, or in case of emergency (the curfew order);

(8) being present on or in property not open to the general public except with prior written consent of the owner, owner's agent, or person in lawful possession of the property, or in the presence of and with the voluntary consent of the owner, owner's agent, or person in lawful possession (the no-trespassing order);

(9) failing to obey laws prohibiting violence or interference with property rights or commission of acts creating a nuisance.

DISCUSSION

I

Summary of Gang Injunction Legal Principles and Standard of Review

A gang injunction to abate a public nuisance may be issued under the Civil Code (§§ 3479-3480) or under the STEP Act (Pen. Code, § 186.22a). (*People ex rel. Gallo v. [Carlos] Acuna* (1997) 14 Cal.4th 1090, 1119 (*Gallo v. Acuna*) [public nuisance under the Civil Code].) This case was brought under the Civil Code, which defines a nuisance as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of . . . any public park, square, street, or highway." (Civ. Code, § 3479.) A public nuisance is a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) Public nuisances are

misdemeanors. (Pen. Code, §§ 372-373a.) A civil action to abate a public nuisance may be brought by a district attorney on behalf of the people. (Code Civ. Proc., § 731.)

Where the action is based on gang activity, plaintiff must show (1) the group is a criminal street gang, (2) its members engage in public nuisance activities, and (3) the individuals being subjected to the injunction are active members of the gang. (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1258 (*Englebrecht*) [permanent injunction], citing *Gallo v. Acuna, supra*, 14 Cal.4th at p. 1125 [preliminary injunction].)

A criminal street gang is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of [certain enumerated criminal offenses including assault, robbery, and felony vandalism], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (Pen. Code, § 186.22, subd. (f).) For the purposes of a gang abatement injunction, the test is public nuisance activity rather than criminal activity (*Englebrecht, supra*, 88 Cal.App.4th at p. 1258), but in this case the public nuisance activity consisted mainly of crimes. "In order to prove the existence of a criminal street gang in a given case, it is of course necessary to concentrate on the activities of those alleged to be members. A criminal street gang can act only through its members. [Citation.]" (*Acuna I, supra*, 182 Cal.App.4th at pp. 874-875, citing *Englebrecht, supra*, 88 Cal.App.4th at pp. 1260-1261.)

"[I]n order to enforce a gang injunction against an alleged member, it must be shown the person 'participates in or acts in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. The participation or acting in concert must be more than nominal, passive, inactive or

purely technical.' [Citation.]" (*Acuna I, supra*, 182 Cal.App.4th at p. 875, citing *Englebrecht, supra*, 88 Cal.App.4th at pp. 1260-1261.) Of necessity, the definition of active membership cannot be very specific. (*Acuna I, supra*, 182 Cal.App.4th at p. 884.) It is not likely criminal street gangs maintain rosters of their active members. (*Ibid.*) Some factors to consider are self-identification, gang tattoos, crimes committed with other gang members, information from reliable informants, clothing, accessories, photographs, and close association with known gang members. (*Ibid.*) We held this definition of active gang member is not unconstitutionally vague. (*Acuna I, supra*, 182 Cal.App.4th at pp. 883-884.)

The injunction may not burden the constitutional right of association more than is necessary to serve the significant governmental interest at stake. (*Gallo v. Acuna, supra*, 14 Cal.4th at pp. 1115, 1120-1122.)

The importance of the interests affected by the injunction, i.e., constitutional due process and general public policy considerations, requires that the finding of facts necessary to justify its issuance be proved by clear and convincing evidence. (*Acuna I, supra*, 182 Cal.App.4th at p. 873; *Englebrecht, supra*, 88 Cal.App.4th at pp. 1254-1256.) Here, the trial court correctly applied the clear and convincing evidence standard.

On review of a trial court's decision to grant an injunction, we apply the abuse of discretion standard, but we review the trial court's factual findings under the substantial evidence standard, resolving all factual conflicts and credibility questions in favor of the prevailing party and indulging all reasonable inferences in support of the injunction. (*Gallo v. Acuna, supra*, 14 Cal.4th at pp. 1109-1110; *Acuna I, supra*, 182 Cal.App.4th at pp. 878-879.) We review questions of law de novo. (*People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 38 (*Totten v. Colonia Chiques*).) While constitutional issues are always subject to independent review, we do not on appeal reweigh the evidence before the trial court or determine the credibility of witnesses. (*Acuna I, supra*, 182 Cal.App.4th at pp. 878-879.)

II

Claims of Evidentiary Error

While appellants describe the challenged gang evidence as inflammatory, we are mindful that this case does not involve a jury, but rather a bench trial in which the trier of fact was a judge capable of weighing the evidence without being influenced by its inflammatory nature. (*In re Hernandez* (1966) 64 Cal.2d 850, 851.) The trial court expressly noted this point.

Appellants claim the trial court made multiple prejudicial evidentiary errors. We generally review the trial court's evidentiary rulings for abuse of discretion, though when the issue is whether admission of evidence violated the federal Constitution, we review the matter de novo. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

Under a heading that erroneous admission of evidence in violation of federal constitutional due process rights renders a trial "fundamentally unfair," appellants make catch-all arguments that the trial court erroneously allowed "virtually all evidence" regardless of its irrelevance, inflammatory nature, and prejudicial effect and allowed all victims' hearsay statements as spontaneous utterances. Appellants "must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the [trier of fact] may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the [trier of fact] must have used the evidence for an improper purpose.' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*).)

A. *Appellants' "Standing" Re: Non-appellants*

In its respondent's brief, plaintiff argues the eight appellants lack standing to challenge hearsay statements of other gang members. Plaintiff cites *Acuna I*, where we

said the appellants -- named defendants found to be "active members" -- lacked standing to challenge the definition on behalf of persons not before the court. Here, however, the issue is different. Appellants are entitled to challenge use of evidence of other people's out-of-court statements to prove as a factual matter that Broderick Boys is a criminal street gang whose members engage in public nuisance activities -- facts which are necessary to the permanent injunction to which appellants are being subjected.

B. *Deferred Ruling*

Appellants complain the trial court improperly deferred ruling on hearsay objections until the end of trial, allowing plaintiff to "connect the dots" linking actors to the gang. Appellants present no legal authority that deferred ruling constitutes reversible error.

The trial judge has inherent and statutory authority to control the order of proceedings, regulate the order of proof, provide for the orderly conduct of the proceedings, and control the litigation. (Evid. Code, § 320 [court in its discretion shall regulate order of proof]; Code Civ. Proc., § 128, subd. (a)(3) [court has power to provide for orderly conduct of proceedings]; *Rayii v. Gatica* (2013) 218 Cal.App.4th 1402 (*Rayii*) [allowing defense witnesses to be called out of order was not abuse of discretion].) The trial court's exercise of such powers will not be disturbed on appeal absent a clear showing of abuse of discretion. (*Rayii, supra*, 218 Cal.App.4th at p. 1413.)

Appellants fail to acknowledge the trial judge's authority and fail to show abuse of that authority. Appellants assert the court "never did rule" on the objections "except impliedly" in the statement of decision where the court stated plaintiff had proved specified persons were Broderick Boys and therefore admitted their statements. So appellants admit the court did rule.

Appellants say they did a word search of the trial transcript and found 145 references to "defer[red] ruling" or "connect[ing] dots." They claim the court

erroneously admitted 43 incidents with no conceivable bearing on this case. They then simply tell us to "See, Crimes Addendum for list of 'continuing objections' based upon relevance and hearsay admissions." A list of their continuing objections does not meet their burden on appeal to demonstrate prejudice warranting reversal of the judgment.

Appellants argue the deferred rulings prejudiced them in four ways. First, they had to decide whether or not to cross-examine the witnesses on the incidents whose relevance and admissibility was undetermined, thereby potentially inviting damaging testimony. Second, appellants assert they did not know until the conclusion of trial whether it would be necessary to introduce rebuttal evidence on the admissibility of which the court deferred ruling. Third, appellants never knew on what evidence the court would base its decision. Fourth, appellants say they could not craft a final argument or briefing in support of a decision without knowing what evidence had been admitted during trial.

However, appellants (1) fail to show they were forced to elicit damaging testimony, (2) fail to show they were precluded from introducing any rebuttal evidence they wanted to adduce, (3) fail to show the trial court was required to give advance notice of what evidence it would find persuasive, and (4) fail to show that they were denied the opportunity to make whatever points they wanted to make.

We conclude appellants fail to show grounds for reversal based on the deferred rulings.

Moreover, we note appellants use the deferral to misrepresent matters on appeal. They argue they were prejudiced by evidence of nuisance activities committed by persons who ultimately were not included on the court's list of active gang members. However, the exclusion of those people from the list means the trial court found they were not active gang members and therefore disregarded that evidence.

C. *Hearsay Statements of All Alleged Gang Members*

Without addressing any specific evidence in the discussion portion of their opening brief (other than massive footnotes listing objections without context or analysis), appellants claim the trial court erred in allowing all hearsay statements of *all* alleged gang members.

On this point and others, appellants ignore basic rules of appeal: "[T]he trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. [Citations.] [¶] It is the appellant's responsibility to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf. [Citation.] [¶] . . . And the appellant must present each point separately in the opening brief under an appropriate heading, showing the nature of the question to be presented and the point to be made; otherwise, the point will be forfeited. [Citations.] This rule is 'designed to lighten the labors of the appellate tribunals by requiring the litigants to present their cause systematically and so arranged that those upon whom the duty devolves of ascertaining the rule of law to apply may be advised, as they read, of the exact question under consideration, instead of being compelled to extricate it from the mass.' [Citation.]" (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655-656 (*Keyes*).)

Despite the defects in appellate presentation, we attempt to discern whether appellants present any viable claim of reversible evidentiary error. There are two categories of gang-member hearsay declarants: (1) individuals named as defendants and found by the trial court to be Broderick Boys active members, and (2) individuals *not* named as defendants but who were found by the trial court to be active members of defendant Broderick Boys at the relevant times.

1. *Hearsay of Individuals Named as Defendants*

Evidence Code section 1220 provides, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

Appellants present no analysis showing error in the court allowing evidence of statements made by the people named as party defendants.

2. *Hearsay Statements of Gang Members Not Named as Individual Defendants*

The gang experts testified to various hearsay statements by alleged Broderick Boys members *not* named as defendants: (1) self-admissions of membership verbally to police and in written jail intake questionnaires, (2) perpetrators' pronouncements during commission of crimes (adduced through victim/witness testimony and/or police testimony relating victim/witness statements), and (3) declarants' conversations with police about gang culture.

As noted in the statement of decision, "[d]uring trial, the court allowed plaintiff to present certain out-of-court statements of alleged Broderick Boys members. The court permitted these statements on the condition that plaintiff prove by the close of its case that the declarants were members of the Broderick Boys and that the statements were, therefore, admissions by party-declarants under Evidence Code section 1220. For the limited purpose of admitting statements in this trial under Evidence Code section 1220, plaintiff has proved, by clear and convincing evidence, that the following [94] persons [including named defendants] were, at the relevant times, Broderick Boys."

The statement of decision does not reference Evidence Code section 1222 (admissibility of hearsay statements by authorized agents), but during trial the court said with respect to one nonparty, "he'd have to be established to be a member of the

Broderick Boys. It would have to be an admission of an agent for the Broderick Boys, the Broderick Boys being a named defendant."

The trial court also ruled the nonparties' hearsay statements were separately admissible to the extent the experts relied on them in forming expert opinions -- a ruling now called into question by *Sanchez, supra*, 63 Cal.4th 665, as we discuss *post*.

Appellants argue the trial court erred in applying Evidence Code section 1220 to declarations of *non-party individuals*, because there was no proof that the gang is an "unincorporated association" or that any declarant was a member as defined by the Corporations Code, or that any declarant was authorized to speak as an agent of Broderick Boys under Evidence Code section 1222. Appellants fail to offer any legal authority conditioning admissibility on the Corporations Code.

Evidence Code section 1220 allows hearsay "when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." On its face, this provision requires that the declarant be a party. The statute thus appears inapplicable to the non-party gang members here, because they were not parties at all, and therefore were not parties in an individual or representative capacity. (But see, *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150 [in wrongful termination action against employer-corporation, hearsay statements of corporation's merchandising director expressing animus against plaintiff were admissible as statements of a party under section 1220].)

Assuming for the sake of argument that the hearsay statements should not have been admitted under Evidence Code section 1220, they may have been admissible under other statutes. We do not discuss plaintiff's suggestion that they were admissible under Evidence Code section 1230 as declarations against interest by persons unavailable as witnesses, because plaintiff does not show unavailability (other than Angel Sanchez). But Evidence Code section 1224 provides: "When the liability, obligation, or duty of a

party to a civil action [here, named-defendant Broderick Boys] is based in whole or in part upon the liability, obligation, or duty of the declarant, . . . evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty." Here, statements by nonparty Broderick Boys members would be admissible against them had they been named as defendants and thus were admissible because Broderick Boys' liability was based in part on liability of their active members. Evidence Code section 1223 makes hearsay admissible if the statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy.

The trial court impliedly referenced the latter statute by stating admission of the hearsay statements would be subject to plaintiff "connecting dots" to show the declarants were indeed Broderick Boys members, and "This is not unlike a case where parties attempt to prove a conspiracy, and we can't get all the facts in through one witness or one piece of evidence, and it's the totality of the evidence that will permit it."

Appellants argue that, according to rules of vicarious liability for conspiracy, a gang member's hearsay statement cannot be used to impose liability on *another* gang member for pursuit of a common purpose in the absence of independent evidence of concerted action. Although appellants present this as a claim of evidentiary error, it is really a claim of insufficiency of the evidence. Either way, it fails. Appellants quote from *Davis v. Superior Court of Marin County* (1959) 175 Cal.App.2d 8: "The fact of conspiracy cannot be proved by evidence of extra judicial declarations of an alleged conspirator. [Citation.] Only after and upon the proof of the conspiracy itself can such declarations be admitted . . . . The conspiracy cannot be built upon imposed vicarious responsibility for other persons' declarations to whom a defendant has not been related by some showing of *common action*." (*Id.* at pp. 24-26 [criminal case alleging attorney

conspired with incarcerated client to remove from prison and publish a manuscript written by client]; italics added.)

Appellants fail to show that any of them was found to be subject to the injunction based on hearsay *of another gang member*. Appellants claim they "demonstrate in the analysis of the hearsay admitted and its impact on their defenses, the use of statements by *other* named defendants, as well as non-parties against them, in the absence of common action, was highly prejudicial, since it tended to show that there was complicity between identified gang members in creating or contributing to a public nuisance." (Orig. italics.) We see no such analysis of hearsay or impact on defenses in appellants' 114-page opening brief, or in their addenda for that matter. For example, their Crimes Addendum Objections Index asserts, "[appellant] Billy Wolfington's home searched [in March 2008], pills found. Admitted over Defendants' continuing objection that the incident was **irrelevant** [citation to record] and **hearsay not qualifying as a party admission.**" (Orig. emphasis.) This assertion on its face involves no hearsay by Billy Wolfington. Moreover, the only citation to the record involves police officer testimony about a different person at a different time.

In any event, there was ample evidence of common action, and the record shows, as to each appellant, evidence other than hearsay *of another gang member*. For example: (1) Timothy Acuna admitted to police his membership in Broderick Boys, pleaded no contest to vehicle theft with intent to assist the criminal street gang, and has a BRK tattoo; (2) Alex Estrada had multiple guns and ammunition in his home in January 2007, was in a stolen car with Timothy Acuna in February 2007, and in 2007 "self-admitted" at jail that he is a "Northerner" (aka Norteno); (3) Jesse Garcia wrote "Broderick Boys" on a jail intake form that asked him about his gang membership; (4) Robert Montoya has Broderick Boys tattoos and told his parole agent as recently as five months before trial that he is a Broderick Boys leader; (5) Michael Morales in jail intake forms admitted being a Broderick Boys member; (6) Guillermo Rosales was apprehended by police in

possession of a firearm in a car with three other Broderick Boys, and he admitted being a Northerner in jail questionnaires; (7) Felipe Valadez, Jr., pleaded no contest to criminal street gang activity in March 2007; and (8) Billy Wolfington admitted gang membership to police, was arrested with drugs in the company of gang member Raymond Corona, has a 2002 criminal conviction for drugs with a gang enhancement, and has Broderick Boys tattoos.

While appellants want us to disregard this evidence and credit their evidence that they recanted or explained away their admissions (e.g., that jail intake forms do not prove membership), that violates the standard of review on appeal. (*Gallo v. Acuna, supra*, 14 Cal.4th at pp. 1109-1110; *Acuna I, supra*, 182 Cal.App.4th at pp. 878-879.)

Assuming evidentiary error, appellants fail to show grounds for reversal because they fail to show prejudice. Appellants acknowledge there is no prejudice under state law unless it appears reasonably probable they would have obtained a more favorable result absent the errors. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 354; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.)

Appellants' prejudice argument blends different issues. They assert under a separate heading labeled "prejudice" that "There can be little question that the hearsay statements of the identified non-party Broderick Boy/Norteno gang members, gang members identified as Defendants, and the spontaneous statements of crime victims were crucial to the People's case, and prejudicial to the Defense." Appellants drop a footnote exhorting us to "See, Crimes Addendum Objections Index and Gang Members Addendum Objections Index for identification of most of the hearsay statements." Appellants then argue the experts' use of "self-admission" of gang membership to infer existence of a gang entity to which such persons belonged and were complicit in each others' activities, used "entirely circular" inferences -- gang membership was used to prove the existence of a gang entity, which led to the further inference that individuals knew of its existence and were therefore members. Appellants argue that, without self-

admissions, plaintiff's case would have been "considerably weakened, even though there was other evidence, such as tattoos or association, which were used to link individuals to the supposed gang." Moreover, say appellants, the hearsay statements were important in showing the various crimes committed by such "self-admitted" members were relevant to the "pattern of conduct" which was found to constitute the nuisance attributed to the gang and its members, whether or not they were gang related. Appellants again invite us to "See" their addenda.

Appellants' prejudice argument is abysmally deficient. They fail to show that any nonparty's self-admission was the sole evidence of membership. For example, the Objections Index says with regard to Christopher Castillo: "Admitted he is a member of the Broderick Boys and his moniker is 'Cricket;' in 2009, a police report alleges that he assaulted a victim and stated 'Hey, are you scraps? And you fuckers think you're hard. Broderick bitch.' [Citation to record.] Admitted over Defendants' objection that the statements were hearsay not qualifying as party admissions. [Citation to record.]" (Emphasis omitted.) However, appellants' prejudice argument ignores other evidence involving Castillo, such as his criminal conviction of a March 2009 gang activity offense (case No. 09-1349) and victim testimony about being assaulted by Castillo in the March 2010 fight at Memorial Park. Appellants cite no authority that Memorial Park's location outside the safety zone precludes consideration of this crime in determining whether Castillo is a Broderick Boys gang member engaging in public nuisance activities.

Appellants cite no instance where membership was based solely on self-admission. In each instance of an admission of gang membership by a person not named as defendant, there was also other evidence, such as criminal convictions or gang tattoos. Appellants acknowledge tattoos but sweep under the rug the compelling, unchallenged, multiple final criminal convictions -- including for gang activity and gang enhancements. Appellants fail to support their claim that, without self-admissions, the convictions lose relevance. Even convictions for crimes without gang-related offenses or enhancements

are relevant. As we have stated, "conduct not amounting to a *gang* crime under Penal Code section 186.22 may be the subject of an action to abate a nuisance. [Citation.]" (*Acuna I, supra,* 182 Cal.App.4th at pp. 879-880; italics added.) Additionally, absence of prejudice is apparent in that the trial court did not accept plaintiff's evidence wholesale but made individual determinations that some individuals were *not* Broderick Boys members despite plaintiff's allegations that they were.

Appellants fail to demonstrate that any evidence was used in an improper way that prejudiced appellants. They direct us to their "Objections Index," which is exceedingly unhelpful. For example, one entry states: "William Ybarra, Tyson Ybarra, and Gregory Osio[] contacted standing near a shotgun. Admitted over Defendants' continuing objection that the incident was irrelevant [citation to record] and hearsay not qualifying as a party admission [citation to record.]" (Emphasis omitted.) On its face, this entry contains no hearsay. If we follow the trail to the reporter's transcript, we find police officer testimony that William Ybarra (whom the court noted was no longer a defendant, having being dismissed) admitted he possessed the gun. However, the officer also testified he saw William Ybarra drop the gun. So any error regarding Ybarra's admission was clearly harmless.

As another example, the Objections Index states: "Benny Macias and William McFadden present at a stabbing, search of home and persons located red clothing and marijuana. Admitted over Defendants' continuing objection that the incident was irrelevant and hearsay not qualifying as a party admission." (Emphasis omitted.) Again, the entry on its face contains no hearsay. The entry fails to cite to the reporter's transcript.

Additionally, appellants' Objections Index includes items related to individuals who do not appear on the court's list of gang members, which means the trial court disregarded that evidence due to plaintiff's failure to "connect the dots." Yet appellants include those items in the Objections Index prepared for this appeal, as if they could

constitute grounds for reversal. Also, some of the items in the Objections Index contain no citation to the reporter's transcript.

Appellants fail to show reversible error.

Appellants claim erroneous admission of the evidence of gang members not named as defendants violated federal constitutional due process rights and rendered the trial fundamentally unfair (*Albarran, supra*, 149 Cal.App.4th at pp. 229-230), but appellants fail to show a due process violation or fundamental unfairness. They "must satisfy a high constitutional standard to show that the erroneous admission of evidence resulted in an unfair trial. 'Only if there are no permissible inferences the [trier of fact] may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citations.] Only under such circumstances can it be inferred that the [trier of fact] must have used the evidence for an improper purpose.' [Citation.]" (*Albarran, supra*, 149 Cal.App.4th at p. 229.)

Appellants make catch-all arguments that the trial court erroneously allowed "virtually all evidence" regardless of its irrelevance, inflammatory nature, and prejudicial effect. Appellants offer no specifics of prejudice. They cite *Albarran, supra*, 149 Cal.App.4th 214, as having reversed a conviction, but they fail to acknowledge distinguishing features. *Albarran* reversed a conviction for attempted murder, shooting at a dwelling, and attempted kidnapping for carjacking, with gang enhancements, where the trial court improperly allowed certain gang evidence (about Mexican Mafia, threats to police, and unrelated crimes by other gang members). (*Id.* at p. 217.) The trial court believed the evidence was relevant to motive or intent for the charged offenses, even though it was insufficient to prove the gang allegations. (*Ibid.*) The appellate court held that the specific evidence had "no legitimate purpose" in the trial, and "there was a real danger that the jury would improperly infer that whether or not Albarran was involved in these shootings, he had committed other crimes, would commit crimes in the future, and

posed a danger to the police and society in general and thus he should be punished." (*Id.* at p. 230.)

No such danger appears in this case, and the evidence did have a legitimate purpose in this public nuisance trial.

We see no basis for reversal for evidentiary error regarding statements by Broderick Boys members.

D. *Hearsay Statements of Victims/Witnesses*

Appellants acknowledge Evidence Code section 1240 authorizes admissibility of a hearsay statement if it "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and **[¶]** (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." They acknowledge case law (e.g., *People v. Pirwani* (2004) 119 Cal.App.4th 770, 789) that such statements are admissible because they are presumptively reliable due to lack of opportunity for reflection, and the declarant's state of mind is crucial.

Appellants then argue: "While in many cases the People's police witnesses testified that the declarants [crime victims and witnesses] looked upset, all the hearsay statements were made in response to police questioning of victims/witnesses. [Italics omitted.] (See, Crimes Addendum, Objections Index.) **[¶]** Early in the trial, the Defense objected to the court's spontaneous statement rulings and provided formal briefing on the subject. (3AA 595-597) After consideration of the Defense briefing, the court denied the objections ([2]RT 369:4-374:25 [*sic* 376]) and continued to admit hearsay statements as spontaneous statements[,]" which "constitutes reversible error [citation] because it resulted in the improper admission of evidence that was prejudicial and unfair."

Appellants forfeit any challenge to hearsay statements of crime victims and witnesses by failing to present any factual or legal analysis. If appellants mean to suggest, without analysis, that statements in response to police questioning presents a

Confrontation Clause issue, the point fails because the Confrontation Clause applies only in criminal cases (*People v. Otto* (2001) 26 Cal.4th 200, 209, 214 (*Otto*)), and this is a civil case. Moreover, appellants' reference to their 16-page "Objections Index" is insufficient. It is not limited to victim/witness statements and merely says victims "alleged" things (e.g., that an appellant punched a victim and stole his bike) over defense objections that the hearsay statements did not qualify as spontaneous statements. This does not satisfy appellants' burden to demonstrate error, much less reversible error. The pages of the reporter's transcript referenced in appellants' brief reveal only one incident, in July 2006, where a victim told police -- about 10 minutes after it happened -- that defendants Rainey Martinez and Robert Sanchez assaulted the victim in his home, broke a stereo speaker, and stole some items. The trial court found it qualified as a spontaneous statement, reconsidered at defense request, and again found it qualified as a spontaneous statement. The appellate brief does not discuss these facts or present any analysis as to why the ruling was wrong. The reference to a trial brief in the clerk's transcript is improper appellate briefing (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334 (*Garrick*) [appellant cannot simply incorporate by reference arguments made in trial court]). Moreover, the document is merely a request for reconsideration arguing there was insufficient indicia of reliability of statements in response to police questioning after opportunity to reflect.

Appellants develop no legal analysis or authority regarding their point that victims and witnesses were responding to police questioning. Forty pages later in their opening brief, appellants assert in a subheading (under a heading about due process violations rendering trials "fundamentally unfair") that the hearsay statements from crime victims deprived defendants of the opportunity for cross-examination. The single paragraph under this subheading in their appellate brief contains no legal analysis or authority whatsoever. The matter is forfeited. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

As we admonished this same attorney in *Acuna I, supra*, 182 Cal.App.4th at p. 879: "It is not the function of this court to comb the record looking for the evidence or absence of evidence to support defendants' argument. [Citations.]" It is also not the function of this court to comb through hundreds of pages of scorched-earth briefing to try to make appellants' case for them. (*Lewis, supra*, 93 Cal.App.4th at p. 116.)

Since appellants fail to show any evidentiary error regarding victim statements, i.e., that the statements were inadmissible hearsay, any reliance by the gang experts on such statements would not be problematic under *Sanchez*, because *Sanchez* restricts only reliance on inadmissible hearsay.

E. *Hearsay as Basis for Expert Opinion (Sanchez)*

The trial court allowed hearsay of nonparties alleged to be Broderick Boys members as a basis for expert opinions that the declarants were Broderick Boys members and engaged in nuisance activities and that Broderick Boys had organization and structure.

The trial court overruled defense objections pursuant to the rule that experts may rely on hearsay in forming their opinions. (Evid. Code, §§ 801-802; *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619 (*Gardeley*) [hearsay statements used as a basis for expert opinion are not offered for their truth but instead are offered merely to evaluate the expert's opinion].)

While this appeal was pending, the California Supreme Court disapproved *Gardeley* "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez, supra*, 63 Cal.4th at p. 686, fn. 13.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) An expert may be asked to assume hypothetically a set of case-specific facts for which there is independent competent evidence, and then be asked what conclusions the

expert would draw from those assumed facts. But if no competent evidence of a case-specific fact has been, or will be, adduced, the expert cannot be asked to assume it. (*Id.* at pp. 676-677.) *Sanchez* restored the common law rule the expert is not permitted to supply case-specific facts. (*Ibid.*) This aspect of *Sanchez* concerning state evidentiary rules for expert testimony applies in civil cases such as this nuisance lawsuit.

Sanchez also held that *in criminal cases*, the Sixth Amendment right to confront and cross-examine witnesses (*Crawford v. Washington* (2004) 541 U.S. 36) limits an expert witness from relating case-specific hearsay content in explaining the basis for his or her opinion. (*Sanchez, supra*, 63 Cal.4th at pp. 679-686.) However, *Sanchez* expressly stated its constitutional rule does not extend to civil cases. "Because *Crawford* is based on the Sixth Amendment right to confrontation, its rule has not been extended to civil proceedings . . . ." (*Sanchez,* at p. 680, fn. 6.)

Sanchez reversed the street gang enhancements because of the Confrontation Clause violation, not because of the state Evidence Code. (*Id.* 63 Cal.4th at p. 699.)

We allowed supplemental briefing on what effect, if any, *Sanchez* has on this case. Our order calling for supplemental briefs alerted the parties, by citation to *Otto*, *supra*, 26 Cal.4th at pp. 209, 214 (involuntary commitment of sexually violent predator), that the Confrontation Clause does not apply to civil cases, though there may be a confrontation component to due process principles applicable in civil litigation. Appellants' supplemental brief did not develop a due process argument.

Appellants' supplemental brief mentions multiple hearsay about a crime, to which Officer Labin Wilson testified as a gang expert in plaintiff's rebuttal case, to support his opinion that nonparty Chris McDaniel was an active Broderick Boys member. The crime was an assault that occurred in the safety zone on November 6, 2010 (during trial) that later caused the death of the victim. Wilson reviewed police reports and participated in the investigation. In the early morning on November 6, 2010 (about five weeks before completion of this trial), police found a bloody, unconscious male in a parked vehicle on

Fremont Street. He later died. Police learned the victim had been at a party at the Fremont Street home of validated Broderick Boys member Juan Zinzun.

Over defense objection, the trial court allowed Officer Wilson to testify to case-specific facts that included hearsay. Witnesses at the party told police that (Rumaldo) Samuel Rios punched the victim in the face at the party, after being given the "green light" to "take out" the victim by Chris McDaniel, who said the victim had been talking about "snitching" on McDaniel at the market where they both worked. Gang-related graffiti threats ("BRK" and "You're next D") were found written at the market. Rios was on a *Yuba City* Police Department's list of validated Norteno gang members. A witness told police that Rios said, "it was either Chris or I had to do it."

Officer Wilson opined McDaniel is a Broderick Boys gang member based on the following facts. When Wilson and other officers arrested McDaniel, McDaniel was wearing red clothing and a hat with a red "B"; he had a "B" tattooed on his neck, four dots on his arm, "S" and "K" on his calves (which the expert opined stood for "scrap killer" despite the demur of some that it stands for Sacramento Kings). McDaniel told jail staff he was an active Norteno gang member and a validated Broderick Boy (though he was not at that time on WSPD's list). Wilson testified: "And then just the circumstance. That's all supporting indicators that he's a Broderick Boys gang member. [¶] But again, going to the facts of this case, when the subject is at a Broderick Boy[s]-sponsored party, being at Juan Zinzun's house, who is a validated Broderick Boys gang member, and it was for his birthday party, and you have somebody that you've deemed by the gang as a snitch, and then you have an individual who tells somebody else to -- or gives somebody a green light to take that, quote/unquote, snitch out, well, if you have the status within the gang to give an order like that and have it be carried out at this party where other gang members are present, you are displaying a level of status in that gang. I mean, he is giving out orders to somebody to put in work for the gang. [¶] So all that

goes together, in my opinion, he [McDaniel] is an active Broderick Boy[s] gang member."

Plaintiff's counsel asked the expert for his opinion as to what a Norteno gang member would have to do if he wanted to transfer from one region to another. The expert said, "It's not defined. You know, he could know people from that region, but basically you have to -- to be accepted by that new set, they would have to believe that you were loyal and committed to the gang and somebody they could trust. [¶] So whether your reputation preceded you or you had to do something to prove your loyalty and your trustworthiness, you know, it would depend case by case." The common term for proving trustworthiness is "putting in work" for the gang. "[S]omebody who is trying to put in work to prove themselves to the gang, if the gang members told you to take somebody out and you didn't, well, one, that would definitely discredit you as being a member of that gang and, in my opinion, you wouldn't be accepted by the gang. However, conversely, if you did follow through with that work and took that person out, you would prove yourself in a gang -- status within the gang. [¶] So I believe that's the circumstances that took place. There was a group of Norteno gang members having a party. An assignment was given to this guy [Rios] from Yuba City who is already a Norteno gang member, but to put in work for the local set of Broderick Boys, they told him -- they assigned him to take out this person they were looking at as a snitch, and he did it."

The trial court in this nuisance case took judicial notice that criminal charges had been filed for the November 6, 2010, matter -- case No. CRF-10-5649, charging Rios with involuntary manslaughter, aggravated battery, plus gang enhancements, and charging McDaniel with a substantive gang offense as well as the battery and gang enhancement. Though not determinative of this appeal, we note McDaniel filed an appeal from his December 2012 conviction in case No. CRF-10-5649 but abandoned the appeal after we received the trial court record. (C072865) The jury found McDaniel

guilty of battery with bodily injury but was unable to reach a verdict on the gang offense or enhancement. The trial court sentenced McDaniel to four years in prison and granted the prosecution's motion to dismiss the gang charge and allegation without prejudice. Rios did not file an appeal, but the clerk's transcript in McDaniel's appeal indicates the jury found Rios guilty of battery with serious bodily injury and assault.

In light of *Sanchez*, much of Officer Wilson's testimony appears problematic, because he assumed the truth of and relied on case-specific facts for which no competent evidence was adduced, i.e., that McDaniel gave a "green light" to Rios to assault the victim for snitching, which meant McDaniel had high status in the gang, and Rios did as directed in order to "put in work" so he could transfer to the Broderick Boys subset.

Nevertheless, assuming the trial court erred in allowing this evidence, we see no prejudice warranting reversal of the judgment. The standard for prejudice applicable to state law error in admitting hearsay evidence is whether it is reasonably probable the appellant would have obtained a more favorable result absent the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 354; *Winfred D., supra*, 165 Cal.App.4th at p. 1038; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 866-867 [erroneous introduction of hearsay through expert's testimony was harmless where non-hearsay supported expert's conclusions], disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.)

Due to the abundance of other evidence that Broderick Boys was a criminal street gang engaged in nuisance activities, Officer Wilson's testimony in plaintiffs' rebuttal case was unnecessary. Its main value was to show that nuisance activity was still ongoing at the time of trial. However, even disregarding Wilson's testimony, other evidence demonstrated that nuisance activity continued despite the preliminary injunction -- particularly the Memorial Park incident which occurred only a few months before trial began.

Appellants argue we cannot know how the trial court would have ruled had it excluded the testimony about the November 2010 killing. They quote case law: "If improper evidence under objection has been admitted, it is impossible for this [appellate] court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows it may have been that particular evidence which turned the scale and lost the case to the appellants. This must of necessity be the rule wherever improper evidence has been admitted *which upon its face tends in any degree to affect the final conclusion of the court.* [Italics added.]" (*Estate of James* (1899) 124 Cal. 653, 655; accord, *Wilson v. Manduca* (1965) 233 Cal.App.2d 184, 189-190.)

However, the quotation specifies it is referring to evidence which *on its face* tends to affect the trial court's decision. Appellants fail to argue or demonstrate that the hearsay about the November 2010 incident, or any other evidence, would on its face affect the trial court's decision, particularly in light of the wealth of other evidence.

Appellants' supplemental brief lists expert opinions to which appellants objected, but they list opinions about general gang culture, not case-specific facts. Appellants' supplemental brief complains the trial court allowed a summary of 108 crimes, which included hearsay, as a basis for expert opinion about the existence of a public nuisance, not being admitted for the truth of the matter. However, evidence of the crimes also included admissible evidence such as criminal court records and victim testimony.

Appellants complain the trial court allowed the expert to opine whether individuals were Broderick Boys members and contributed to a nuisance based on a "power point" collection of information about 52 alleged gang members, including some appellants, culled from various resources, police reports, field interview cards, contacts, photographs, and investigations in which the expert was involved. Appellants fail to show that the judgment results from inadmissible hearsay.

F. *Other Claims of "Fundamentally Unfair" Evidentiary Rulings*

1. Appellants claim the trial court demonstrated bias -- assisting plaintiff and obstructing defendants -- by allowing evidence of events that occurred outside the safety zone, i.e. Memorial Park and "maybe" the Amtrak train. Appellants offer no legal analysis or authority on this point. Evidence of these recent events was clearly relevant and probative to refute the defense claim that gang activity had stopped, rendering a permanent injunction unnecessary. That one or both events happened outside the safety zone was relevant and probative of plaintiff's point that the relative lull in activity within the safety zone covered by the injunction was attributable to the deterrent effect of the preliminary injunction rather than a voluntary, good-faith termination of misconduct.

2. Appellants complain the trial court in this 2010 trial denied their motion to exclude events remote in time (before January 2008) and allowed evidence of events dating back to Acuna's car theft in 1997. However, appellants fail to mention the trial court allowed older incidents to prove a history of gang activity in order to rebut defense claims of the nonexistence of a gang. Moreover, remote activities are relevant to the issue whether the persistent and prolonged nature of defendants' activities before issuance of the preliminary injunction support a conclusion that misconduct is likely to recur unless permanently enjoined. (*Feminist, supra*, 32 Cal.App.4th at p. 1659.) The court acknowledged remoteness would go to the weight of the evidence. To the extent appellants believe that exclusion of remote incidents would strip the case of substantial evidence of "active" membership as to any particular appellant, they fail to demonstrate it, as we discuss, *post*.

3. Appellants complain the trial court included in the judgment the individual defendants' "alleged" nick-names or "gang names" (Cartoon, Little Vic, Otter, Kiko, Smokey, Snoopy, Billy, Little Rob, Duke, Rabbit, Savage, Gangster, Shug, and Bouncer),

putting them in a bad light without substantiating evidence. However, there was evidence about the monikers, and they were relatively innocuous.

4. Appellants complain the trial court refused to order plaintiff to produce a list of "validated" Broderick Boys members and associates, which gang expert Winger maintains and revises weekly. We agree with plaintiff that appellants forfeit this point by failing to present any legal authority. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.) Moreover, we see no merit on the facts. Appellants claim the document should have been disclosed in response to their discovery request, and they did not learn of its existence until trial. The trial court ruled: "From what I hear this witness saying is that list is a tickler list. It is not the source material on which he's rendered his opinion. It is not the material on which he's based his opinion, and at best would be cumulative. Overruled. Request denied." Appellants argue the ruling denied them the opportunity to cross-examine the experts effectively, to discover and present rebuttal witnesses, and denied them "impeaching material." Appellants fail to explain these supposed deprivations. Appellants speculate the document may have described an individual as only an "associate" of the gang, which would have undercut plaintiff's proof that the person was an active gang member. Speculation does not demonstrate error.

We conclude appellants fail to show reversible evidentiary error.

III

Broderick Boys is a Criminal Street Gang

A. *"Jural Entity" Subject to Being Sued*

Appellants contend plaintiff failed to introduce substantial evidence that membership in the Broderick Boys gang was by "mutual consent" between the gang and the members which -- according to appellants -- is a prerequisite for Broderick Boys being a "jural entity" capable of being sued and thus capable of being the subject of an injunction. (Code Civ. Proc., § 369.5 [partnership or other unincorporated association

may sue and be sued and members may be joined as a parties]; Corp. Code, § 18035 [unincorporated association means a "group of two or more persons joined by mutual consent for a common lawful purpose"].)

However, defendant Broderick Boys defaulted and is not an appellant. Appellants are individuals. The individuals' susceptibility to a civil injunction enjoining a gang's public nuisance activities is not dependent on the gang being a party. Thus, *Gallo v. Acuna, supra*, 14 Cal.4th 1090, upheld a civil injunction where the complaint named only gang members, not the gang. The Supreme Court said the City's evidence demonstrated it was the gang itself, acting through its membership, that was responsible for the public nuisance, and "[b]ecause the City *could* have named the gangs themselves as defendants and proceeded against them, its decision to name individual gang members instead does not take the case out of the familiar rule that both the organization and the members through which it acts are subject to injunctive relief." (*Id.* at p. 1125.) *Gallo v. Acuna* thus indicated in dictum that injunctive relief may be granted against a criminal street gang.

We applied the Corporations Code to Broderick Boys in a different and limited context in *Broderick Boys, supra*, 149 Cal.App.4th 1506, where we held Broderick Boys street gang was not an "unincorporated association" *for purposes of service of process* (Code Civ. Proc., § 416.40, subd. (b); Corp. Code, § 18220) because the gang had no "lawful purpose" under Corporations Code section 18035. We noted case law has treated gangs as unincorporated associations but also noted those cases did not address "lawful purpose." (*Id.* at p. 1522.) An entity could have both lawful and unlawful purposes, but the People submitted a gang expert's declaration that the gang had no social benefits. (*Id.* at pp. 1512, 1521.)

The Second Appellate District, Division Six, later disagreed with our reasoning in *Totten v. Colonia Chiques, supra*, 156 Cal.App.4th at p. 39, fn. 6. There, the gang was the only defendant. Two individuals who had been served with the injunction intervened,

arguing the gang was not a jural entity capable of being sued, and the judgment could not operate against nonparties. (*Id.* at p. 35.) The appellate court disagreed. It considered persuasive the dictum in *Gallo v. Acuna*, and held that even if a gang had not been formed for a lawful purpose, it still would be capable of being sued as an unincorporated association under Code of Civil Procedure section 369.5. (*Id.* at p. 39.) The Corporations Code definition does not necessarily apply, because Corporations Code section 18000 states definitions in that chapter govern the construction of that title of the Corporations Code. (*Id.* at pp. 39-41.) *Totten v. Colonia Chiques* considered it "highly unlikely" that the Legislature intended criminal street gangs to use Corporations Code section 18035 as a shield against a gang injunction. (*Id.* at p. 40.) The Legislature made criminal street gangs subject to gang injunctions under Penal Code section 186.22a and even authorizes the court to award money damages to be paid from assets of the gang or its members when the court issues an injunction under the general nuisance statute of Civil Code section 3479. (Pen. Code, § 186.22a, subd. (c).) *Totten v. Colonia Chiques* said the criteria applied to determine whether an entity is capable of being sued as an unincorporated association " 'are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity.' " (*Id.* at pp. 38-39.)

Without any supporting legal authority or analysis (and without acknowledging *Totten v. Colonia Chiques* on this point), appellants assume in their opening brief that Corporations Code section 18035 applies in this context. Even assuming for the sake of argument that it does, plaintiff alleged and the trial court found "mutual consent," and appellants fail to offer any authority or legal analysis on interpretation of the Corporations Code provision that would render the evidence of mutual consent insufficient. They argue that "while individuals indicated their allegiance to the Broderick Boys/Nortenos gang by distinctive regalia and tattoos, as well as, at times,

association, admissions and criminal actions, there was no evidence of *mutuality* - no evidence that anyone had been (or had to be) *accepted* into the gang; that the identified gang members shared property or profits with other identified members; that any individual crime was adopted or ratified by those who were not immediate participants; or that supposed members met any requirements or had any obligations whatsoever - other than the 'generational thing' of having family members with similar allegiance or identity. Membership was casual, spontaneous, and self-elective." (Orig. italics.)

However, appellants cite no authority requiring formal acceptance into the gang or that members must share property or affirmatively ratify crimes, or imposing any specific requirements as the *sine qua non* of an unincorporated association. They cite *DeMott v. Board of Police Commissioners* (1981) 122 Cal.App.3d 296, 305-306, which held a purported "film club" was not an unincorporated association so as to escape an ordinance regulating picture arcades open to the public. Anyone could join without restriction by paying one dollar. *DeMott*, which did not even discuss mutual consent, is inapposite.

Appellants note *DeMott* cited a Massachusetts case that a purported residential swim club did not qualify as an unincorporated association, because there were no criteria or restrictive requirements for membership and no mutual relationship of contemplated permanence. (*Ibid.*) Again, however, the court found the purported club was an artifice to avoid regulation as a commercial amusement place, and the case has no bearing here. (*Ibid.*)

Appellants cite another inapposite case, *Motta v. Samuel Weiser, Inc.* (D. Me. 1984) 598 F.Supp. 941, which said in a copyright case that a purported organization did not qualify as a jural entity capable of owning copyrights, where it had no definite membership but was just an amorphous set of ideas and rituals which could be appropriated by anyone so inclined. (*Id.* at pp. 950-951.)

Here, the evidence amply shows "mutual consent" under a common sense understanding of that term. The members share a common purpose and function under a

common name under circumstances where fairness requires the group be recognized as a legal entity. (*Totten v. Colonia Chiques, supra*, 156 Cal.App.4th at pp. 38-39.)

Appellants' reply brief cites *White v. Cox* (1971) 17 Cal.App.3d 824, 826-828, for the proposition that the unincorporated association must be distinct from its membership. However, that case held a condominium homeowners' association was a separate entity from the homeowners such that a homeowner who tripped over a sprinkler in the common area could pursue a tort action against the association. Appellants fail to show how that case helps them in this appeal.

B. *Substantial Evidence of Criminal Street Gang*

Sanchez does not bar a gang expert from relying on hearsay for general background information. (*Sanchez, supra*, 63 Cal.4th at pp. 676-677.) Substantial evidence about gang culture might consist of expert opinion testimony "based . . . on conversations [the gang expert] had with . . . gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324, citing *Gardeley, supra*, 14 Cal.4th at pp. 617-618.) Additionally, the expert's relevant personal observations are admissible. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1034.)

Appellants argue the evidence was insufficient to support expert opinions regarding the gang's alleged organization and collective activity, because the opinions lacked a factual basis. (*In re Alexander* (2007) 149 Cal.App.4th 605, 612-613 [expert testimony without an adequate foundation does not constitute substantial evidence].) But appellants fail to show absence of a factual basis. They split their argument into separate issues of (1) organization, subdivided as (a) history/structure and (b) membership (tattoos/regalia, jumping in, and putting in work); and (2) concerted or collective activity (intimidation, rivalry, and defense of turf). But the issues overlap.

Appellants note Villanueva's testimony about Broderick Boys being a sort of "franchise" of the Nortenos street gang, which developed from the Nuestra Familia prison gang and has policies of hierarchy and collective activity. Appellants posit that, after all these years and countless searches of homes, computers, and cell phones, WSPD has no "evidence of internal organization." But appellants cite no authority requiring documentary proof. Appellants' statement of facts asserts there was little evidence connecting Broderick Boys to the Nuestra Familia prison gang but acknowledges there was evidence connecting Broderick Boys to the Nortenos street gang.

We invited supplemental briefing on the effect, if any, of recent criminal case law regarding gang subsets. (*People v. Prunty* (2015) 62 Cal.4th 59 [prosecution must show connection between gang and subsets where it relies on crimes committed by members of subsets for predicate offenses to prove gang enhancement in criminal case].) Appellants' position is that *Prunty* is inapplicable because that was a criminal case and this is a civil case. We therefore need not consider *Prunty*.

In a two-page footnote, appellants give "examples" of purported lack of factual basis. They claim that no evidence supports Villanueva's testimony that McFadden, as a non-Hispanic, had to do a little bit more to gain membership. Appellants offer no possible way this testimony could have prejudiced them.

Appellants' footnote next complains about evidence of the November 2010 assault where McDaniel gave Yuba City transplant Sam Rios the "green light" to "take out" the victim. As indicated, we do not rely on this evidence to affirm the judgment.

Appellants' footnote goes on to claim expert Villanueva engaged in speculation by opining that Alex Estrada maintained a "weapons cache" for the gang, based on his misdemeanor conviction for possession of ammunition. However, appellants misstate the record. Villanueva based his opinion on the multiple firearms found in Estrada's residence, not on the ultimate conviction. Nuisance activities need not result in criminal

convictions in order to constitute evidence warranting a gang injunction. (*Acuna I, supra*, 182 Cal.App.4th at pp. 879-880.)

Plaintiff's experts testified -- based on contacts with Broderick Boys members (which appellants fail to show was improperly allowed into evidence) -- that individuals join Broderick Boys in a variety of ways, e.g., by legacy of having family members in the group, by "jumping in" (allowing themselves to be beaten), and females could join by having sex with members. New members move up within the gang by "putting in work" for the gang, e.g., by selling drugs or committing acts of violence to foster fear of Broderick Boys and avenge disrespect by rivals. Gang expert Winger said Broderick Boys does not have a *formal* organizational structure but has an informal structure in that members who have put in years of work or committed significant crimes on behalf of the gang have more influence and higher standing in the gang, enabling them to give orders to commit crimes. A significant or violent crime requires the approval of a more senior member. Winger opined Broderick Boys has an informal code of conduct, and senior members determine the course of the informal policy. The expert opinions were supported by other evidence, e.g., Angel Sanchez testified in his criminal trial that he put in work for the gang by fighting members of other gangs.

Appellants argue there was no evidence that anyone knew that anyone else was "putting in work." Appellants argue that, while being "jumped in" was a familiar concept "to at least one identified gang member" (Angel Sanchez), only one person "claimed" that she was "jumped in" when she was 11 years old. Appellants argue the "insubstantiality of this childhood incident, based entirely on hearsay by someone who apparently had no history of active gang involvement, hardly needs elaboration. [Citation to addendum.]"

Again, appellants have failed to show prejudicial evidentiary error, and they ignore the multiple final criminal convictions involving joint activities. The evidence supports an inference that members understood Broderick Boys' informal structure and

acted upon it. Indeed, there was direct evidence from a member -- the transcript of Angel Sanchez's testimony from his criminal case -- in which he admitted being a Broderick Boy and said he had gang tattoos on his face, arms, and hands, and one way to join was to be "jumped in" to the gang, though he himself was not jumped in but joined because he had family members involved in the gang. Angel Sanchez testified he "put in work" for the gang by fighting members of other gangs.

Appellants fail to show grounds for reversal concerning Broderick Boys as a criminal street gang subject to suit.

IV

Broderick Boys Engages in Public Nuisance Activities

Appellants contend the "pattern of conduct" (Pen. Code, § 186.22(f)) found by the trial court to constitute a public nuisance warranting a gang injunction was not attributable to "DEFENDANTS/APPELLANTS" because they did not "act in concert" with the gang to create the pattern. Appellants claim the result is a due process violation imputing guilt by association.

Appellants raise a variety of contentions conflating two separate but overlapping issues: (1) whether the gang, through its members, commits public nuisance activities, and (2) whether these eight appellants are active gang members who participate in or act in concert with the gang so as to make them subject to the injunction. (*Acuna I, supra*, 182 Cal.App.4th at p. 880; *Englebrecht, supra*, 88 Cal.App.4th at pp. 1260-1261.) We address the latter point, *post*. For the first point: "It is the collective action of the gang, not that of any individual member, that determines whether a public nuisance exists." (*Acuna I, supra*, at p. 880.)

As to some of appellants' arguments, we already addressed them in *Acuna I, supra*, 182 Cal.App.4th 866 -- a controlling opinion virtually ignored in appellants' opening brief in this appeal. The "law of the case" doctrine dictates that an appellate

court's holding, on a rule of law necessary to an opinion, must be adhered to throughout the case's subsequent progress in the trial court and on subsequent appeal, as to questions of law (though not as to questions of fact). (*Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213.) We need not address appellants' arguments about *Acuna I* raised for the first time in the reply brief. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10.)

A. *Relative Lull in Activity*

Appellants argue that prior nuisance activities are remote, and there was insufficient evidence of current *ongoing* nuisance activities at the time of trial in 2010 to justify injunctive relief. Appellants argue plaintiff thus failed to show the presence of conditions warranting equitable relief. We disagree.

In *Acuna I, supra*, 182 Cal.App.4th at page 879, the defendants argued that most of the crimes were committed years ago. We said: "As to the relative dearth of recent criminal offenses presented in support of the [preliminary] injunction, it must not be overlooked that during all of 2006 and much of 2007 [the default] injunction was in place restricting the activities of the Broderick Boys in the Safety Zone. Also, [gang expert] Investigator Villanueva indicated the crimes he mentioned in his declaration were only 'a sampling of some of the crimes committed by the Broderick Boys in the Safety Zone' that he personally investigated. The trial court was presented with the criminal records of the 23 named defendants, but not other gang members. Furthermore, the other intimidating conduct of the Broderick Boys tends to paralyze the community, which diminishes their need to actually commit further assaults to maintain control." (*Id.* at p. 881.)

The same lulling effect applies in this appeal, where the preliminary injunction has been in place from April 2007 to the present.

Moreover, a permanent injunction is appropriate if the misconduct is ongoing or likely to recur and, while a permanent injunction may be inappropriate where the defendant *voluntarily and in good faith* discontinues the wrongful conduct, compliance with a court order (here, the preliminary injunction) does *not* constitute voluntary discontinuation. (*Feminist, supra*, 32 Cal.App.4th at pp. 1658-1659.) Additionally, remote activities are relevant to the issue whether the persistent and prolonged nature of defendants' activities before issuance of the preliminary injunction support a conclusion that misconduct is likely to recur unless permanently enjoined. (*Id.* at p. 1659.)

In *Feminist*, we upheld issuance of a permanent injunction imposing time, place, and manner restrictions on antiabortion demonstrations at a medical clinic. The demonstrators -- pointing to lack of evidence of the prohibited conduct for more than a year before trial -- argued no evidence suggested the conduct supporting the preliminary injunction would be resumed unless permanently enjoined. (*Id.* 32 Cal.App.4th at p. 1658.) They argued the testimony of one demonstrator that he "would like to resume" did not establish he *would* resume. (*Id.* at pp. 1658-1659.) We rejected the argument. "Because injunction is an extraordinary remedy, the remedy should not be exercised unless it is reasonably probable the acts complained of will recur. 'Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur. . . . A court of equity will not afford an injunction to prevent in the future that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future.' [Citation.]" (*Id.* at p. 1658.) We concluded "it was reasonable for the trial court to conclude that the prohibited conduct would resume unless permanently enjoined. . . . The nature of the issue involved, plus the persistent and prolonged nature of defendants' activities at the clinic before issuance of the temporary restraining order and preliminary injunction, indicate such conduct was discontinued at least in part because of the legal prohibition. Compliance with a court order is not voluntary discontinuance of prohibited conduct. [Citation.]" (*Ibid.*)

Here, the record supports a conclusion that the relative lull in nuisance activity in recent years is attributable to the existence of the preliminary injunction, which plaintiff sought in July 2007 (*Acuna I, supra*, 182 Cal.App.4th at p. 870), and which the trial court issued in May 2008, and which we affirmed for the most part in our opinion in the prior appeal, filed March 8, 2010.

Plaintiff at trial adduced evidence of additional crimes and other nuisance activities showing nuisance activity was continuing, though to a lesser extent than before the injunction. Villanueva testified he observed a reduction in nuisance activity when the injunction was in place and an increase in subjects openly displaying gang tattoos and clothing when the injunction was overturned in the prior appeal in April 2007. Appellants claim there was no basis for the expert to opine cause and effect between the injunction and the level of activity. However, appellants ignore Villanueva's testimony that Billy Wolfington (a named defendant) told Villanueva the injunction was driving Broderick Boys "under ground." Moreover, Villanueva's personal observations about the level of activity and his continued contact with gang officers support an inference the injunction at least partially achieved its purpose of deterring nuisance activity. Appellants offer nothing to render such inference unreasonable.

Winger testified he had the opportunity to observe gang activity before and after the first (default) injunction issued, between 2004 and 2007. Before the first injunction, police commonly encountered Broderick Boys members openly displaying gang tattoos and the red color and openly acknowledging membership. In Winger's personal observations as well as his review of police reports, such overt signs were less common after the injunction issued. After the first injunction was overturned, Winger personally observed an increase in the number of persons openly wearing red and displaying gang tattoos. Winger opined, based on his involvement in and review of drug investigations, that the injunction had no effect on the amount of Broderick Boys' drug activity -- which was ongoing -- but the injunction caused the drug dealing to be less overt, less visible.

Winger also said of the injunction "[a]s a tool, it helped us to combat drug trafficking or drug dealing in the Safety Zone."

Appellants deceptively cite Winger's opinion that Austin Nunez and Pauliton Nunez are not "presently" (at the time of trial) contributing to a public nuisance. However, Winger also testified those individuals are presently (at the time of trial) incarcerated.

Additionally, the trial court in this case expressly stated remoteness would go to the weight of the evidence. Appellants fail to show any error.

B. *Inside or Outside the Safety Zone*

If appellants mean to argue that nuisance activities taking place *outside* the safety zone cannot be considered -- and it is not at all clear that they do -- they forfeit the point by failing to develop any legal analysis. While the default injunction and preliminary injunctions were in place, the Broderick Boys' stepping outside the safety zone boundary for some of their nuisance activities supports an inference of an attempt to evade the reach of the injunction, hence supports the ongoing need for the injunction.

C. *Collective Action Versus Isolated Acts by Sole Actors*

1. *Issues Concerning Legal Standard*

Appellants argue the trial court erred in considering any crime committed by a single person acting alone. Appellants appear to believe that isolated acts by individuals acting alone cannot be used to find a public nuisance justifying a gang injunction, absent proof the acts are gang-related and each member committed multiple acts. Appellants cite no authority supporting their position that each member must commit multiple acts.

In *Acuna I*, the defendants contended that plaintiff failed to demonstrate the activities of alleged gang members were anything other than isolated instances of bad conduct, and some of the crimes were relatively minor and only six involved a gang-related conviction. (*Id.*, *supra*, 182 Cal.App.4th at p. 879.)

We said, "conduct not amounting to a *gang* crime under Penal Code section 186.22 may be the subject of an action to abate a nuisance. [Citation.]" (*Acuna I, supra*, 182 Cal.App.4th at pp. 879-880; italics added.) "[I]n the context of a gang injunction, it is not necessary to prove the commission of criminal acts. Rather, it must be shown gang members 'participate[] in or act[] in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance.' [Citation.] Thus, conduct not amounting to a *gang* crime under Penal Code section 186.22 may be the subject of an action to abate a nuisance. [Citation.]" (*Ibid.;* italics added, orig. italics omitted.) We said the evidence showed that individual Broderick Boys members vandalize property with gang graffiti, intimidate residents with gang signs, tattoos and red clothing, and patrol the safety zone in small groups, thereby reinforcing their control of the area. (*Id.* at p. 880.) The individual crimes were merely the more serious types of conduct used by the Broderick Boys to "maintain control of their turf." (*Ibid.*) There was no need to link any particular gang member to the gang graffiti in the safety zone for purposes of a gang injunction. (*Ibid.*) It may reasonably be assumed such graffiti was the work product of some member of the gang, even if that member cannot be identified.[2] (*Ibid.*) "It is the collective action of the gang, not that of any individual member, that determines whether a public nuisance exists." (*Ibid.*) We also said the defense argument presupposed that a crime that is not *charged* as a gang offense is not gang-related, but there were many reasons why a prosecutor may choose not to add a gang charge. (*Id.* at p. 881.) "Even crimes that were not technically committed for the purpose of benefitting

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[2] At trial, the defense objected to relevance of graffiti of unknown authorship but acknowledged our prior opinion as law of the case.

a gang may nevertheless have that effect. Furthermore, a gang injunction may properly prohibit conduct of gang members irrespective of whether that conduct is undertaken to further the purposes of the gang. [Citation.]" (*Ibid.*)

In this appeal, appellants appear to suggest that *Gallo v. Acuna, supra*, 14 Cal.4th 1090, stands for the proposition that only *collective* activities can constitute a public nuisance. We disagree. There, the defendants -- who admitted gang membership or whom police identified as gang members -- argued they could not be subject to a gang injunction (which differs from the question whether a public nuisance exists) unless they possessed a specific intent to further the gang's unlawful purpose. (*Id.* at pp. 1122-1123.) The Supreme Court instead concluded it was enough that sufficient evidence supported the conclusion that the gang and its members were responsible for the nuisance and that each individual defendant admitted gang membership or was identified as a gang member. (*Id.* at p. 1125.)

Englebrecht, supra, 88 Cal.App.4th at page 1261, said it does not appear that *Gallo v. Acuna* requires for a sufficient demonstration of membership any showing the individual had engaged in nuisance activities.

Appellants cite *People v. Rodriguez* (2012) 55 Cal.4th 1125, for the proposition that membership in a gang is not enough to establish in an individual vicarious liability for a gang's pattern of conduct, because of constitutional concerns about guilt by association. *Rodriguez* -- which was published after the bench trial in this case -- was not a civil gang injunction case, but rather a criminal conviction for attempted robbery and the separate felony of gang participation under Penal Code section 186.22, subdivision (a). The Supreme Court, affirming our reversal of the gang participation conviction, said the defendant's commission of attempted robbery while acting alone did not fall within the elements of the gang participation offense, which requires willful promoting, furthering, or assisting in felonious criminal conduct by "members" of the gang. (*Rodriguez, supra*, 55 Cal.4th at pp. 1130-1132, citing Pen. Code, § 186.22, subd. (a).)

Interpreting the plural "members" to include the singular (Pen. Code, § 7) would not be reasonable in the context of the due process concerns raised by a gang participation statute that does not require the underlying felony to be gang-related. (*Rodriguez, supra*, 55 Cal.4th at pp. 1132-1139.) However, a person acting alone is still subject to the gang enhancement under Penal Code section 186.22, subdivision (b). (*Rodriguez, supra*, 55 Cal.4th at pp. 1138-1139; *People v. Rios* (2013) 222 Cal.App.4th 542, 545-546.)

Rodriguez is inapposite here, where the lack of gang enhancement or gang charge in connection with a given criminal prosecution is not determinative for purposes of a civil gang injunction. (*Acuna I, supra*, 182 Cal.App.4th at p. 881.) We are mindful, however, of the constitutional concerns about guilt by association, and we address them *post* in our discussion of active membership.

2. *Substantial Evidence Issues*

If appellants mean to argue insufficiency of the evidence of a public nuisance, we disagree.

Appellants say gang expert Villanueva testified Broderick Boys " 'patrol' (drive around the neighborhood)" to maintain control, but there was insufficient evidence of actual patrolling because there were only two incidents of Broderick Boys "driving around" and one incident of Broderick Boys "flamed out" in gang colors 10 years earlier. However, appellants offer no citation to the record and instead *misstate* the record. Villanueva testified "patrolling" means "these guys are out and about on the streets, *whether by vehicle or on foot* . . . ." (Emphasis added.)

In *Acuna I*, the defendants argued there was no evidence of actual sightings of numerous gang members together in public places within the safety zone. (*Id.* 182 Cal.App.4th at p. 879.) We said, "we need look no further than the declaration of Investigator Villanueva [who] indicated Broderick Boys members typically patrol areas within the Safety Zone in small groups, because a 'guy on the corner isn't going to get

the message of fear and intimidation across to the community and to rival gangs.' Unless we are to conclude Investigator Villanueva simply made this up, it is reasonable to assume he observed this activity within the Safety Zone or it was reported to him by others." (*Id.* at p. 880.) We indulged all reasonable inferences in support of the judgment. (*Ibid.*)

In this appeal, the experts acknowledged they had not seen much patrolling lately. However, there was also evidence that gang members admitted to police that the existence of the preliminary injunction had forced them to go "under ground." Additionally, there was some evidence of recent group activity spreading fear in the community, i.e., the 2010 Memorial Park incident. The trial court believed the testimony of the victims of that incident, that fear of the Broderick Boys forced them to move away. In addition to the victim testimony, plaintiff's experts testified about the reluctance of victims to testify against perpetrators who are gang members, due to the victims' fear of retaliation. This evidence was proper, as recently reaffirmed in *People v. Nguyen, supra*, 61 Cal.4th 1035: " 'Whether members of a street gang would intimidate persons who testify against a member of that or a rival gang is sufficiently beyond common experience' " that expert opinion would assist the trier of fact. (*Id.* at p. 1034, citing *People v. Gonzalez* (2006) 38 Cal.4th 932, 945.)

As noted, appellants cite no authority requiring multiple nuisance activities by each gang member and we can perceive no reason to impose such a requirement. A gang injunction aims to stop a public nuisance -- i.e., a nuisance that affects an entire community (Civ. Code, § 3480) -- by a criminal street "gang" which can act only through its members. (*Acuna I, supra*, 182 Cal.App.4th at pp. 874-875.) It matters not to the community whether each gang member commits multiple acts.

Moreover, this presents another instance of appellants misstating the facts.

Appellants' opening brief states, "for those who were immediate participants in a crime, suspected crime, or who were otherwise known to the police, the vast majority of

identified gang members (82 out of 94) appear only once in the record. . . . (See, Crimes Addendum, Crimes Chart, which shows the year(s) each identified gang member appears in the record.) . . . Therefore their nuisance activity cannot be described as 'collective' even with respect to the particular crime or suspected crime. (See, Crimes and Gang Members Addenda.)"

As noted in the respondent's brief, appellants have cited, not to the record, but to a "Crimes Chart" appellants themselves apparently prepared for this appeal -- with no citations to the record whatsoever -- and the chart is wrong. The chart claims Juan Zinzun appeared in the record only once with respect to an incident in the first half of 2002 (Crimes Addendum, Crimes Chart), but Zinzun had *two* gang-related convictions in two separate criminal cases. Appellants' reply brief states: "What counsel meant is that Zinzun was convicted of crimes on one date in the past, and there was no recurrence. And he acted alone, as far as the record reveals." However, "[w]hat counsel meant" is an inadequate excuse for misrepresenting facts in appellate briefing.

Moreover, appellants fail to support their assertions that the convictions were on one date based on one incident, and that the record is confused. Appellants cite their own "Gang Members Addendum at p. Z-1" -- which is not part of the record but rather part of appellants' briefing. The Addendum does claim the offense date in both cases was July 16, 2002. However, the cited pages of the reporter's transcript instead state Zinzun was convicted of assault with a deadly weapon with a gang enhancement in trial court case No. CRF-02-0429, violation date January 16, 2002, plea date July 10, 2002. And he was convicted in case No. CRF-02-5286 of a substantive gang offense committed on *July* 16, 2002, to which he entered a plea on September 26, 2002. Over defense objection, the trial court allowed these convictions as rebuttal evidence to defense testimony of the nonexistence of the gang.

Appellants' reply brief claims respondent's brief admits on page 13 that the two cases were from the same date. However, page 13 contains no such admission.

Appellants also (mis)cite their own Crimes Addendum, which summarizes that police contacted Zinzun about an assault, and then states there were two convictions in the two separate cases. The addendum cites to pages of the reporter's transcript, which merely state he was convicted in one case and was later convicted in the second case.

We conclude appellants fail to show reversible error with respect to the trial court's conclusion that Broderick Boys engages in public nuisance activities.

V

Appellants are Active Members of Broderick Boys

A. *Legal Definition of Active Member*

In *Acuna I*, we said the defendants failed to make individualized argument regarding their active membership, thereby forfeiting the matter. (*Id.* 182 Cal.App.4th at p. 879.) Here, the argument has been made.

Insofar as appellants complain the judgment's list of active members includes persons other than appellants, appellants "lack standing to challenge that definition [of active member] on behalf of parties not before the court." (*Acuna I, supra*, 182 Cal.App.4th at pp. 883-884.) Appellants may challenge the trial court's findings of non-appellants' active membership insofar as the non-appellants' activities were used to conclude the gang engages in public nuisance activities warranting the injunction to which appellants are subjected, but appellants fail to show reversible error on that ground.

Gallo v. Acuna considered who was bound by the preliminary injunction. (*Id.* 14 Cal.4th at pp. 1122-1125.) The Supreme Court concluded for "present purposes" (preliminary injunction), it was enough that sufficient evidence supported the conclusion the gang and its members were responsible for the nuisance and that each of the individual defendants either admitted gang membership or were identified as gang members. (*Id.* at p. 1125.) *Gallo v. Acuna* did not have to decide on a test for

determining whether an individual is a member of a gang responsible for nuisance activity such that he may be enjoined or ultimately found in contempt for engaging in enjoined behavior in the target area, as noted in *Englebrecht, supra*, 88 Cal.App.4th at page 1261. *Englebrecht* said, "It does not appear, however, [*Gallo v.*] *Acuna* requires for a sufficient demonstration of membership any showing the individual had engaged in nuisance activities." (*Englebrecht, supra*, 88 Cal.App.4th at p. 1261, citing *Gallo v. Acuna, supra*, 14 Cal.4th at p. 1125.) "[F]or the purposes of a gang injunction an active gang member is a person who participates in or acts in concert with an ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of acts constituting the enjoined public nuisance, having a common name or common identifying sign or symbol and whose members individually or collectively engage in the acts constituting the enjoined public nuisance. The participation or acting in concert must be more than nominal, passive, inactive or purely technical." (*Englebrecht, supra*, 88 Cal.App.4th at p. 1261.) We applied *Englebrecht*'s definition in *Acuna I, supra*, 182 Cal.App.4th at p. 875.)

Appellants argue the injunction's use of *Englebert*'s definition of "active gang member" as someone who "participates in or acts in concert" with the Broderick Boys, is unconstitutionally vague and overbroad and impermissibly penalizes activity protected under the First Amendment and the liberty interests protected under the due process clause.

We already rejected this argument in *Acuna I*. We said that "[o]f necessity, the definition cannot be much more specific. It is not likely criminal street gangs maintain rosters of their active members." (*Id.* 182 Cal.App.4th at pp. 875, 884.) Some factors to consider are self-identification, gang tattoos, crimes committed with other gang members, information from reliable informants, clothing, accessories, photographs, and close association with known gang members. (*Ibid.*)

We held the definition of active gang member was not unconstitutionally vague. (*Acuna I, supra*, 182 Cal.App.4th at pp. 883-884.) Two principles guide evaluation of whether a law is unconstitutionally vague. (*Id.* at p. 884.) First, abstract legal commands must be applied in a specific context. (*Ibid.*) A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness. (*Ibid.*) Second, only reasonable specificity is required. (*Ibid.*) "In the context of a gang injunction, only a reasonably specific definition of 'active member' is possible in order to give adequate notice while encompassing those who primarily contribute to creation of the public nuisance. We conclude the definition at issue here is sufficiently specific." (*Ibid.*)

Appellants argue due process prohibits guilt by association and requires proof they acted in concert before they can be held vicariously liable for a pattern of conduct attributed to a gang. Recognition of the constitutional concerns is reflected in that a heightened standard of clear and convincing evidence applies to civil gang injunction cases. (*Englebrecht, supra*, 88 Cal.App.4th at pp. 1254-1255.)

Appellants cite *Scales v. United States* (1961) 367 U.S. 203 [6 L.Ed.2d 782] (*Scales*), which upheld constitutionality of a statute making it a crime to be a member of an organization (the Communist Party), knowing it advocates the overthrow of the United States government by force or violence. *Scales* said, "we can perceive no reason why one who actively and knowingly works in the ranks of that organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act." (*Id.* at pp. 226-227.) *Scales* added in a footnote: "The problems in attributing criminal behavior to an abstract entity rather than to specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof. Whether it has been successfully shown that a particular group engages in forbidden advocacy must depend on the nature of the

organization, the occasions on which such advocacy took place, the frequency of such occasions, and the position within the group of the persons engaging in the advocacy. [Citation.] Understood in this way, there is no great difference between a charge of being a member in a group which engages in criminal conduct and being a member of a large conspiracy, many of whose participants are unknown or not before the court. Whatever difficulties might be thought to inhere in ascribing a course of criminal conduct to an abstract entity are certainly cured, so far as any particular defendant is concerned, by the requirement of proof that he knew that the organization engages in criminal advocacy, and that it was his purpose to further that criminal advocacy." (*Id.* at p. 226, fn. 18.)

Here, there is no due process problem or guilt by association, because the injunction applies only to active participants. Even if the definition could be construed to be ambiguous in the abstract, that did not happen to any of these appellants, and they therefore fail to show grounds for reversal.

B. *Substantial Evidence of Active Membership*

Under the heading of evidentiary claims, appellants argue: "Defendants/Appellants have not been engaging in current, ongoing nuisance activity; their crimes are in the past, mostly years before the trial. Therefore the prohibition on guilt by association bars the imposition of the restrictions of the injunction upon persons, including Defendants/Appellants, who are only related by supposed gang membership, rather than ongoing action in concert, unless *each such person* had been shown to be engaged in current, ongoing, nuisance activity that justifies and necessitates the particular restriction. '[I]njunction is not the proper remedy to prevent a person from doing an act which he has never undertaken or threatened to undertake . . . .' " (38 Cal.Jur.3d Injunctions § 44 (2013); see also, *Pezold v. Amalgamated etc. Workmen* (1942) 54 Cal.App.2d 120, 127; *San Francisco v. Market S.R. Co.* (1950) 95 Cal.App.2d 648, 655.)

The contention fails. The cited authorities are not on point but merely held there was no basis to enjoin acts that had not happened. Appellants are trying to invent their own standard requiring proof that each individual participates in committing public nuisance acts, whereas the correct standard is that gang members commit public nuisance activities and each individual subject to the injunction participates more than nominally in the gang.

There is plenty of evidence of appellants' active membership. Villanueva opined each appellant is a Broderick Boys member and (unless incarcerated) contributes to an ongoing public nuisance. Villanueva based his opinions on multiple factors, including his training and experience, personal involvement in crime investigations, and contacts with appellants, all of whom are named defendants.

1. *Timothy Acuna*

Timothy Acuna admitted Broderick Boys membership when police served him with the injunction in 2005; admitted being a Norteno when he went to jail in February 2007; has gang tattoos (BRK on his stomach, one dot on his right hand and four dots on his left, and XIV); was apprehended driving a stolen vehicle with Broderick Boys Alex Estrada as passenger on February 17, 2007 (case No. CRF 07-982); and pleaded no contest to vehicle theft with intent to assist a criminal street gang.

Appellants' brief falsely claims, "[t]here was no evidence he [Acuna] had been seen in the safety zone in the last several years." However, Acuna's parole agent testified in December 2010 as a rebuttal witness that he saw Acuna at Fifth and C Streets in West Sacramento (within the safety zone) three times, the most recent of which was "[a]pproximately two years ago." On cross-examination, Acuna's attorney represented that Acuna just got out of prison "a few weeks ago" after being in prison continuously for the past four years. After the lunch recess, the parole agent testified on redirect examination that Acuna was taken into custody in 2006 and was paroled in 2008, and the

agent testified from recollection refreshed by records from the Department of Corrections and Rehabilitation, that after being paroled in 2008, Acuna was out of custody for some period of time and then went back into custody in 2009 and was paroled in 2010.

Acuna himself testified as a defense witness in this case. He was sent to prison in 2001 for vehicle theft and had previously pleaded to "[m]aybe three" vehicle thefts. When he went to prison for vehicle theft in 2007, Acuna had a "BRK" tattoo on his stomach, which he got in 2002. A couple of weeks before his testimony in this trial, Acuna was arrested when police found a BB gun in his mother's house, but the matter was dropped.

Appellants recite Acuna's trial testimony that he is not a gang member, that he committed his crimes for personal reasons, not to further gang interests, and that the jail classified him as a gang member "just because" he is a Hispanic from Broderick and has tattoos. We disregard Acuna's self-serving testimony because the trial court did not believe him, and on appellate review we resolve all factual conflicts and credibility questions in favor of the prevailing party and indulge all reasonable inferences in support of the judgment.

2. *Alex Estrada*

Alex Estrada "self-admitted" being a "Northerner" (aka Norteno) in jail in 2007. In 2007, he was in the stolen car with Broderick Boys Timothy Acuna. Police found multiple guns and ammunition in his residence within the safety zone, and he was convicted of felon in possession of ammunition. Norteno gangs keep caches of weapons in their territory for use in committing crimes.

3. *Jesse Garcia*

Jesse Garcia acknowledged gang membership in discovery responses. Plaintiff called him as a witness at trial. Before invoking the Fifth Amendment, he claimed he knows nothing about Broderick Boys and claimed he acknowledged membership because

that was how California Youth Authority (CYA) classified him when he was sent there in 2003 and 2005. On the facility intake form, he circled "Norteno" and wrote in Broderick Boys because he was told to do so.

4. *Robert Montoya*

Montoya had numerous gang-related tattoos in 2006 and 2007. In speaking with police in 2005, he "self-admitted" being a Broderick Boy. He identified as a Northerner in a jail questionnaire in 2006. His parole agent testified that in 2008 Montoya said he was "a" current leader of Broderick Boys, but the agent did not independently validate that assertion. Five months before the 2010 trial, as the agent placed handcuffs on Montoya (for possessing alcohol and possessing gang-related clothing -- a "Rider" shirt, Riders being a word used for drop-outs who are sort of their own gang), Montoya said he was a Broderick Boys leader and offered to "give up" other gang members to make a deal.

5. *Michael Morales*

In May 2005, police stopped a speeding car driven by Michael Morales with gang member Guillermo Rosales as passenger. Their presence together violated the 2004 injunction. Michael Morales pleaded no contest to carrying a concealed firearm in a vehicle and got probation, and Rosales pleaded no contest to misdemeanor possession of marijuana. In January 2007, police arrested Morales in a car with Rosales, and Morales pleaded no contest to conspiracy to transport or sell methamphetamine. In jail questionnaires in 2006 and 2007, Morales admitted being a Broderick Boy.

6. *Guillermo Rosales*

Rosales got probation for marijuana possession in the 2005 incident where he was with Michael Morales. Rosales sold drugs to an informant in December 2006 and pleaded no contest to possession of methamphetamines for sale. On an unspecified date,

police apprehended Rosales in possession of a firearm in a car with three other Norteno gang members. The gang expert opined the group was "patrolling," i.e., gang members driving around looking for a confrontation. Rosales admitted being a Northerner in jail questionnaires. At trial, Winger opined Rosales is not "presently" contributing to the nuisance because he is in prison.

7. *Felipe Valadez, Jr.*

He was one of the people involved in a fight in July 2006. Police responding to a report of a fight on July 16, 2006, saw a group of people, one with a baseball bat and one with a tire iron. Some fled, but police arrested Valadez and Rainey Martinez for violating the gang injunction. Police detained others, including Christopher Castillo and Jesse Garcia, but released them due to the victim's unwillingness to cooperate. A police officer testified that in February 2007, he saw Valadez writing "BRK" on a wall in the safety zone. In July 2009, police arrested Valadez for public intoxication and possession of methamphetamines. He yelled, "Fuck West Sac[ramento] PD. I'm Broderick. Straight BRK. I don't give a fuck." Felipe Valadez has Broderick tattooed on his stomach, and a "1" and "4" on his arms. In March 2007, he pleaded no contest to misdemeanor criminal street gang activity.

8. *Billy Wolfington*

In August 2001, Wolfington pleaded no contest to possession of a controlled substance for sale. When arrested, he was in the presence of Broderick Boys member Raymond Corona. In May 2002, Wolfington pleaded no contest to a March 2002 incident of possessing a controlled substance while armed with a loaded gun. Wolfington admitted being a Northerner in December 2006. When returned to jail on a parole violation, Wolfington described himself as a "northern dropout" in a jail questionnaire, but Villanueva opined this was a lie to gain more freedom while in custody. At the time

of trial, Wolfington was not contributing to a public nuisance due to the fact he was in custody.

Appellants fail to show reversible error regarding active membership.

VI

Challenges to Specific Provisions of Injunction

Appellants contend specific provisions of the injunction (1) lack substantial evidence of a need for them, and (2) violate constitutional rights without any showing of necessity. Under this heading, appellants argue in a first subheading that the evidence does not support particular provisions (non-association, curfew, no-trespassing, anti-graffiti, and the safety zone boundaries), and that the entire injunction violates the due process prohibition on guilt by association.

Under multiple separate subheadings, appellants argue they have standing to challenge the injunction as overbroad; the injunction violates their First Amendment and due process rights; the definition of active gang member is vague and overbroad and violates First Amendment and due process liberty interests; the anti-association and curfew provisions are vague and overbroad and violate First Amendment and "intimate" liberty interests under the due process clause; and other provisions of the injunction are vague and overbroad. We already addressed some of these contentions in our 2010 opinion.

A. *Standing*

Appellants claim they have standing to challenge the injunction as overbroad as to third parties, without showing violation of appellants' own constitutional First Amendment rights and liberty interests. Appellants are wrong. They cite case law challenging overbreadth of *statutes*, not *injunctions*. (E.g., *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 612 [37 L.Ed.2d 830].) The California Supreme Court expressly discussed the distinction in *Gallo v. Acuna, supra*, 14 Cal.4th at pages 1112-1115. The

"narrow and particularized focus inherent in the nature of the injunction" does not embody "the broad and abstract commands of a statute." (*Id.* at p. 1114.) "Unlike the pervasive 'chill' of an abstract statutory command that may broadly affect the conduct of an absent class and induce self-censorship, the decree here did not issue until after *these* defendants had had their day in court, a procedure that assures ' "a prompt and carefully circumscribed determination of the issue." ' [Citation.]" (*Ibid.*; orig. italics.)

Appellants dismiss *Gallo v. Acuna* on the ground that there the "only individuals subject to the trial court's interlocutory decree . . . are *named parties* to this action, [whose] activities allegedly protected by the First Amendment have been and are being aggressively litigated. There is accordingly no basis, legal or factual, for the professed concern that protected speech or communicative conduct by anyone *other* than defendants might be endangered by the terms of the trial court's injunction." (*Id.* at p. 1114; orig. italics.) Here, the injunction applies to "active members" not named in the complaint.

However, as we said in *Broderick Boys, supra*, 149 Cal.App.4th at page 1516, "a nonparty [who is served with the injunction] *could* attack the injunction in a declaratory relief action [citation] or in defense of contempt charges [Citation]." (Orig. italics.)

We conclude appellants lack standing to assert overbreadth challenges on behalf of nonparties to the appeal.

B. *The "Do Not Associate" Provision*

The permanent injunction "enjoin[s]" and restrain[s] appellants from "engaging in or performing, directly or indirectly, any of the following activities in the Safety Zone: [¶] a. **Do Not Associate**: Standing, sitting, walking, driving, gathering or appearing, anywhere in public view or any place accessible to the public, with any known member of the Broderick Boys, including but not limited to those members identified by name in this order. This non-association order shall not apply when the enjoined parties are inside

a school attending class or on school business, or inside a church; however, the non-association order shall apply to the enjoined parties when they are traveling to or from school or church."

In the prior appeal from the preliminary injunction, appellants argued that an identical provision infringed on their constitutional right of association, by prohibiting them from gathering in public places for lawful and peaceful purposes, and by interfering with intimate family relationships. (*Acuna I, supra*, 182 Cal.App.4th at pp. 885-886.) We held the preliminary injunction did not burden association rights more than was necessary to serve the significant governmental interests at stake. (*Ibid.*) Appellants raise the same arguments again, but we need not address them again; *Acuna I* is law of the case.

In this appeal, appellants present a new argument, claiming insufficiency of evidence of ongoing public collective activity to support the non-association restriction, because there were only a few incidents involving multiple actors in 2010 and only seven in 2009. As indicated, however, a permanent injunction is appropriate if the misconduct is ongoing or likely to recur, and compliance with a preliminary injunction does not constitute voluntary discontinuation of the wrongful conduct rendering a permanent injunction unnecessary. (*Feminist, supra*, 32 Cal.App.4th at pp. 1658-1659.) Appellants fail to confront these legal principles and fail to show insufficiency of evidence that the nuisance activity was ongoing or likely to recur.

Appellants also contend the anti-association provision is vague and overbroad because it prohibits association with "known" members of Broderick Boys, yet fails to define "known." They cite no authority other than *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 458 [83 L.Ed. 888], as indicating that "known" was ambiguous with reference to undefined "reputed" membership. However, *Lanzetta* was construing a statute, not an injunction. As indicated, statutes and injunctions are not equivalent for constitutional analysis. (*Gallo v. Acuna, supra*, 14 Cal.4th at p. 1114.) Moreover, *Lanzetta* is

inapposite. There, a New Jersey criminal statute stated that any unemployed person "known" to be a gang member, who has been convicted of a crime, is a gangster subject to a fine or imprisonment for that status. (*Lanzetta, supra*, 306 U.S. at p. 452.) After finding uncertainty in other parts of the statute, the *Lanzetta* court went on to say that the phrase "known to be a member" was ambiguous, because (1) if it meant actual membership, the word "known" would be without significance, but (2) if reputed membership sufficed, it was unclear whether that reputation must be general or extend only to some persons. (*Id.* at p. 458.) "Known" in the New Jersey statute referred to knowledge of unknown persons. Here, no equivalent ambiguity appears, because the injunction in context prohibits appellants from associating with people *whom appellants know* are gang members. Thus, the injunction in *Gallo v. Acuna, supra*, 14 Cal.4th at page 1110, enjoined the defendants from associating with "known" gang members, which the Supreme Court said effectively forbade gang members from engaging in any form of social intercourse with anyone "known to them" to be a gang member. (*Id.* at p. 1121.)

C. *The Curfew Provision*

The injunction enjoins and restrains appellants from "Remaining on public property, a public place, on the premises of any establishment open to the public, or on a vacant lot, between the hours of 10:00 p.m. on any day and 6:00 a.m. the following day, unless (1) going to or from a meeting or scheduled entertainment activity at a theatre, school, church or other religious institution, or sponsored by a religious institution, local educational authority, governmental agency or support group such as Alcoholics Anonymous, (2) actively engaging in a business, trade, profession or employment that requires such presence, (3) in an emergency situation that requires immediate attention; or (4) in the side yard or back yard of his or her own residence. A 'public place' is defined as any place to which the public has access, including but not limited to

sidewalks, alleys, streets, highways, parks, hospitals, office buildings, transport facilities and the common areas of schools."

In the prior appeal from the preliminary injunction, appellants challenged a similar curfew provision on the grounds that it infringed on constitutional freedom of movement and was vague and overbroad. (*Acuna I, supra*, 182 Cal.App.4th at p. 889.) We held the curfew provision did not sweep too broadly, nor did it invade protected freedoms of the defendants and other active gang members. (*Id.* at p. 891.)

In this appeal, appellants challenge the trial evidence as insufficient to establish an ongoing need for the curfew provision. Again, appellants' arguments incorrectly assume they benefit from the deterrent effect of the preliminary injunction.

D. *The "No Trespassing" Provision*

The injunction enjoins and restrains appellants from "Being present on or in any property not open to the general public, except (1) with the prior written consent of the owner, owner's agent, or the person in lawful possession of the property, or (2) in the presence of and with the voluntary consent of the owner, owner's agent, or the person in lawful possession of the property."

In the prior appeal, we rejected a constitutional challenge to an identical provision in the preliminary injunction. (*Acuna I, supra*, 182 Cal.App.4th at pp. 888-889.) We noted the gang expert's declaration that Broderick Boys use abandoned property as a "crash pad" to drink and do drugs, take over parking lots and common areas of apartment buildings, and use private residences to escape police pursuit. (*Ibid.*)

In this appeal, appellants argue "the evidence at trial did not establish that trespassing occurred. In fact, . . . only one incident involved trespassing in the entire record. That lone and remote incident occurred on July 25, 2006 . . . . Robert Sanchez and Rainey Martinez were both arrested for violation of Penal Code 211 [robbery], after they forced entry into a home and stole items therein. (RT 367:9-394:15.) There is no

justification, and no evidence was presented at trial, to support the imposition of a 'no trespassing' provision requiring written consent from an owner in order to visit a residence." (Orig. brackets.)

Appellants' argument on this point misstates the record and fails to acknowledge other evidence favorable to the judgment. For example, a trespass occurred in March 2007, when a shooting occurred after a homeowner asked three Broderick Boys gang members, who were being loud and drinking in his driveway, to leave. In the Summer of 2009, Broderick Boys gang members threw objects into the driveway of a victim's home, calling the occupants "scraps" and challenging them to come out and fight. Since appellants fail to acknowledge evidence favorable to the judgment, they forfeit their substantial evidence claim on this point. (*Foreman, supra*, 3 Cal.3d at p. 881.)

Under a different subheading, appellants complain the "no trespassing" provision prevents them from stopping by the home of a relative who is out or attending to an emergency and requires even a renter to be present with a written lease in hand. However, appellants misread the provision and offer no legal analysis rendering it defective.

E. *Graffiti*

The injunction enjoins: "**No Graffiti or Graffiti Tools:** Damaging, defacing, or marking any public or private property, or possessing any spray paint can, felt tip marker, or other graffiti tool as defined in Penal Code section 594.2." Appellants argue "The evidence of graffiti in 2009 and 2010 is slight." Another forfeiture by appellants, who fail to show that the multitude of graffiti observed by the court and counsel in their tour of the safety zone during trial in November 2010 were relics of an earlier time. Moreover, since no one should be damaging or defacing property, the restriction cannot possibly prejudice appellants.

Appellants claim the provision prevents them from possessing markers for lawful purposes at their own home. No, it does not. The injunction references Penal Code section 594.2, which prohibits possession "with the intent to commit vandalism or graffiti."

Appellants complain the provision prevents them from marking private property with the owner's consent, even with non-gang markings. We disagree. The clause's heading ("graffiti") and reference to the Penal Code make clear that what is being restricted is graffiti, which the Penal Code defines as "any unauthorized inscription, word, figure, mark, or design . . . ." (Pen. Code, § 594, subd. (e).)

Appellants complain the provision applies to all active members, even those who have not done any graffiti. Appellants have no standing to challenge any provision as to any gang member other than themselves. Appellants need not have personally drawn any graffiti in order to be bound by the provision. "[I]n order to enforce a gang injunction against an alleged member, it must be shown the person 'participates in or acts in concert with [a gang] . . . whose members individually or collectively engage in the acts constituting the enjoined public nuisance.' " (*Acuna I, supra*, 182 Cal.App.4th at pp. 874-875.)

F. *Safety Zone Boundaries*

Appellants argue the boundaries of the safety zone are overbroad because there has not been much "ongoing" gang activity recently. We have already explained that the "ongoing" argument lacks merit.

G. *Remaining Provisions*

Under a subheading that the remaining provisions of the injunction are also vague and overbroad, appellants complain of the "no intimidation" clause restraining them from "Confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting or battering any person known to be a witness to any activity of the Broderick

Boys, known to be a victim of any activity of the Broderick Boys, or known to be a person who has complained about any activity of the Broderick Boys." Appellants argue the terms "confronting," "annoying," "challenging," and "provoking" are vague. These exact words were upheld against a claim of vagueness in *Gallo v. Acuna, supra*, 14 Cal.4th at page 1118, which said the words were not unconstitutionally vague when considered in context with the facts and the objectives of the injunction. Appellants suggest the Supreme Court's conclusion was dependent on the severity of the nuisance activity in that case, which appellants view as more severe than their own activity, but they cite nothing in *Gallo v. Acuna* supporting that suggestion. We reject appellants' meritless claim that the words are vague in this case "because there is no background that gives them contextual meaning." Appellants also complain the "no intimidation" clause does not say whether the "activity" must have been unlawful or by "active" members or whether complaints must be made to a government agency, and the clause applies to all active members even if they have never been suspected of intimidation. Appellants fail to show that any of these points render the provision unconstitutional.

Appellants complain about the "no guns" clause, which restrains them from "Anywhere in public view or any place accessible to the public, (1) possessing any gun, ammunition, or illegal weapon as defined in Penal Code section 12020, (2) knowingly remaining in the presence of anyone who is in possession of such gun, ammunition, or dangerous weapon, or (3) knowingly remaining in the presence of such gun, ammunition or dangerous weapon." Appellants complain this clause applies even to those appellants who have never had or used a gun illegally, and even when the gun is licensed or "otherwise protected by law." Appellants offer no analysis converting this gripe into a meritorious constitutional claim.

Appellants assert that restrictions to "stay away from drugs" or "obey all laws" simply reiterate the criminal law, rendering such provisions unnecessary.

VII

Miscellany

Appellants' brief, under a heading that the trial was fundamentally unfair, raise other contentions, some of which we have already addressed. The remaining points have no merit.

1. Appellants complain the trial court improperly refused to order incarcerated defendants to be transported to court to testify, which supposedly prevented the defense from rebutting plaintiff's evidence and presenting affirmative defenses. They cite authority that an indigent prisoner who is a defendant in a civil action threatening his personal interests has a federal and state constitutional right, as a matter of due process and equal protection, to meaningful access to the courts in order to present a defense. (*Payne v. Superior Court* (1976) 17 Cal.3d 908, 913-919.)

The appellate brief does not name names to show that any *appellant* was denied the right to appear in court. Appellants again violate appellate rules by simply incorporating by reference papers filed in the trial court. (*Garrick, supra*, 3 Cal.App.4th at p. 334.) Again, we overlook the violation.

Meaningful access does not necessarily mean personal appearance, nor does it mandate a particular remedy. (*Payne v. Superior Court, supra,* 17 Cal.3d at p. 923.) The trial court has discretion which remedy to choose, including appointment of counsel for the prisoner (when there is a bona fide threat to his personal or property interests and no other feasible alternative exists), transfer of the prisoner to court, using depositions in lieu of personal appearance, etc. (*Id.* at p. 925; *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792-794.) We will not overturn the trial court's exercise of discretion absent a miscarriage of justice. (*Wantuch,* at p. 794.)

In denying appellants' motion for production of (appellants) Michael Morales and Guillermo Rosales and petition for writ of habeas corpus to transport the prisoners to

court, the trial court noted they were being represented by counsel in this trial, the defense could have proceeded by depositions, Rosales had already invoked the Fifth Amendment in written discovery, and the defense failed to persuade the court to exercise discretion to order the prisoners produced in this civil case. Appellants mention none of this in their brief but just argue that no one could testify as powerfully and persuasively as the prisoners, as to what they mean by their identification as Broderick Boys, and their clothing and tattoos.

Appellants fail to show grounds for reversal.

2. Appellants next claim the trial court displayed favoritism for plaintiff because the court originally scheduled the trial to proceed every other week but at the conclusion of plaintiff's case ordered the defense to put on its case without benefit of "rest weeks." Appellants forfeit the point by failing to address the court's fundamental power to control litigation (Code Civ. Proc., § 128) and failing to cite any evidence whatsoever of favoritism rather than reasonable case management of protracted litigation that ultimately spanned five months.

3. Appellants argue the trial court denied them procedural due process by failing to appoint counsel when defendants' physical liberty was at stake (due to the curfew and "do not associate" provisions of the injunction). We need not consider the point, because appellants were all represented by counsel, and they fail to show they have standing to raise this contention on behalf of others. Moreover, *Iraheta v. Superior Court* (1999) 70 Cal.App.4th 1500, 1511-1515, held due process did not give alleged street gang members a right to appointed counsel in an action for a gang injunction.

4. Appellants argue the trial court erroneously denied a motion to recuse the entire Yolo County judicial branch from hearing the case. The defense theory was that Broderick Boys' criminal convictions in Yolo County must have poisoned all judges against them. However, as appellants acknowledge, the motion was denied because it was untimely and lacked a written verified statement as required by Code of Civil

Procedure sections 170.3 and 170.4. Appellants offer no legal analysis to overcome the defects; hence we need not consider the contention.

5. Appellants contend the trial court erred in denying a defense motion to move the trial from the Yolo County courthouse to a courtroom in the City of West Sacramento -- the community most directly affected by the nuisance activities. They assume this is required by the Sixth Amendment to the United States Constitution, which says *criminal* prosecutions are to be held in the state and district where the crime was committed. This is not a criminal prosecution. Appellants champion the benefit of easy access for affected citizens to attend trial, but they offer no evidence or legal analysis applicable here. Appellants argue the trial court deprived them of a public trial by barring testifying witnesses from the courtroom until after they testified. They offer no supporting authority.

We conclude appellants fail to show grounds for reversal.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover costs on appeal. (Cal. Rules of Court, rule 8.278.)

HULL, J.

We concur:

RAYE, P. J.

BUTZ, J.

Filed 2/4/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re the Marriage of ANNA ANKA and LOUIS YEAGER.	
ANNA ANKA, Appellant, v. LOUIS YEAGER et al., Respondents; LISA HELFEND MEYER, Objector and Appellant.	2d Civil No. B281760 (Super. Ct. No. SD032322) (Ventura County)

It is axiomatic that an attorney must represent a client to the best of his or her ability. The attorney owes a duty to that client to present the case with vigor in a manner as favorable to the client as the rules of law and professional ethics permit. But besides being an advocate to advance the interest of the client, the attorney is also an officer of the court. (See Bus. & Prof. Code, § 6067; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922.)

California Rules of Court, rule 9.7, pertaining to the oath required when an attorney is admitted to practice law, concludes with, " 'As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.' "[1] These cautions are designed to remind counsel that when in the heat of a contentious trial, counsel's zeal to protect and advance the interest of the client must be tempered by the professional and ethical constraints the legal profession demands. Unfortunately, that did not happen here.

In a child custody dispute, the trial court imposed $50,000 in sanctions jointly and severally against an attorney and her client for disclosing information contained in a confidential child custody evaluation report. (Fam. Code, §§ 3025.5, 3111.)[2]

We affirm the order for sanctions against the attorney but reverse the order for sanctions against the client.

FACTS

Anna Anka (Anna) was married to Louis Yeager.[3] A child was born of the marriage. The parties dissolved their marriage, but child custody issues remained (Yeager action). The trial court ordered that a child custody evaluation be performed by Dr. Ian Russ, and that the parties undergo a psychological evaluation if Russ recommended it. Russ filed a custody evaluation report that included a psychological evaluation by Dr. Carl Hoppe.

After the Yeager marriage dissolved, Anna married Paul Anka (Paul). A child was born of that marriage also. The Ankas

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[1] Deletion of the words "strive to" from the oath gives it the potency it deserves. Attorneys are up to the task.

[2] All further statutory references are to the Family Code unless stated otherwise.

[3] No disrespect intended; we refer to some parties by their first names for clarity.

dissolved their marriage, but child custody issues remained (Anka action). Thus, Anna was a party to custody disputes in both the Yeager and Anka actions. Attorney Lisa Helfend Meyer represented Anna in both actions.

Yeager filed an affidavit in support of Paul in the Anka action. The affidavit accused Anna of substantial misconduct involving the children from both marriages.

Meyer took Yeager's deposition in the Anka action. She asked Yeager numerous questions without objection about what he told Dr. Russ during the custody evaluation; what his child told Russ during the custody evaluation; and what Russ found and concluded.[4] Yeager answered that he did not remember to most of the questions. After a lunch break, Yeager did not return to continue the deposition.

Yeager moved for sanctions in the Yeager action under sections 3025.5 and 3111, subdivision (d) for disclosing information contained in a confidential custody evaluation. The trial court granted the motion.

The trial court found the disclosures were made maliciously, recklessly, without substantial justification, and were not in the best interest of the child. The court ordered Anna and Meyer to pay jointly and severally a fine of $50,000. The court found that the fine was large enough to deter repetition of the conduct; and that in absence of evidence to the contrary, the fine would not impose an unreasonable financial burden on the parties.

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[4] We need not add to the invasion of privacy by repeating the questions verbatim.

DISCUSSION

I

Meyer contends the information she sought is not protected by section 3025.5.

Section 3025.5, subdivision (a) provides:

"In a proceeding involving child custody or visitation rights, if a report containing psychological evaluations of a child or recommendations regarding custody of, or visitation with, a child is submitted to the court, . . . *that information* shall be contained in a document that shall be placed in the confidential portion of the court file of the proceeding, and may not be disclosed, except to the following persons:

"(1) A party to the proceeding and his or her attorney.

"(2) A federal or state law enforcement officer, the licensing entity of a child custody evaluator, a judicial officer, court employee, or family court facilitator of the superior court of the county in which the action was filed, or an employee or agent of that facilitator, acting within the scope of his or her duties.

"(3) Counsel appointed for the child pursuant to Section 3150.

"(4) Any other person upon order of the court for good cause." (Italics added.)

Meyer argues the term "that information" as used in section 3025.5, subdivision (a) refers only to "psychological evaluations of a child or recommendations regarding custody of, or visitation with, a child." She claims nothing else contained in the report is protected.

Meyer acknowledges that she asked about Yeager's statements to Dr. Russ. She also acknowledges she asked about Russ's findings whether Anna abused her children and the

children's attachment to Anna. But Meyer asserts none of these areas are protected by the statute.

Meyer attempts to parse the statute into meaninglessness. The purpose of section 3025.5, subdivision (a) is to protect the privacy of the child and to encourage candor on the part of those participating in the evaluation. Statements made to the evaluator and the evaluator's conclusions about parental abuse and the nature of the relationship between parent and child are well within the protection of the statute. The evaluator's conclusions about parental abuse and the relationship between parent and child are at the very heart of every child custody evaluation.

Meyer argues section 3025.5 carries no penalty for its violation. But section 3111, subdivision (d) provides:

"If the court determines that an unwarranted disclosure of a written [child custody evaluation] confidential report has been made, the court may impose a monetary sanction against the disclosing party. The sanction shall be in an amount sufficient to deter repetition of the conduct, and may include reasonable attorney's fees, costs incurred, or both, unless the court finds that the disclosing party acted with substantial justification or that other circumstances make the imposition of the sanction unjust. The court shall not impose a sanction pursuant to this subdivision that imposes an unreasonable financial burden on the party against whom the sanction is imposed."

Meyer claims section 3111 protects only the written report itself, not the confidential information contained in the report. Suffice it to say, the argument is absurd.

Meyer argues that her questions disclosed no confidential information. It is true that Yeager evaded answering the

questions by stating he did not remember. But the nature of Meyer's questions implicitly disclosed confidential information. One would have to be unduly naïve not to know the information contained in the report.

Meyer argues there were no disclosures to unauthorized persons. She points out the only persons present at Yeager's deposition were the parties, their attorneys, a court reporter, a videographer, and Paul's attorney.

Meyer claims the court reporter and videographer are exempt under section 3035.5, subdivision (a)(2) as officers of the court. But the subdivision does not exempt officers of the court; it exempts a "court employee." (*Ibid.*) Meyer points to no evidence that the court reporter and videographer are court employees. Nor is Paul's attorney exempt under section 3035.5, subdivision (a)(1) as an attorney for a party to the proceeding. The confidential custody report was prepared for the Yeager action. Paul is not a party to that action. Finally, Meyer points to no evidence that the deposition itself was taken under seal.

Section 3111, subdivision (f) defines an "unwarranted" disclosure as one that is "done either recklessly or maliciously, and is not in the best interests of the child."

Meyer argues the evidence does not support a finding of malice or recklessness. But Meyer did not inadvertently disclose information in the report. She intentionally asked numerous questions that disclosed the information. Her actions went beyond reckless; they were intentional.

Meyer argues her conduct did not negatively impact the child's best interest. But Meyer's questions disclosed highly personal information about the child and her family. That supports the trial court's finding that the disclosure was not in

the best interest of the child. Moreover, Meyer fails to explain how disclosing the information in the Anka action is in the best interest of Yeager's child.

Meyer argues she is protected by the litigation privilege. (Civ. Code, § 47, subd. (b).) But the litigation privilege does not apply to sanctions imposed by the trial court. (See *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1527.)

Meyer's reliance on *Bernstein v. Alameda-Contra Costa Medical Assn.* (1956) 139 Cal.App.2d 241 and *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232 is misplaced.

In *Bernstein,* a physician prepared a report that criticized another physician. The report was prepared for use in litigation. The physician who prepared the report was disciplined by a local medical association under a bylaw prohibiting the criticism of another physician. The court held that the litigation privilege bars the enforcement of such a bylaw. (*Bernstein v. Alameda-Contra Costa Medical Assn., supra,* 139 Cal.App.2d at p. 246.)

In *Action Apartment Assn.*, the court held that the litigation privilege preempts a local ordinance imposing civil and criminal penalties on any landlord who maliciously takes action to terminate a tenancy. (*Action Apartment Assn., Inc. v. City of Santa Monica, supra,* 41 Cal.4th at p. 1252.)

Bernstein and *Action Apartment Assn.* concern the preemption of an association bylaw and a local ordinance by Civil Code section 47, subdivision (b). They do not concern the imposition of sanctions by the trial court, an act expressly authorized by section 3111, subdivision (d). If the imposition of sanctions by the trial court were covered by the litigation privilege, the trial courts would have no control over litigation.

II

Meyer contends the sanction order without findings supporting the imposition of sanctions violates due process.

Here the trial court expressly made all the necessary findings for the imposition of sanctions pursuant to sections 3025.5 and 3111. Meyer's actual complaint is that the trial court did not identify the factual basis for those findings. She relies on *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970.

In *Caldwell*, the trial court imposed sanctions pursuant to Code of Civil Procedure 177.5 for failure to comply with a court order. That section requires that the order imposing sanctions "recite in detail the conduct or circumstances justifying the order." The trial court's order simply stated there was "good cause appearing" to justify the sanctions. *Caldwell* held that the trial court stated an inadequate justification for the sanctions. (*Caldwell v. Samuels Jewelers, supra*, 222 Cal.App.3d at p. 977.) *Caldwell* also held "due process requires that any order giving rise to the imposition of sanctions state with particularity the basis for finding a violation of the rule." (*Id.* at p. 978.)

Here, unlike *Caldwell*, the trial court's order did not simply say "good cause appearing." Instead, the order made the factual basis for finding a violation abundantly clear. The order stated: "The court finds that portions of the Confidential Child Custody Evaluation of Dr. Russ and the Psychological Evaluation of Dr. Hoppe conducted in this case [Marriage of Yeager] were disclosed by the questions of Petitioner's counsel in a deposition in the [Marriage of Anka] case . . . . This constituted dissemination of information contained in a confidential custody evaluation in an unrelated case in violation of the prohibitions contained in Family Code sections 3025.5 and 3111(d) and Judicial Council

forms 328 and 329. The court finds that these disclosures were done maliciously, recklessly, and without substantial justification. The court further finds that these disclosures were not in [the child's] best interests. These acts are sanctionable by way of a fine."

That is sufficient to satisfy due process.

Meyer argues the fine violates the ban on excessive fines in the federal and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

Our Supreme Court in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 729, articulated the test for determining whether a fine is unconstitutionally excessive. The court should consider: (1) the defendant's culpability, (2) the relationship between the harm and the penalty, (3) the penalties imposed in similar statutes, and (4) the defendant's ability to pay. (*Id.* at p. 728.)

As to culpability, Meyer willfully disclosed information that she knew was confidential and protected by statute. The harm is not only to Yeager and his child, it is also to the entire process of child custody evaluation. Meyer points to no similar statutes with which we can compare. Finally, Meyer had notice that Yeager was seeking $50,000 in sanctions. Evidence of her ability to pay is entirely within her control. But she made no effort to introduce such evidence.

The trial court did not abuse its discretion in imposing sanctions on Meyer.

III

Although the trial court did not abuse its discretion in sanctioning Meyer, the sanctions against Meyer's client Anna are another matter.

There is nothing in the record to suggest Anna directed or even encouraged Meyer to disclose privileged information. Presumably Meyer, a seasoned trial attorney, was in charge of the proceedings. Most clients assume their attorney's questions are proper and will not expose them to sanctions. There is no suggestion that Anna thought otherwise.

The judgment (order for sanctions) against Meyer is affirmed. The judgment (order for sanctions) against Anna is reversed. Costs are awarded to respondents.

CERTIFIED FOR PUBLICATION.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John R. Smiley, Judge

Superior Court County of Ventura

Honey Kessler Amado, James A. Karagianides for Appellants.

Goldenring & Prosser, Peter A. Goldenring and Edwin S. Clark for Respondent Louis Yeager.

Degani Law Offices, Orly Degani; Law Offices of Salley E. Dichter, Salley E. Dichter for Minor and Respondent E.Y.

Panel 4
Ethics and Technology

The State Bar *of California*

Ethics & Technology Resources

This Ethics and Technology page is a collection of resources addressing attorney professional responsibility issues that arise in connection with the use of Internet websites, email, chat rooms and other technologies. The resources include advisory ethics opinions, articles and MCLE programs. Most of the links to these resources are internal links to other State Bar pages. Some are external links to local or specialty bar association and other websites.

- Ethics Opinions
- Articles
- Online MCLE Programs

The above links organize items by the type of resources. The links below organize the same collection of resources by subject matter.

- Online Communication (email, chat, blogs, etc...)
- Electronic Files (cloud computing, ediscovery, metadata, virtual law office, etc...)
- Advertising (website and email content issues)
- Social Media
- Internet/Email Scams
- Miscellaneous

The links below are to the Rules of Professional Conduct that account for lawyer use of technology.

- Rule 1.4, Comment [2] - updates the duty to provide copies of significant documents to expressly permit provision by "electronic or other means"
- Rule 1.16(e) - clarifies a lawyer's duty to release all client materials when terminating a representation to expressly include release of client materials created or held in "electronic or other form"
- Rule 4.4 - requires a lawyer who receives inadvertently produced materials that obviously appear to be subject to the attorney-client privilege or confidential and privileged to immediately notify the sender
- Rule 7.2(a) - clarifies the advertising rules to provide that a lawyer may advertise through "electronic means of communication, including public media"
- Rule 7.5, Comment - clarifies the scope of the rule governing a lawyer's professional designation to include logos and "URLs"

The State Bar *of California*

Ethics Articles on Technology

Ethics Hotliner and Ethics Alerts

- *What Are "Friends" For?*, Ethics Hotliner, December 2011, Wendy L. Patrick
- *Ethics Alert: Internet Scams Targeting Attorneys*, Ethics Hotliner January 2011, COPRAC
- *New Regulations on Electronic Media Advertising*, Ethics Hotliner Spring 1995, Karen A. Betzner

California Bar Journal (CBJ) and other State Bar articles

- *Advice for road warriors: Navigating airport security with client secrets intact*, California Bar Journal, November 2017, Scott Garner
- *Scammers use real attorney IDs to cheat consumers*, California Bar Journal, June 2016, Amy Yarbrough
- *Scammers continue to target attorneys with check fraud*, California Bar Journal, March 2016, Amy Yarbrough
- *Ethics Opinion: Assess risks before releasing electronic files*, California Bar Journal, August 2015, Amy Yarbrough
- *How to ethically handle confidential information received inadvertently*, California Bar Journal, May 2015, Richard Egger
- *Opinion: Self-promotion in blogging runs fine line of risk*, California Bar Journal, February 2015, Amy Yarbrough
- *Lawyers on the defensive: the ethical considerations of responding to online reviews*, California Bar Journal, November 2014, Drew Dilworth
- *The ethics of attorney blogging*, California Bar Journal, October 2014, Larry Doyle
- *Dishonest clients can mire attorneys in messy bank, Internet scams*, California Bar Journal, February 2014, Amy Yarbrough
- *Foreign Fee Scammer Target* California Bar Journal, October 2013, Diane Karpman
- *My connections keep endorsing me. May I keep them?*, September 2013, Larry Doyle
- *Web offers pearls of wisdom, but also legal tangles*, August 2013, Diane Karpman
- *From the chat room to the courtroom: Social media postings as evidence*, May 2012, Wendy Patrick
- *Mrs. Smith called; she wants her file...*, February 2012, Wendy Patrick
- *Counterfeit check scams continue to target law firms*, January 2012, California Bar Journal

- *State Bar Ethics Opinions on Internet and Technology Use*, The Bottom Line, LPMT, December 2011, Andrew Tuft
- *Ethics Byte: 'Flash sales' for legal services?*, November 2011, Diane Karpman
- *Ethics Byte: Early client education can prevent big problems later*, October 2011, Diane Karpman
- *You saw what? Inadvertent disclosure and the attorney-client privilege*, August 2011, Wendy Patrick
- *Ethics Byte: Internal emails and attorney-client privilege*, July 2011, Diane Karpman
- *Ethics Byte: R u sure u want 2 tweet?*, May 2011, Diane Karpman
- *Beware of Online Scams*, March 2011, California Bar Journal
- *Advertising in the electronic age*, November 2010, Wendy Patrick
- *Why talk when you can text?*, October 2010, Wendy Patrick
- *With "Friends" like these*, June 2010, Wendy Patrick
- *Beware the Latest Internet Scam*, May 2010, California Bar Journal
- *Ethics Byte: Technology offers an E-ticket to a new world of legal practice*, March 2010, Diane Karpman
- *Email Scams Continue to Successfully Target Lawyers*, July 2009, Diane Curtis
- *E-Discovery Pocket Guide*, August 2008, State Bar Litigation Section
- *Embarrassed Lawyers Fall Victim to Internet Scams*, July 2008, Diane Curtis

Other articles

- *Cryptocurrency Is a Brave New World for Legal Ethics*, ABA/BNA Lawyers' Manual on Professional Conduct, Helen Gunnarsson
- *#Denied: US Supreme Court Won't Touch Dispute Over Tweeting Federal Judge*, The Recorder, June 2018, Marcia Coyle
- *Ethics opinion stresses lawyers' duty of confidentiality when blogging*, ABA Journal, March 2018, David Hudson
- *"Linked in" law firm websites*, American Bar Association, December 2017, Peter Geraghty
- *Judge's Facebook Friendship With Attorney Doesn't Require Recusal*, Court Rules, Daily Business Review, August 2017
- *Avvo Lawyer Referral Services Rules to be Unethical*, Louisiana Legal Ethics, June 2017, Dane Ciolino
- *Attorneys: How to Protect Your Small Law Firm Against These New Phishing Scams*, CNA, May 2017, Michael Barrett
- *Law firms must manage cybersecurity risks*, ABA Journal, March 2017, Julie Sobowale
- *Social Media and Judicial Ethics: Part 1 - Friending*, Judicial Conduct Reporter, National Center for State Courts Center for Judicial Ethics, Spring 2017, Celia Ampel

- *Citing twin law firm websites (1 real, 1 fake), bar group urges public to beware*, ABA Journal, August 2015, Martha Neil
- *When Social Media Marketing and Ethics Rules Collide*, Recorder, August 2015, Brian Kabateck and Hrag Kouyoumjian
- *Lawyer can't learn identity of anonymous Avvo critic absent defamation evidence, appeals court says*, ABA Journal, July 2015, Debra Cassens Weiss
- *Ethics and Cybersecurity: Obligations to Protect Client Data*, American Bar Association, March 2015 Section of Labor and Employment Law
- *The Top 10 eDiscovery Developments of 2014 in the Mountain West and California*, The National Law Review, February 2015
- *Can Computers Practice Law*, Corporate Counsel, January 2015, Nina Cunningham
- *Lawyer struggle to reconcile new technology with traditional ethics rules*, ABA Journal, November 2014, James Podgers
- *Lawyer Conned by Check Scam du Jour, Bank Says*, Courthouse News Service, October 2014, Jack Bouboushian
- *Basic Measures Law Firms Can Take to Improve Cybersecurity*, Los Angeles Lawyer, October 2014, Steven G. Mehta and Adam Ashby
- *Free Email and Attorney Client-Privilege*, Texas Lawyer, October 2014, Chris Castle
- *NSA surveillance policies raise questions about the viability of the attorney-client privilege*, ABA Journal, September 2014, David L. Hudson Jr.
- *Matchmaking website connects plaintiffs to litigation funding, but is that ethical?*, ABA Journal, September 2014, Ed Finkel
- *You don't need perfect tech know how for ethics' sake--but a reasonable grasp is essential*, ABA Journal, August 2014, James Podgers
- *FYI: Blogs*, American Bar Association Law Practice Division
- *Blog Technology 101*, American Bar Association, Joshua Poje
- *Controversial Currency: Accepting Bitcoin as Payment for Legal Fees*, Orange County Lawyer Magazine, June 2014, Jennifer Bagosy
- *Lawyers can look up jurors on social media but can't connect with them*, ABA ethics opinion says, ABA Journal, April 2014, Terry Carter
- *Lawyers' definitions of virtual practice vary, but not when it comes to finding success*, ABA Journal, April 2014, G.M. Filisko
- *Guidelines Explain How Ethics Rules Apply to Lawyers' Use of Social Media Networks*, Bloomberg BNA, March 2014
- *Social Media Ethics Guidelines*, New York State Bar Association Commercial and Federal Litigation Section, March 2014
- *common.sense (What happens to the old firm's web address and URL?)*, Virginia Lawyers Weekly, February 2014, Paul Fletcher

- *Building Blogs and Law Firm Web Sites Ethically, Effectively*, Washington Lawyer, January 2014, Walter A. Effross
- *Judge removed from divorce case after sending one party a Facebook friend request*, ABA Journal, January 2014, Stephanie Francis Ward
- *Legal Ethics, Social Media, and the Jury*, Orange County Bar Association, November 2013, Carole J. Buckner
- *Federal Court Rules E-Mails Are Personal Data Under California Song-Beverly Act*, Bloomberg BNA, October 2013
- *Lawyer's response to client's bad Avvo review leads to disciplinary complaint*, ABA Journal, September 2013, Debra Cassens Weiss
- *Bank Entitled to Recover Counterfeit Check Amount From Attorney's Client Trust Account*, Lawyers for the Profession, August 2013
- *Facebook - Friend or Foe? What are the Ethical Risks of Using Facebook in Your Litigation Practice*, Office of Chief Disciplinary Counsel Missouri, August 2013, Nancy Ripperger
- *Legal Ethicists are Playing Catch-Up to Create Social Media Guidelines for Lawyers, Judges*, ABA Journal, August 2013, James Podgers
- *Lawyers, but Not Law Firms, May List Their 'Specialties' in Social Media Profile*, Bloomberg BNA, August 2013, Samson Habte
- *Internet Marketing Raises Ethics Issues but Bar Representative See Few Grievances*, Bloomberg BNA, June 2013, Helen W. Gunnarsson
- *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, St. Mary's Law Journal, June 2013, John G. Browning
- *Lawyers May Solicit Clients by Text Messages if Specific Rules on Advertising Are Followed*, ABA/BNA Lawyers' Manual on Professional Conduct, April 2013, Samson Habte
- *Ethical Rules Require Reasonable Care When Using Technology in the Practice of Law*, Los Angeles County Bar Association - County Bar Update, February 2012, Wendy Wen Yun Chang
- *E-Mail and Attorney-Client Privilege: Cautionary Tales for Employee and Employer*, Los Angeles County Bar Association - County Bar Update, April 2011, Clare Pastore
- *A Legal Battle: Online Attitude vs. Rules of the Bar*, The New York Times, September 2009, John Schwartz
- *Ethical Challenges in the Use of Electronic List Service Communications*, Los Angeles County Bar Association - County Bar Update, February 2009, Lisa Claire Miller
- *Ethics and Lawyer Blogs*, American Bar Association Law Practice Management Section, July/August 2005, William Hornsby, Jr.

The State Bar *of California*

Ethics Opinions Related to Technology

State Bar of California Ethics Opinions

- CAL 2003-164: Forming an Attorney-Client Relationship on a Radio Call-In Show or Similar Forum
- CAL 2004-166: Communicating with Mass Disaster Victims via Internet Chat Room
- CAL 2005-168: Website for Visitors to Submit Legal Questions and Confidentiality
- CAL 2007-172: Accepting Credit Card Payments from a Client
- CAL 2007-174: Electronic Client Files
- CAL 2010-179: Confidentiality and Technology
- CAL 2012-184: Virtual Law Office
- CAL 2012-186: Social Networking
- CAL 2013-188: Confidential Information and Unsolicited Email Correspondence
- CAL 2015-193: ESI and Discovery Requests:
- CAL 2016-196: Attorney Blogging

Los Angeles County Bar Ethics Opinions

- LA 514: Ethical Issues Involving Lawyer and Judicial Participation in Listserv Communications (August 2005)
- LA 525: Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client

Orange County Bar Ethics Opinions

- OCBA 2005-01: File Transfer and Work Product Rules Applicable to Electronic Files

San Diego County Bar Ethics Opinions

- SD 2006-1: Electronic communication technology revolution via computer networks and new opportunities for public access to legal services and for lawyers and law firms
- SD 2011-2: Has an attorney violated his ethical obligations by making an ex parte "friend" request to a represented party?
- SD 2012-1: What conditions, consistent with the California Rules of Professional Conduct and the State Bar Act, must an attorney meet to represent a client in litigation when that client regularly transmits and stores information digitally, including by email?

San Francisco County Bar Ethics Opinions

- SF 2014-1: May an attorney respond to a negative online review by a former client alleging incompetence but not disclosing any confidential information where the former client's matter has concluded? If so, may the attorney reveal confidential information in providing such a response? Does the analysis change if the former client's matter has not concluded?

Other Ethics Committee and Other Advisory Opinions

- ABA Formal Opinion 11-459: Duty to Protect the Confidentiality of E-mail Communications with One's Client
- ABA Formal Opinion 11-460: Duty when Lawyer Receives Copies of a Third Party's Email Communications with Counsel
- ABA Formal Opinion 477R: Securing Communication of Protect Client Information
- ABA Formal Opinion 462: Judge's Use of Electronic Social Networking Media
- ABA Formal Opinion 465: Lawyers' Use of Deal-of-the-Day Marketing Programs
- ABA Formal Opinion 466: Lawyer Reviewing Jurors' Internet Presence
- ABA Formal Opinion 480: Confidentiality Obligations for Lawyer Blogging and Other Public Commentary
- ABA Formal Opinion 483: Lawyers' Obligations After an Electronic Data Breach or Cyberattack
- Alaska Bar Association 2016-1: May a Lawyer Surreptitiously Track Emails and Other Documents Sent to Opposing Counsel
- California Judges Association Judicial Ethics Committee Opinion 66: Judges' Participation in Online Social Networking
- Connecticut Informal Opinion 2013-07: Cloud Computing
- DC Bar Ethics Opinion 362 (2012): Non-lawyer Ownership of Discovery Service Vendors
- Delaware Ethics Opinion 2008-2: Use of the designation "Super Lawyer" or "Best Lawyer" on a lawyer's website or in an email solicitation
- Florida Bar Ethics Opinion 00-4 (2000): Legal Services over the Internet
- Florida Bar Ethics Opinion 12-3 (2013): Cloud Computing
- Illinois State Bar Opinion 15-05 (2015): A law firm's website may contain links to other websites of other businesses and/or organizations.
- Maine Ethics Opinion 207: The Ethics of Cloud Computing and Storage
- Massachusetts Ethics Opinion 12-03 (2012): Google docs and cloud computing
- Michigan Ethics Opinion RI-341 (2007): Lawyer named "Super Lawyer" may advertise it
- Nebraska Ethics Advisory Opinion for Lawyers No. 17-03: Digital Currencies such as Bitcoin as Payment

- Nevada State Bar Formal Opinion No. 32: Attorney-Client Relationship Following the Advent of the Internet and Electronic Means of Communication
- New Hampshire Ethics Opinion 2012-13/4: The Use of Cloud Computing in the Practice of Law
- New York City Bar Formal Opinion 2001-1: Obligations of Law Firm Receiving Unsolicited E-Mail Communications from Prospective Client
- New York City Bar Formal Opinion 2010-2: Obtaining Evidence From Social Networking Websites
- New York City Bar Formal Opinion 2011-2: Third Party Litigation Financing
- New York City Bar Formal Opinion 2012-2: Jury Research and Social Media
- New York City Bar Formal Opinion 2014-2: Use of Virtual Law Office by New York Attorneys
- New York City Bar Formal Opinion 2015-3: Lawyers Who Fall Victim to Internet Scams
- New York State Bar Association Ethics Opinion 842 (2010): Using an outside online storage provider to store client confidential information
- New York State Bar Association Ethics Opinion 877 (2011): Permissible material on a firm's website.
- New York State Bar Association Ethics Opinion 888 (2011): Links on a lawyer's web site to other businesses
- New York State Bar Association Ethics Opinion 915 (2012): Assuming relevant advertising rules are adhered to, a law firm's website may link to the website of a nonlegal entity, and vice versa.
- New York State Bar Association Ethics Opinion 972 (2013): Listing in Social Media
- New York State Bar Association Ethics Opinion 1025 (2014): Virtual law office; Advertising principal law office address
- New York State Bar Association Ethics Opinion 1032 (2014): Responding to a former client's critical commentary on a website
- New York State Bar Association Ethics Opinion 1062 (2015): Financing a law practice; crowdfunding websites
- New York State Bar Association Ethics Opinion 1101 (2016): Advertising; dual practice; link from law firm's website to real estate brokerage information
- North Carolina State Bar 2007 Formal Ethics Opinion 14: Lawyer may advertise the lawyer's inclusion in Super Lawyers and other similar publications subject to certain conditions.
- Ohio Board of Commissioners on Grievances and Discipline Opinion 2013-2: Direct Contact with Prospective Clients: Text Messages
- Oregon State Bar Formal Opinion 2005-107: Unauthorized Practice of Law: Producing General Legal Information Tapes

- Oregon State Bar Formal Opinion 2005-164: Communicating with Represented Persons: Contact Through Web Sites and the Internet
- Oregon State Bar Formal Opinion 2007-180: Internet Advertising: Payment of Referral Fees
- Oregon State Bar Formal Opinion 2011-187: Competency: Disclosure of Metadata
- Oregon State Bar Formal Opinion 2011-188: Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials
- Oregon State Bar Formal Opinion 2013-189: Accessing Information about Third Parties Through a Social Networking Website
- Pennsylvania Bar Association Ethics Opinion 2010-200: Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in Pennsylvania
- Pennsylvania Bar Association Ethics Opinion 2011-200: Ethical Obligations for Attorneys Using Cloud Computing / Software as a Service while Fulfilling the Duties of Confidentiality and Preservation of Client Property
- Pennsylvania Bar Association Ethics Opinion 2014-200: Lawyer's Response to Client's Negative Online Review
- Pennsylvania Bar Association Ethics Opinion 2014-300: Ethical Obligations for Attorneys Using Social Media
- Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6: Attorney's Fees and Crowdfunding
- South Carolina Ethics Opinion 09-10 (2010): May a South Carolina lawyer claim his or her Company X website listing, including peer endorsements, client ratings, and Company X ratings? May a lawyer invite peers and clients to post comments and/or rate the lawyer?
- Texas Ethics Opinion 2015-02 (2015): Social Media and Attorneys
- Virginia State Bar Legal Ethics Opinion 1872 (2013): Virtual Law Office and Use of Executive Office Suites
- Virginia State Bar Legal Ethics Opinion 1873 (2014): Continued Use of Former Firm Name in URL After Firm Name has Changed
- Washington State Bar Ethics Opinion 2008 (2003): Inclusion of the logo for Best Lawyers in America and that the lawyer had the highest rating in advertisements
- Washington State Bar Ethics Opinion 2070 (2004): Linking to the lawyer rating & directory company's independent attorney ratings on a firm's website
- Washington State Bar Ethics Opinion 2215 (2012): Cloud Computing
- Cloud Ethics Opinions Around the U.S., Comparison Table by ABA Law Practice Managment Section
- Metadata Ethics Opinions Around the U.S., Comparison Table by ABA Law Practice Management Section

- New York State Bar Report on the Ethical Implications of Third-Party Litigation Funding, April 2013, Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION INTERIM NO. 12-0003

ISSUES: What are an attorney's ethical obligations regarding a profile of the attorney posted on a professional directory website maintained by a third-party?

DIGEST: An attorney is not responsible for the content of her profile on a professional online directory and rating website created and maintained by a third-party. However, if the attorney chooses to exercise "control" over the profile's content by "adopting" her profile on the directory itself or otherwise using the profile to market her practice, she becomes responsible for its content. When an attorney uses her profile to market her practice, her profile becomes a "communication" on behalf of the attorney, and an "advertisement" for her professional services, and consequently she must comply with the relevant advertising rules and the State Bar Act. This means she cannot post or induce another to post content that is false, misleading, or deceptive and must undertake reasonable efforts to correct any such content.

In addition, if third-party testimonials are posted on the profile, the attorney should take reasonable steps to ensure that such testimonials are not presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations. An attorney who abandons a profile on a third-party directory has no further obligation to correct false, misleading, or deceptive content contained in the profile. An attorney abandons the profile by taking reasonable steps to alert the public that she is no longer monitoring the profile such as posting a notice of that fact on the profile as well as ceasing to use it in marketing her practice.

AUTHORITIES INTERPRETED: Rules 7.1 and 7.2 of the Rules of Professional Conduct of the State Bar of California.[1/]
Business and Professions Code section 6106.
Business and Professions Code sections 6157, et seq.

STATEMENT OF FACTS

Attorney visits an online professional directory website. The site has a separate profile page for Attorney, which includes her "Background Information," with things like the name of her current firm, email address, and other contact information; the undergraduate and law schools from which she graduated; her areas of practice; and a statement that she has no record of discipline. The profile also

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[1/] Unless otherwise indicated, all references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California in effect as of November 1, 2018.

includes a numerical rating of Attorney, which the site asserts is a measure of her professional competency, accomplishments, and reputation.

The web host has set up the site in segments, giving Attorney different rights to edit or post depending on the segment. As to the segment containing her Background Information, Attorney may correct any errors once she has "adopted" her profile listing. She can "adopt" her profile by clicking a "button" on the site, which verifies that she is the profiled attorney, and her profile thereafter indicates to anyone who views it that she has formally adopted it.

A second segment on the site allows the attorney to post any information she wishes about her qualifications, experience, activities, publications, and the like.

A third segment is reserved for content generated by third parties – things like comments, testimonials, and reviews of Attorney's performance by clients, peers, or other interested third parties. Under the site's policies, Attorney is not permitted to correct, edit, or delete information in this segment; only the third-party authors of the material posted there may do so.

Attorney adopts her profile and corrects some errors in the Background Information. Later she posts information in the second segment of the site, including a list of legal articles she has written and some accomplishments not directly related to her law practice, including serving on the board of directors of a non-profit charity, and coaching her daughter's soccer team. She also notes her award as a "Five-Star Lawyer" from another national attorney evaluation website.

In the hopes of increasing her ranking on the site itself, Attorney also convinces her sister, who has never used Attorney's services and has no real knowledge of the quality of Attorney's professional abilities, to post a favorable review, extolling Attorney's handling of a fictitious case.

Attorney also asks Client, for whom she actually and successfully completed a representation, to post a testimonial reviewing her performance. Client posts a testimonial, with no further input from Attorney, stating that Attorney provided excellent service and describing the settlement Attorney helped achieve. However, the testimonial contains incorrect factual information about the representation and settlement, and lacks any disclaimer regarding the likelihood of achieving the same results in similar matters.

Attorney asks Client to post an edited testimonial with the incorrect factual information corrected, and with a disclaimer on the attorney's behalf, but Client refuses. Attorney then contacts the website and explains her ethical duties to correct the inaccuracies and to post the disclaimer in the testimonial, and asks the administrator to edit Client's posting. The website administrator, citing the site's policies, refuses the request and leaves the testimonial as written. Attorney then asks the website administrator to delete the testimonial altogether but, again consistent with the site's policies, the website administrator refuses. Finally, attorney posts the following in the segment of the site where she is allowed to post material:

> TO ANY READERS OF A CLIENT TESTIMONIAL OR OTHER THIRD-PARTY REVIEW OF MY PERFORMANCE AS PART OF THIS PROFILE: PLEASE REALIZE THAT SUCH TESTIMONIAL OR REVIEW DOES NOT CONSTITUTE A GUARANTEE, WARRANTY, OR PREDICTION REGARDING THE OUTCOME OF YOUR LEGAL MATTER, AS THE FACTS AND CIRCUMSTANCES OF EACH CASE DIFFER.

PLEASE ALSO REALIZE THAT THE POLICIES OF THE WEBSITE DO NOT PERMIT ME TO EDIT ANY CLIENT OR OTHER THIRD-PARTY'S REVIEWS OR TESTIMONIALS ON MY PROFILE, AND THUS I CANNOT ATTEST TO THE FACTUAL ACCURACY OF THE STATEMENTS MADE IN ANY SUCH REVIEWS OR TESTIMONIALS.

Attorney thereafter posts a link to the online directory profile on her own professional website, and encourages anyone interested in her qualifications to view her profile on the third-party site.

After several months, Attorney abandons the profile. She no longer posts information to it, removes the link from her professional website, no longer urges clients or others to view her profile on the third-party site, and posts a note in that segment of the website where she is allowed to post that she is no longer monitoring or using the profile.

DISCUSSION

1. When is Attorney's Conduct Related to Online Directory Sites Subject to Attorney Advertising Regulations and Requirements?

All media an attorney uses to promote her professional legal services as an attorney is regulated by Rules 7.1 and 7.2 of the California Rules of Professional Conduct and Business and Professions Code sections 6157 et seq.; see also California State Bar Formal Opn. No. 2001-155.[2/] The rules and statutes prohibit an attorney from making a communication that is false, misleading, or deceptive.[3/] Rule 7.1, Comment [4] further states: "[a] communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for clients in similar matters without reference to the specific factual and legal circumstances of each client's case."

[2/] The ethics opinions cited herein may refer to Rules of Professional Conduct in effect prior to November 1, 2018 including, but not limited to, former rule 1-400 (Advertising and Solicitation.)

[3/] Rule 7.1 provides:

> (a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

Business and Professions Code section 6157(c) provides:

> (c) "Advertise " or "advertisement" means any communication...that solicits employment of legal services provided by a member, and is directed to the general public and is paid for by, or on behalf of, an attorney.

Business and Professions Code section 6157.1 provides:

> No advertisement shall contain any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of the circumstances under which they were made, not false, misleading or deceptive.

Professional directory websites are available to members of the general public, and thus by definition, are directed to a "person" and, if used to market the attorney's services, concern the availability for professional employment of the lawyer or firm. A profile becomes "by or on behalf" of the attorney when the attorney exercises control over it by "adopting" it as directed by the site itself in order to market her practice. The profile would also become "by or on behalf" of the attorney if the attorney used the profile to market his or her practice even without "adopting" the profile as directed by the site itself. Hence, adoption of the profile, or any other use of the profile in an attorney's marketing of her services, obligates the attorney to ensure the information she posts on the profile is truthful and not deceptive, or misleading to the public as required by rules 7.1 and 7.2 and Business and Professions Code sections 6157 et seq., and to take reasonable steps to ensure that the factual content on the profile page posted by others is similarly truthful and not misleading or deceptive.

On the other hand, an attorney who is not aware of her profile on a professional directory website, or who is aware of the profile but takes no action to use or benefit from the profile, is not responsible for any information contained thereon, inaccurate or not, because the information is not made "by or on behalf of" the attorney.

In our hypothetical, when Attorney adopted her profile and when she linked the profile page to her own professional website, the profile became a communication by or on behalf of Attorney within the meaning of rules 7.1 and 7.2 of the Rules of Professional Conduct and an "advertisement" under the State Bar Act. Consequently, she was thereafter subject to the ethical obligations flowing from those rules and statutes regarding her profile, including ensuring, to the extent reasonably possible, that only accurate, non-misleading factual information appears on the profile.[4/] Such duties last until Attorney abandons her use of the profile.

2. Effect of Posting False Information Solicited by Attorney

Knowingly posting false or misleading information on a profile, or causing others to do so, violates the provisions of rule 7.1(a), which prohibits a false or misleading communication about the lawyer or the lawyer's services. The communication is false or misleading if it contains a material misrepresentation of fact or law. Business and Professions Code section 6157.1 also prohibits advertisements containing any "false, misleading or deceptive" statement. Consequently, the posting of the solicited false review of Attorney's services by her sister, who had never used those services, violates rule 7.1(a) and Business and Professions Code section 6157.1. Further, the solicitation of her sister by Attorney to publish deceptive information to the general public may also violate Business and Professions Code section 6106, prohibiting "act[s] involving moral turpitude, dishonesty or corruption."

3. Effect of Posting Truthful Information and Ratings Information from "Bona Fide" Organizations and the Website Itself

A state may not constitutionally prohibit, or impose discipline for, an attorney's communication of truthful information in an advertisement. (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*(1980) 447 U.S. 557, 566 [holding that truthful commercial speech is entitled to constitutional protection]). As such, the posting of the legal articles Attorney had written is entirely proper.

[4/] The Committee does not believe there is any set rule with regard to the frequency with which Attorney must revisit her profile to ensure the continuing accuracy of the information posted on her profile page after first adopting it or using it to market her practice. However, to ensure compliance with her ethical obligations, some periodic monitoring of the profile should be done.

Attorney's posting of her service on the board of directors of a non-profit charity and her soccer coaching is also constitutionally protected. (*Ibanez v. Florida Dep't of Business and Prof. Regulation* (1994) 512 U.S. 136 [holding an attorney's truthful statements that she was a CPA and a Certified Financial Planner in her advertising was constitutionally protected commercial speech without an evaluation of whether such information was of value to prospective clients]). Therefore, the posting of Attorney's non-legal community and business service is proper, and may also be relevant to a legal consumer who wants to retain an attorney who is active in the community or has particular experience outside of the practice of law.[5/]

With regard to Attorney's "Five-Star" rating from a national attorney evaluation organization, the Supreme Court has ruled that an attorney's rating by a bona fide organization with clear evaluation standards is also constitutionally protected commercial speech. (See, *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*(1990) 496 U.S. 91 ("*Peel*") [holding an attorney's statement on his stationery that he was a "Certified Civil Trial Specialist" according to the National Board of Trial Advocacy was constitutionally protected because it was not misleading and came from a "bona fide" organization]).

While *Peel* establishes that attorneys may reference accolades or ratings from "bona fide" organizations in their advertisements, it provided only minimal guidance as to what makes an organization "bona fide." That is, while it made a fact-specific argument in *Peel* itself that an award from the National Board of Trial Advocacy was "bona fide" because the group's standards for bestowing such awards were especially rigorous,[6/] the only general direction the Court provided as to what makes an organization "bona fide" was dicta. Specifically, the Court cautioned that, "if the certification had been issued by an organization that had made no inquiry into petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement, even if true, could be misleading." (*Id.* at 102.)

There is similarly little guidance on this issue by a California court or bar association. However, the ethics committees of several other states have addressed the question of what a "bona fide" organization is for purposes of legal ratings and awards, and the consensus is that if the organization employs a selection methodology based upon objective or other quantifiable factors relating to an attorney's qualifications, such as years of practice, publications, types of experience, reputation within the legal community, and client and other third-party testimonials, the organization may be considered "bona fide" and the rating or appellation awarded by such an organization can be used and cited by the

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[5/] See also California State Bar Formal Opn. No. 1982-67 (finding that listing the qualifications of firm members in letters mailed to non-clients could assist the public in making, "an informed choice of legal counsel, although members of the bar should take care that their communications are not false, misleading or deceptive.").

[6/] The Court stated, "NBTA has developed a set of standards and procedures for periodic certification of lawyers with experience and competence in trial work. Those standards, which have been approved by a board of judges, scholars, and practitioners, are objective and demanding. They require specified experience as lead counsel in both jury and nonjury trials, participation in approved programs of continuing legal education, a demonstration of writing skills, and the successful completion of a day-long examination. Certification expires in five years unless the lawyer again demonstrates his or her continuing qualification. NBTA certification has been described as a 'highly-structured' and 'arduous process that employs a wide range of assessment methods.'" (*Peel v. Attorney Registration & Disciplinary Comm'n of Illinois* (1990) 496 U.S. 91, 95).

attorney.[7] Some of these sources also emphasized *Peel's* dicta that an award from an organization which charged or accepted a fee for a rating is likely not one from a "bona fide" organization since there is a risk of a legal consumer being misled into believing that such an award was a legitimate reflection of the attorney's competence and not merely available for purchase by any attorney with sufficient means. (See, e.g., State Bar of Virginia Legal Advertising Opinion A-0114, at 2 ["However, attorneys may not ethically communicate to the public credentials that are not legitimate. For example, if a particular credential or certification is based not upon objective criteria or a legitimate peer review process, but instead is available to any attorney who is willing to pay a fee, then the advertising of such credential or certification is misleading to the public and is therefore prohibited."].)

It is thus appropriate for Attorney to post on her profile her rating as a "Five-Star Lawyer" from another national attorney evaluation website if it is based upon objective factors relating to her qualifications and professional reputation, and not merely purchased by Attorney.

A separate question is whether the numerical rating provided by third-party's website itself is an award from a "bona fide" organization and thus within the constitutional protections of *Peel*. So long as the site does not require or accept payment by the attorney for providing or increasing an attorney's rating, and the criteria for calculating the rating on the site are in line with what other "bona fide" groups use in deciding to bestow an award to an attorney such as years in practice, awards, legal publications, reputation, etc., it is likely an attorney website's internal rating does not implicate any ethical concerns and an attorney's use of it as part of her profile would be constitutionally protected.[8]

4. Testimonials and Reviews by Third Parties

Online professional directory websites often provide opportunities for clients, peers, and other interested third parties to post testimonials, endorsements, and reviews of individual attorneys on the attorney's profile. Comment [4] of rule 7.1 states that a communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Rule 7.1 does not hold testimonials or endorsements to be presumptively deceptive or misleading, and does not affirmatively

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[7] See e.g., Alaska Bar Association Ethics Opinion 2009-2; State Bar of Arizona Opinion No. 05-03 (July 2005) (providing that a listing in *The Best Lawyers in America* was a "bona fide" award); Delaware State Bar Association Committee of Professional Ethics, Opinion 2008-2 at 7-8 (stating that an attorney's listing in *Super Lawyers* and *Best Lawyers* were "bona fide" awards); State Bar of Iowa Ethics Opinion 07-04; North Carolina State Bar 2007 Formal Ethics Opinion No. 14; South Carolina Bar Association Advisory Opinion 09-10; State Bar of Virginia Legal Advertising Opinion A-0114. See also, *In re Opinion 39 of the Comm. on Atty. Advertising* (2008) 197 N.J. 66, 79 [961 A.2d 722] (vacating ethics opinion which found ratings misleading as the result of court case *Dwyer v. Cappell* (3rd Cir. 2014), 762 F.3d 275 on ground that truthful disclosure of such information was protected by the First Amendment).

[8] In addition to checking on the site's criteria for providing a numerical rating, the Committee suggests that an attorney investigate and understand all the policies of the site with respect to the ability to post disclaimers or correct misleading content before adopting it or otherwise using it to market her practice.

require a disclaimer. Comment [4] to rule 7.1 notes, however, that an appropriate disclaimer or qualifying language "often avoids creating unjustified expectations."[9/]

The factually inaccurate testimonial posted by Client presents a number of potential ethical problems for Attorney. These problems stem from the fact that rules 7.1, 7.2, and the related advertising provisions in the State Bar Act presume the attorney is generally in charge of both the production and distribution of the advertisement, and has editorial control over it. Hence if a client is willing to have his or her testimonial published for the attorney's benefit in an advertisement, the accuracy of the client's statements, and the ability to add a disclaimer or qualifying language, is presumed to be within the attorney's control.

However, when the content comes directly from clients and other third parties, and these testimonials and reviews are posted on an independently-run site, final editorial content of what is said has passed to the clients and third parties who author the statements, and to the website administrator who controls their edits. If neither the client nor the administrator will allow the correction of false or misleading content, or agree to append an appropriate disclaimer to the client's testimonial, an attorney is left in a potential ethical quandary – being required to take certain measures in an advertisement that is on her behalf, but being unable to implement them.[10/]

The Committee believes that common sense dictates that the attorney's reasonable, good faith attempt to meet the requirements of rules 7.1, 7.2, and the related State Bar Act provisions should be sufficient to satisfy her ethical obligations. Some steps an attorney should consider taking are:

1. *Requesting that the client, or other third-party author of the content, either revise the posting to make it accurate and complete so as to be in compliance with the attorney's ethical obligations, or delete the posting altogether.*

2. *Requesting that the website administrator correct or remove any inaccurate information, add an appropriate disclaimer, or delete the posting altogether.*

If neither Client nor the website administrator agrees to any such changes, the attorney should attempt to post something herself on the site in order to satisfy her ethical obligations. Such posting should likely include the language of an appropriate disclaimer or qualifying language as stated in Comment [4] of rule 7.1, or a statement that the editorial policies of the site are such that the attorney cannot vouch for the factual accuracy of third-party content, either generally or as regards a particular post. Of course, other ethical concerns such as privilege, confidentiality, and loyalty may limit the specificity of what can

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[9/] Business and Professions Code sections 6157.2 through 6158.3 still prohibit certain advertising practices, require disclaimers under specified circumstances, and create some evidentiary presumptions arising from advertising, none of which apply to the facts presented. Accordingly, the committee does not address them in this opinion.

[10/] In *Hassell v. Bird* (2018) 5 Cal.5th 522 [234 Cal.Rptr.3d 867], the court ordered that the poster of defamatory review on Yelp to remove the offending posting from the website. However, the court would not compel Yelp to do so, finding that the latter was protected as a provider of an interactive computer service under the Communications Decency Act of 1996, 47 U.S.C. section 230.

be said by the attorney;[11/] however, a general statement that the attorney cannot correct any inaccuracy in a third-party's post on the profile due to the editorial restrictions imposed by the site's administrator, and a general disclaimer, should suffice in most situations.

Rule 7.1 states nothing about the proximity of the disclaimer to the testimonial or the proximity of any disavowal or posting of correct information to the third-party post that such statements are designed to correct. However, with electronic webpages administered by others, it is entirely possible that the disclaimer or disavowal in the segment of the website where the attorney can post information might be several "screens" away from the testimonial or review itself, and thus, an interested reader would never see it or even know to look for it. In this situation, the Committee believes that the attorney can only be ethically required to do what she can reasonably do, and that the posting of a disclaimer or disavowal as close as reasonably possible to the testimonial on the profile should be sufficient to meet her ethical obligations. The alternative would be to prohibit the attorney from using or adopting the third-party profile at all once the attorney discovered that any inaccuracies in third-party postings could not be corrected and any required disclaimer could not be placed in a prominent enough location to be easily or reliably noticed. This could lead to attorneys choosing not to take advantage of such websites in the first place so as to avoid an ethical gamble. As we believe attorney profiles in professional online directory and rating websites maintained by third parties provide information that some legal consumers value in selecting counsel, we believe allowing the attorney to continue using the profile with any disclaimer or disavowal as close as reasonably permitted to the testimonial or review is preferable, and consistent with the policies behind rules 7.1, 7.2, and the related provisions of the State Bar Act.

Finally, as we discuss in greater detail below, another option the attorney should at least consider when faced with inaccurate factual information that cannot be corrected on a ratings website posted by others is to abandon the profile altogether.

In our hypothetical, Attorney acted ethically once she discovered Client's posting. She asked Client to edit the post; when Client refused, she asked the website administrator to make ethically required corrections and insertions; and, when the administrator refused, she posted a disclaimer and general disavowal in the section of the website that was available for her to do so, which was as proximate as reasonably possible to the testimonial itself. We do not believe that Attorney was required to abandon the profile under these facts because she was able to post a general disclaimer and disavowal in the profile, which ameliorates any misleading effect of the client's inaccurate testimonial. However, when the attorney is prohibited from taking any corrective measures, for example because the website administrator will not allow her to post any disclaimer or disavowal, abandonment may be the only reasonable course.

[11/] See, e.g., Los Angeles County Bar Association Professional Responsibility and Ethics Committee, Formal Opinion No. 525 (2012) (opining an attorney may respond to website comments from former client consistent with client confidentiality and in a response that "is proportionate and restrained."); Bar Association of San Francisco, Opinion No. 2014-1 (opining an attorney may respond to negative online reviews provided no confidential information is revealed, and there is no adverse effect on the matter the attorney previously handled for the client). See also, *In the Matter of Betty Tsamis*, Illinois Attorney Registration and Disciplinary Commission No. 6288664 (attorney charged with violation of client confidentiality obligation when responding to client criticism on AVVO).

5. Abandonment of Third-party Profile

The obligation to take reasonable steps to correct known inaccurate, misleading, or incomplete information contained on the attorney's profile continues until the attorney abandons it. An attorney abandons the profile by taking reasonable steps to alert the public that she is no longer monitoring the profile such as posting a notice of that fact on the profile as well as ceasing to use it in marketing her practice.

Whether an attorney has abandoned a profile posted on an online professional directory site is a case-by-case, fact-based inquiry. Although the Committee cannot define all the ways in which an attorney may demonstrate her abandonment of the profile, some tangible evidence of abandonment includes no longer referring clients to the profile and no longer making reference to the profile on her own site. Abandonment may take place at any time, from immediately following adoption of the profile, to years later if the attorney continually uses her profile to market her practice. Once an attorney abandons the profile, she is not thereafter responsible for its content. Here, Attorney's posting a notice that she is no longer using or monitoring it, and her actions in no longer referring clients to it or referring to it on her own site, should be sufficient to demonstrate her abandonment of it.[12/]

CONCLUSION

An attorney is not responsible for a profile on an online professional directory website which she has not adopted or otherwise used in order to market her practice. Adopting a profile, or otherwise using it to market her practice, makes the profile a communication on the attorney's behalf, and an advertisement for her professional services, and obligates an attorney to take reasonable steps to ensure the information on the profile is accurate and not misleading.

Attorneys may not post false, misleading or deceptive material on a profile under rule 7.1 and Business and Professions Code section 6157.1, nor request others to do so. Attorneys may, however, post truthful information in their advertisements, regardless of whether it is directly related to the practice of law. Attorneys may also report their ratings or accolades from a bona fide attorney evaluation website (including from the website hosting the profile) which uses verifiable criteria based upon the attorney's experience, accomplishments, professional reputation, and the like. Attorneys should avoid using ratings issued for a price.

An attorney must take reasonable steps to correct any inaccuracies posted by a third-party in a profile adopted or used by the attorney. These steps can include asking the party who posted the information, or the web site administrator, to edit the posting so that it only reports accurate, non-misleading content, so long as client confidentiality and other ethical requirements permit. If such editing is not possible, attorney should disavow inaccurate information in the third-party postings, either generally or specifically.

When a testimonial on a profile adopted or used by the attorney appears without a disclaimer, and the absence of a disclaimer could lead a reasonable person to form an unjustified expectation of the same results in similar matters, the attorney should take reasonable steps to correct the situation. Again these

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[12/] Abandoning the third-party profile would clearly not cure an ethical violation resulting from a lawyer's knowingly posting false, misleading, or deceptive information on the profile or causing others to do so, as in this hypothetical.

steps include a request to the person who posted the testimonial or the website administrator to provide a proximally close disclaimer. If such requests are denied, a general disclaimer regarding all testimonials on the profile or abandoning the profile altogether are other actions which should be considered to fulfill an attorney's ethical obligations.

An attorney is not responsible for profile content on an online professional directory posted after she has abandoned the profile by no longer using the profile in marketing her practice. An attorney who has decided to abandon a profile should take reasonable steps demonstrating such decision, such as posting that she is no longer monitoring or using the profile, and not directing clients to it.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Trustees, any persons or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

Panel 5
Attorney Competence

The State Bar *of California*

Senior Lawyers Resources

Many attorneys reach their senior years with questions about what to do if they faced health problems that might affect how long they can work. They may be thinking of closing their practices or how to handle business if they were to suddenly pass away.

This Senior Lawyers Ethics Resources page is a collection of resources addressing attorney professional responsibility issues that arise in connection with retirement, disability, and death of attorneys. The resources include rules, advisory ethics opinions, articles, publications, and MCLE programs. Most of the links to these resources are internal links to other State Bar pages. Some are external links to local or out-of-state bar association and other websites.

- Rules and Statutes
- Ethics Opinions
- Publications and Guides
- Articles
- Online MCLE
- Forms
- Links
- Contact Us

Additional resources regarding closing a law practice and attorney surrogacy are listed below.

- Closing a Law Practice
- Attorney Surrogacy

Pro Bono Practice Program

The State Bar's Pro Bono Practice Program allows retired attorneys, as well as those taking a temporary break from the active practice of law, to assist low-income Californians on a pro bono basis.

Take the SAGE Test

Ohio State University's **cognitive screening test**

The State Bar *of California*

Publications and Guides

Selected California Publications

- A Wellness Guide for Senior Lawyers and their Families, Friends and Colleagues
- Guidelines for Closing or Selling a Law Practice
- Practitioner's Checklist (for the sale or closing of a law practice)
- Handbook on Client Trust Accounting for California Lawyers
- Seniors & the Law: A Guide for Maturing Californians
- Get the Legal Facts of Life: "What Should I Know About Elder Abuse?"
- Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel

Selected ABA Publications

- ABA Policy on Advance Designation of Caretaker or Surrogate Lawyer
- Chart - State by State Caretaker Rules when Lawyer Disappears, Dies, or is Declared Incompetent
- Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers
- Judicial Determination of Capacity of Older Adults in Guardianship Proceedings
- Experience, The Senior Lawyer Magazine
- Partner Departures and Lateral Moves
- Turning Points: New Paths and Second Careers for Lawyers
- Emeritus Attorney Programs: Best Practices and Lessons Learned
- Lawyer's Toolkit for Health Care Advance Planning
- Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events

Other Publications

- NOBC-APRL Joint Committee on Aging Lawyers - Final Report

Take the SAGE Test

Ohio State University's **cognitive screening test**

PUBLIC MATTER—DESIGNATED FOR PUBLICATION

Filed March 28, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 16-O-10339
	)	
JOSEPH PATRICK COLLINS,	)	OPINION
	)	
A Member of the State Bar, No. 163442.	)	
	)	

This matter is before us on appeal by the Office of Chief Trial Counsel of the State Bar (OCTC). OCTC charged Joseph Patrick Collins with five counts of failing to obey civil court sanctions orders, and Collins stipulated to all of the predicate facts as well as culpability. However, following a one-day trial on aggravation, mitigation, and the level of discipline, a hearing judge sua sponte dismissed the case, finding the sanctions orders were void or voidable and Collins had no obligation to comply with them. OCTC asks that we reverse the judge's decision and find culpability. As to discipline, it seeks a one-year stayed suspension. Collins did not appeal, but asks that we affirm the dismissal.

We independently review the record (Cal. Rules of Court, rule 9.12) and reverse the hearing judge.

The parties stipulated that Collins was served with all five sanctions motions and orders, that he was named in the sanctions orders along with his client, and that he was jointly and severally responsible for the debt. The superior court records indicated that the motions named only Collins's client, while the resulting sanctions orders named Collins's client and his counsel, the Law Offices of Joseph P. Collins. The hearing judge disregarded the stipulation and found

that the orders were void or voidable as to Collins since he was not named in the motions or personally named in the sanctions orders.

We enforce the factual admissions in the parties' stipulation, which demonstrate that Collins was aware of the sanctions orders, which he was subject to, and failed to comply or challenge them in the courts of record. We disagree with the hearing judge that the sanctions orders can be collaterally attacked for the first time in these proceedings. After considering and weighing aggravation and mitigation, we find no basis to deviate from the applicable disciplinary standard, which minimally calls for a period of actual suspension. We therefore recommend a 30-day actual suspension, which we note is at the lowest end of the standard's range but is sufficient to protect the public, the courts, and the profession.

I. FACTUAL[1] AND PROCEDURAL BACKGROUND

Collins was admitted to the practice of law in California on January 8, 1993. On September 21, 2016, OCTC filed a Notice of Disciplinary Charges against him alleging five separate violations of Business and Professions Code section 6103 for willfully disobeying civil court sanctions orders in a single client matter.[2]

A. The Parties' Joint Stipulation

On January 10, 2017, OCTC and Collins filed a joint stipulation as to facts, admission of documents, and conclusions of law (stipulation). In summary, the parties stipulated that Collins

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[1] The factual background is based on the parties' joint stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

[2] All further references to sections are to the Business and Professions Code. Section 6103 provides that an attorney's "wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

was culpable as charged of five counts of violating court orders, as supported by the following facts.

Collins represented the defendant, Martin Caverly, in a civil case involving breach of contract.[3] On March 25, May 6, June 24, July 1, and July 15, 2015, the superior court heard and granted five separate discovery motions brought by the plaintiff to compel Caverly's responses to various discovery requests (form interrogatories, special interrogatories, demand for production of documents [set one], demand for production of documents [set two], and his appearance for deposition). With each motion, the plaintiff also sought sanctions. In total, the court ordered monetary sanctions of $6,300 ($1,185 for each document-related discovery violation [$4,740] plus $1,560 for compelling Caverly's deposition) against Collins and Caverly, jointly and severally, payable to the plaintiff within a specified period of time (ranging from 20 to 30 days).

The plaintiff served notice of each ruling on Collins, which Collins received. The sanctions were not paid, nor were discovery responses provided as ordered. For this reason, on September 17, 2015, the court granted the plaintiff's motion for terminating sanctions and entered Caverly's default. The plaintiff served notice of this ruling on Collins, which he received. Judgment was entered against Caverly on November 4, 2016.[4] The amount of the judgment did not include the sanctions ordered against Collins and Caverly, and, as of the date of trial in this matter, none of the sanctions had been paid to the plaintiff.

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[3] *O'Connor Peabody Holdings, LLC, et al. v. Martin B. Caverly*, Los Angeles County Superior Court, Case No. SC122588.

[4] The 2016 date appears to be a typographical error, as the superior court records show that judgment was entered on November 4, 2015. For our purpose, this error is insubstantial and does not affect the culpability or disciplinary analysis. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 19, 23, fn. 6 [modifications made by Review Department in referee's decisions did not affect recommended discipline and were deemed insubstantial].)

B. The Trial Proceeding

Since the parties did not agree to the level of discipline for Collins's stipulated misconduct, a one-day trial on that issue was held on January 20, 2017. The parties had a full and fair opportunity to present evidence and testimony, opening and closing arguments, and posttrial briefing.

At the commencement of the trial, the hearing judge received the stipulation into evidence, along with other exhibits and Collins's declaration. Collins also testified on his own behalf and was the sole witness in the proceeding. In both his declaration and his trial testimony, Collins explained that the decision not to comply with the discovery requests was client-driven. He stated that Caverly wanted to keep litigation expenses to a minimum, and made the tactical decision to cease participation and let the case terminate by default. Thus, Caverly did not respond to discovery requests or attend his scheduled deposition, and neither Caverly nor Collins opposed the motions to compel and requests for sanctions, appeared at the hearings on those motions, sought reconsideration, or otherwise challenged or appealed the sanctions awards. Although Collins was served with and received copies of all pleadings and orders, he contends that he was simply following Caverly's instructions.

On January 27, 2017, the hearing judge took Collins's disciplinary matter under submission.[5] However, before issuing her decision, she held a telephonic status conference on March 3, 2017, during which she informed the parties of her concerns about whether the stipulated conclusions of law were adequately supported by the record. In particular, she had reviewed the underlying motions and orders in the civil case and questioned whether the sanctions orders against Collins were valid and enforceable. The judge also noted that the

[5] The judge gave the parties until January 27, 2017, to submit closing briefs. OCTC timely filed its brief, but Collins failed to file a conforming brief. He attached a copy of his brief to an email to the Hearing Department, but the clerk rejected it because it was not signed or accompanied by a proof of service. (State Bar Ct. Rules of Prac., rule 1112(a).)

plaintiff's sanctions motions only sought recourse against Caverly, who, according to Collins, directed the litigation strategy. She further expressed doubts about whether Collins had adequate advance notice that he would be subject to sanctions along with his client because he was not named in the sanctions motions. The judge then asked the parties to file supplemental briefs addressing whether: (1) the sanctions orders were final and binding on Collins individually; and (2) payment of the sanctions was an act that Collins "ought in good faith to have done." Her verbal directives were also reflected in a March 6, 2017 order, and both parties filed the requested briefs on March 20, 2017.

C. The Hearing Judge's Decision

On April 27, 2017, the hearing judge issued her decision. She rejected the parties' five stipulated conclusions of law[6] and dismissed Collins's disciplinary case, finding that the sanctions orders against him were either void or voidable. While she stated that the parties remained bound by the stipulated facts under rule 5.58(G) (parties bound by stipulated facts even if conclusions of law are rejected), she nevertheless found that the superior court sanctions orders themselves did not name Collins individually, but instead named the Law Offices of Joseph P. Collins, and that, in any event, neither Collins nor his law firm was given prior notice of any sanctionable conduct on their part.

II. COLLINS IS CULPABLE OF FAILING TO OBEY COURT ORDERS (§ 6103)

To prove the section 6103 violations, OCTC must establish that Collins knew the sanctions orders against him were final and binding and that he intended his acts or omissions. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.)

[6] In his posttrial brief, Collins asked to withdraw his stipulated conclusions of law. The hearing judge denied the request as moot in her April 27, 2017 decision since she dismissed the case.

We find that the parties' stipulated facts, the superior court records in evidence, and Collins's trial testimony and declaration clearly and convincingly[7] establish his culpability. Collins stipulated that he represented Caverly in the civil court action and testified that he was aware of and joined in Caverly's tactical decision not to participate in discovery. The court records show that Collins was timely served with copies of all five sanctions motions against Caverly, yet Collins chose not to file responsive pleadings or appear at the hearings so that the case could conclude by default. The court records also indicate that the sanctions orders were issued against Caverly and *his counsel*, the Law Offices of Joseph P. Collins, jointly and severally. Additionally, Collins stipulated that he was individually responsible for this obligation, that he was served with and received each of the sanctions orders, and that the sanctions had not been paid.

Under these circumstances, we find that Collins was aware of the orders and had ample time and opportunity to contest their validity in the courts of record. He failed to do so. Thus, he was obligated to comply with the orders, and "not simply disregard them" (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47), even if he was following his client's instructions. As we stated in *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403: "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients. [Citations.] In the case of court-ordered sanctions, the attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed."

[7] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Given Collins's knowing and intentional disobedience of the five unchallenged sanctions orders, we find him culpable of five violations of section 6103.

III. THE HEARING JUDGE SHOULD HAVE ABIDED BY THE PARTIES' STIPULATED FACTS AND THE UNCHALLENGED SANCTIONS ORDERS

We disagree with the hearing judge's attack in this disciplinary proceeding on the validity of the civil court sanctions orders. As discussed below: (1) the hearing judge failed to adhere to the parties' stipulated facts, which expressly resolved that Collins was individually obligated to pay the sanctions; (2) Collins forfeited his ability to contest the sanctions orders by not seeking relief in the courts of record; and (3) the unchallenged orders are now final and binding for attorney disciplinary purposes.

A. Collins Is Individually Liable for the Sanctions

Contrary to the parties' mutual understanding and agreement that Collins was obligated to pay the sanctions, the hearing judge concluded that Collins was not individually responsible for the debt because the sanctions orders named the Law Offices of Joseph P. Collins. We find the judge erred, and should have abided by the parties' stipulated facts, which, we note, are binding on the parties and amply supported by the record and the law. (Rule 5.58(G); *Inniss v. State Bar* (1978) 20 Cal.3d 552, 555 ["Ordinarily, . . . the stipulated *facts* may not be contradicted; otherwise, the stipulation procedure would serve little or no purpose, requiring a remand for further evidentiary hearings whenever the attorney deems it advisable to challenge the factual recitals"].)

There is no question that Collins represented Caverly in the civil action, and that as Caverly's counsel, Collins was, in part, the subject of the sanctions orders. Thus, the sanctions against the Law Offices of Joseph P. Collins constituted sanctions against Collins. The title, "Law Offices of Joseph P. Collins," includes no corporate or limited liability partnership

indicia,[8] and there is no evidence in the record that establishes that the Law Offices of Joseph P. Collins is anything but Collins operating under that name as a solo practitioner. Nevertheless, even if Collins enjoyed corporate or limited liability status, he cannot escape personal liability for his own professional malfeasance. (See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 8–9; see also § 6068, subd. (o)(8) [attorney's duty to notify State Bar of reportable sanctions includes sanctions against law firm or law corporation in which attorney was partner or shareholder at time of conduct complained of].)

B. Collins Had Notice of the Sanctions Orders and Chose Not to Challenge Them

Relying on *In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070 and *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, the hearing judge sua sponte determined that even if Collins were individually obligated to pay the sanctions, the orders are void or voidable because he was not named in the sanctions motions and was therefore not aware that his conduct could be the subject of possible sanctions. The judge, however, failed to recognize that Collins stipulated that he had actual notice that he had been sanctioned, and at that point, "he was obligated to obey the order[s] unless he took steps to have [them] modified or vacated, which he did not do. [Citations.]" (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 1, 9; accord, *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951–952 [technical arguments regarding validity of civil court orders waived if orders became final without appropriate challenge; "[t]here can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid"]; see also *Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166 (*Jansen*).) Under facts similar to Collins's case, the plaintiff in *Jansen* sought sanctions against Codercard, after the company and its attorney failed to attend mandatory arbitration proceedings.

[8] See State Bar Rules 3.152(B) (corporate naming requirements) and 3.174(B) (limited liability partnership naming requirements).

(*Jansen,* at p. 1168.)[9] When the trial court imposed monetary sanctions against the attorney only, the attorney did not object or seek reconsideration. (*Id.* at pp. 1168–1169.) The attorney later sought to invalidate the orders based on lack of notice, but the appellate court found he had forfeited that right: "In failing to raise the issue of inadequate notice during the hearing, failing to request a further hearing on the matter, and failing to file a motion to reconsider the issue, [the attorney] waived any objection he may have had upon that ground [Citations.]." (*Id.* at p. 1170.)

Likewise, Collins failed to object at the superior court level or seek appellate recourse. He has thus waived his right to challenge the orders.

C. The Sanctions Orders Are Now Final and Binding for Purposes of Attorney Discipline

The sanctions orders against Collins are now final and binding for purposes of this disciplinary matter. The hearing judge's collateral attack on the orders and her finding that they are void or voidable during this proceeding were beyond her authority. Specifically, we disagree with the judge that *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, establishes that the State Bar Court has the limited jurisdiction to determine the validity of civil court orders.

In *Respondent X, supra,* 3 Cal. State Bar Ct. Rptr. 592, an attorney deliberately violated the confidentiality provision of a court order enforcing a settlement agreement and he was subsequently convicted of civil and criminal contempt. The attorney sincerely believed he was acting in support of sound public policy in violating the order, but lost his appeals of both the underlying order and the contempt findings. In assessing culpability under section 6103, we held: "As to the validity of the court's confidentiality order, . . . we properly defer to the

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[9] The plaintiff made this request pursuant to Code of Civil Procedure section 128.5, which authorizes a trial court to issue sanctions against "a party, the party's attorney, or both," for "[f]rivolous actions or delaying tactics." Collins attempts to distinguish these sanctions from the discovery sanctions imposed in his case. However, for purposes of due process and notice requirements, we see no tangible difference.

collective judgment of the courts of record which heard the contempt proceeding and which found respondent guilty and to the courts which considered respondent's subsequent appeal and requests for reconsideration and certiorari." (*Id.* at p. 605.) We emphasized that the attorney "had his opportunities to litigate *in the courts of record* his claims that the order he violated was void" and that there was "no valid reason to go behind the now-final order." (*Ibid.*, italics added.)

We read *Respondent X* in harmony with *In the Matter of Boyne*, *supra*, 2 Cal. State Bar Ct. Rptr. 389 and *In the Matter of Klein, supra*, 3 Cal. State Bar Ct. Rptr. 1—cases that also address an attorney's ethical duty to comply with civil court orders. Contrary to the hearing judge's position, the above-cited cases all stand for the same principle salient to the current matter—that superior court orders are final and binding for disciplinary purposes once review is waived or exhausted in the courts of record.

Where the cases differ is at what point *during a civil case* an attorney can challenge an order. In *Boyne* and *Klein*, we held that an attorney cannot sit back and await contempt proceedings before complying with, or explaining why he or she cannot obey, a court order. (*In the Matter of Boyne*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 404; *In the Matter of Klein*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 9.) However, we held in *Respondent X*, interpreting the then-recent Supreme Court case of *People v. Gonzalez* (1996) 12 Cal.4th 804, 818-819 (criminal case that rejected collateral bar rule in California), that an attorney facing an injunctive order has one of two options: either obey the order while simultaneously challenging its validity or disobey the order, await contempt proceedings, and raise any jurisdictional contentions when punishment for such disobedience is sought to be imposed. (*In the Matter of Respondent X*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 604.) But with either of these two options, the remedy lies in the "courts of record," where the order originated. (*Id.* at p. 605.) We find no support for the hearing judge's

finding that the concept of punishment extends beyond contempt proceedings in the superior court to attorney disciplinary proceedings. To the contrary, *Respondent X* and the related body of case precedent on this topic make clear that an attorney cannot wait until State Bar proceedings commence in order to collaterally challenge the legitimacy of a superior court order.

IV. AGGRAVATION AND MITIGATION

Standard 1.5[10] requires OCTC to establish aggravating circumstances by clear and convincing evidence; standard 1.6 requires Collins to do the same to prove mitigation. In their stipulation, OCTC and Collins stipulated to two factors in mitigation (no prior discipline and cooperation), and expressly "reserve[d] the right to argue to the court the weight that should be given to these factors." In fact, the hearing judge gave both sides a full and fair trial and opportunity to present additional evidence of aggravation and mitigation, and to advocate orally and in writing their positions on the import of all of the factors. Collins did not present any additional evidence in mitigation. Since the hearing judge dismissed the case, she did not make any findings as to aggravation and mitigation in her decision. Nonetheless, we review the record and find the following.

A. Aggravation

Multiple Acts of Wrongdoing

Collins violated five distinct superior court sanctions orders. We assign moderate aggravating weight to these multiple acts of wrongdoing. (Std. 1.5(b); *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts]; *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 526 [eight acts of misconduct, including violation of four court orders, assigned moderate aggravating weight].)

[10] All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

B. Mitigation

1. No Prior Discipline

Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. (Std. 1.6(a).) Collins has a 22-year legal career without discipline, which warrants significant weight in mitigation. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of misconduct-free practice given significant weight in mitigation].) Moreover, his misconduct involved a single client matter where the sanctioned discovery abuses occurred over a relatively short period of time (March to July 2015). In light of these factors, we do not find that the misconduct is likely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [long history of no discipline most relevant when misconduct is aberrational].)

2. Cooperation

Collins is entitled to significant mitigation for his cooperation with the State Bar. He stipulated to facts and culpability, which assisted OCTC's prosecution of the case and conserved time and resources. (Std. 1.6(e) [spontaneous candor and cooperation to State Bar is mitigating]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation given to those who willingly stipulate to facts and culpability].)

V. A 30-DAY ACTUAL SUSPENSION IS WARRANTED

Our analysis begins with the standards, which promote the uniform and consistent application of disciplinary measures, and are entitled to great weight. (Std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Although we are not strictly bound by the standards, the Supreme Court instructs us to follow them whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) If we deviate, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

Here, standard 2.12(a) directly applies, providing that disbarment or actual suspension is the presumed sanction for disobedience of a court order. Section 6103 itself also states that violation of a court order is cause for disbarment or suspension, and Supreme Court precedent makes it clear that such misconduct is considered "unbefitting an attorney." (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) OCTC, however, seeks a one-year *stayed* suspension, which represents a downward departure from the prescribed minimum sanction under standard 2.12(a). It argues that Collins's mitigation outweighs his aggravation.

In weighing aggravation and mitigation, standard 1.7(c) permits us to recommend a more lenient disciplinary sanction than is otherwise specified in a given standard if the net effect of the aggravating and mitigating circumstances demonstrates that a lesser measure fulfills the primary purposes of discipline. However, standard 1.7(c) also indicates that, on balance, this is only appropriate in "cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future."

While we acknowledge Collins's 22 years of discipline-free law practice and his extensive cooperation in this proceeding, his showing of mitigation is not enough to satisfy standard 1.7(c). His misconduct is serious, not minor, as he violated *five* separate court orders, and he has yet to provide proof of payment or resolution of the outstanding debt. (See *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 112 [violation of court order is considered serious misconduct].) Under these circumstances, he does not qualify for a reduction in the discipline under our standards.

Therefore, we find that a period of actual suspension, in accordance with standard 2.12(a), is appropriate and necessary discipline. We recommend a 30-day actual suspension, with probation and conditions that include payment of the sanctions ordered by the

superior court. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 869 [payment of outstanding sanctions is necessary component of discipline and ensures respondent's professional obligations under § 6103]; see also *In re Morse* (1995) 11 Cal.4th 184, 210–211 [payment of civil penalties ordered as explicit condition of probation despite any redundancies in civil enforcement action].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Joseph Patrick Collins be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 30 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within one year after the effective date of discipline, he must show proof of payment of the following sanctions as ordered by the Los Angeles County Superior Court on March 25, May 6, June 24, July 1, and July 15, 2015, in Case No. SC122588 (or reimburse the Client Security Fund, to the extent of any payment from the Fund to the payee(s), in accordance with Business and Professions Code section 6140.5), and furnish such proof to the State Bar Office of Probation in Los Angeles:

    a. $1,185 plus 10 percent interest per year from March 25, 2015;
    b. $1,185 plus 10 percent interest per year from May 6, 2015;
    c. $1,185 plus 10 percent interest per year from June 24, 2015;
    d. $1,185 plus 10 percent interest per year from July 1, 2015; and
    e. $1,560 plus 10 percent interest per year from July 15, 2015.

    Alternatively, he may show satisfactory proof of resolution of the five sanctions orders to the State Bar Office of Probation.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist as directed and upon request.

6. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

7. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

8. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Joseph Patrick Collins be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

HONN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

Case No. 16-O-10339

In the Matter of

JOSEPH PATRICK COLLINS

Hearing Judge

Hon. Cynthia Valenzuela

Counsel for the Parties

For State Bar of California:	**Brandon Keith Tady, Esq.** **Office of Chief Trial Counsel** **The State Bar of California** **845 So. Figueroa St.** **Los Angeles, CA 90017-2515**
For Respondent:	**Joseph P. Collins** **548 El Medio Ave.** **Pacific Palisades, CA 90272-4222**

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed May 19, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 12-C-11576; 12-C-11759; 12-C-12032; 12-C-12883 (Cons.)
	)	
MARC ANTHONY GUILLORY,	)	
	)	OPINION
A Member of the State Bar, No. 214098.	)	
	)	

This case demonstrates that significant professional discipline may be imposed for multiple misdemeanor convictions of driving under the influence (DUI) where the surrounding facts and circumstances involve moral turpitude. Between 1999 and 2012, Marc Anthony Guillory was convicted of four alcohol-related driving offenses. He appeals the hearing judge's recommendation that he be actually suspended for two years and until he demonstrates his rehabilitation. Guillory also challenges the judge's moral turpitude finding and seeks no more than a six-month actual suspension. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal and submits that the discipline recommendation should be affirmed.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the facts and circumstances surrounding Guillory's convictions involve moral turpitude. We base our conclusion on the following facts: (1) Guillory attempted to use his position as an assistant deputy district attorney to avoid arrest; (2) his cousin died in one of his alcohol-related driving incidents; (3) he repeatedly drove with a blood alcohol concentration (BAC) well above the legal limit; and (4) he violated his criminal probation by driving on a suspended license at the time of his two most recent arrests for DUI.

From the start of his career, Guillory has been on notice that the State Bar considers alcohol-related driving convictions to be a serious matter. His first conviction occurred while he was in law school, and it affected his admission to the Bar. He promised the Moral Character Committee (Committee) during the admissions process that he would not drink and drive again. Nevertheless, he did so repeatedly after becoming an attorney, evidencing a lack of concern for public safety and respect for the legal system. Given these circumstances, as well as the serious aggravation (multiple acts and indifference) and lack of mitigation, we affirm the hearing judge's recommendation of a two-year actual suspension with conditions, including proof of his rehabilitation and fitness to practice law.

I. FACTUAL BACKGROUND

A. Guillory's Four Alcohol-Related Driving Convictions[1]

In June 1999, while in law school, Guillory was driving his cousin home from a party when he collided with a disabled airport shuttle bus on the side of the road. His cousin was killed. Police officers at the scene observed Guillory to be under the influence of alcohol and unable to operate the vehicle. Guillory was arrested for felony DUI after he failed a field sobriety test. Two hours later, his blood test showed a 0.06 percent BAC.[2] He later pled nolo contendere and was convicted of a "wet reckless" misdemeanor violation of Vehicle Code section 23103, subdivision (a). (See Veh. Code, § 23103.5 [requiring statement as to alcohol or drug involvement when prosecution agrees to reckless driving after charging DUI].)

In seeking admission to the Bar in 2001, Guillory underwent an informal examination by the Committee to discuss his wet reckless conviction and his cousin's death. He told the

[1] Guillory's convictions are conclusive proof, for the purposes of attorney discipline, of the elements of the crimes committed. (See Bus. & Prof. Code, § 6101, subds. (a) & (e); *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 820.)

[2] An expert toxicologist testified at the hearing below that Guillory's BAC would likely have been 0.09 percent at the time of the accident. Since 1990, the legal definition of DUI impairment has been 0.08 percent BAC.

Committee members that he drank only two beers the night of the accident.[3] During the Committee's examination, Guillory characterized the accident and loss of his cousin as tragic, and his drinking and driving as aberrational. Guillory acknowledged to the Committee that alcohol played a role in his arrest, but insisted it did not cause the accident. He promised not to drink and drive again.

After his June 2001 admission to the Bar, Guillory worked as a criminal prosecutor in San Bernardino from 2002 to 2006 and in San Francisco from 2006 to 2012. Both agencies praised his outstanding performance. He prosecuted an array of crimes, including DUIs and criminal gang activity. While working in San Francisco, he was convicted of three DUIs.[4]

First, in early 2008, Guillory pled nolo contendere to a misdemeanor DUI following his December 2007 arrest in El Cerrito, California. At the time, he had a BAC of 0.18 percent.[5] He was stopped after changing lanes without signaling and forcing other vehicles, including a motorcycle, to maneuver out of his way to avoid a collision. Guillory was sentenced to two days in jail, three years' probation, and three months in the First Offender Program. As a probation condition, he was ordered not to drive with any measurable amount of alcohol in his system.

Second, in March 2010, Guillory pled nolo contendere to a misdemeanor DUI (with one prior DUI conviction) following his December 2009 arrest in Oakland, California. His BAC was

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[3] Guillory admitted during his hearing in the present case that he had also consumed alcohol-spiked punch. The expert forensic toxicologist who testified below opined that based on Guillory's BAC, he would have had to have consumed the equivalent of four 12-ounce cans of beer with a 0.05 percent alcohol content.

[4] A misdemeanor DUI may be charged under Vehicle Code section 23152, subdivision (a), for driving under the influence of any alcoholic beverage, or under subdivision (b) for driving a vehicle with 0.08 percent or more, by weight, of alcohol in his or her blood, or under both. Guillory entered a plea to subdivision (a) in his first two DUI cases, and to subdivision (b) in his third DUI case.

[5] OCTC presented the testimony of the arresting officer and the 2007 arrest report.

0.15 percent.[6] He was stopped for speeding and weaving his vehicle between lanes while talking on a cell phone. At the time, he was on criminal probation from his 2008 DUI case, and was driving on a suspended license. When an officer asked about his license, Guillory said he was permitted to drive to and from his job on a restricted license. In fact, he was not driving to or from work, nor was he permitted to drive for any reason. Guillory also said he drank only one glass of wine.[7] He was sentenced to 15 days in jail, three years' probation, and an 18-month Second Offender Program.

Third, in December 2012, Guillory pled nolo contendere to a misdemeanor DUI (with two prior DUI convictions) following his December 2011 arrest in Martinez, California. He had a BAC of 0.24 percent.[8] He was arrested at 2:20 a.m. when an officer found him passed out in the driver's seat of his car in a traffic lane at an intersection. The engine was running with the car in drive and Guillory's foot on the brake. The arresting officer had difficulty waking him. When Guillory finally awoke, he was disoriented and exited the car without placing it in "park" or setting the emergency brake. When asked, he first told the officer he had not been drinking and then admitted he had two beers.[9] As before, at the time of his arrest, Guillory was on probation and driving with a suspended license. This time, he was sentenced to 180 days' electronic home detention and five years' probation. He was also ordered not to drink alcohol or enter bars.

Before each arrest, Guillory tried to persuade the officers not to arrest him because he was a prosecutor in San Francisco. For example, in the 2007 arrest, the officer testified that

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[6] OCTC presented the testimony of two officers present at the arrest and the 2009 arrest report.

[7] The expert witness testified Guillory would have had to have consumed seven 4-ounce glasses of wine with a 0.12 percent alcohol content.

[8] OCTC presented the testimony of the arresting officer and the 2011 arrest report.

[9] The expert witness testified Guillory would have had to have consumed a minimum of twelve 12-ounce cans of beer with a 0.05 percent alcohol content.

Guillory showed his deputy district attorney identification in order to influence him. The officers present at the 2009 arrest testified that they believed Guillory was engaging in "badging," i.e., showing his credentials in an effort to obtain leniency. Further, the 2009 arrest report states that he kept asking one officer to let him go, saying "you don't have to do this, you can just let me go, I work for you guys." Finally, the 2011 arresting officer testified: "[H]e showed me he had a San Francisco district attorney badge [and insisted] that he was well known in San Francisco among police officers, and I should let him go." Guillory could not recall clearly whether he had tried to influence the officers, but admitted: "I was a guy that was almost twice the legal limit, who was trying to not be arrested."

After his third DUI, Guillory was terminated from the San Francisco District Attorney's Office. He is now a sole practitioner in Oakland, California.

B. Guillory's Personal Problems and Alcohol Abuse

From 2007 through 2011, Guillory dealt with significant personal problems. His beloved grandmother died. He also went through a contentious divorce and child custody dispute that required him to fly to and from Los Angeles frequently for visitation and to attend custody hearings. His divorce was emotionally and financially draining. And he experienced considerable stress on the job as a gang prosecutor. Guillory maintains that these trying circumstances caused his alcohol abuse, which led to his three DUI convictions, the loss of his job, and the present disciplinary charges.

Despite the toll alcohol has taken, Guillory equivocated at his discipline hearing as to whether he considers himself an alcoholic; however, he now declares he abstains from drinking. After his third DUI, Guillory completed a one-month outpatient rehabilitation program and joined the State Bar's monitored Lawyer Assistance Program (LAP), which supports and verifies sobriety. Yet, while in the program, Guillory tested positive for an unauthorized substance in

December 2012, missed two lab tests around the same time, and dropped out of the program for more than a month before returning for several months. Ultimately, in June 2013, Guillory chose to formally leave the monitored LAP, but claims he continued with the support aspect of the program. The acting director of LAP testified that he could confirm only four months of sobriety for Guillory, and opined that three years of continuous sobriety and stability is "the gold standard." Guillory did not present other evidence to demonstrate his efforts to maintain his sobriety.[10]

II. PRE-ADMISSION CONVICTION IS ADMISSIBLE

On review, Guillory challenges the admission and use of his 1999 wet reckless conviction and evidence relating to his 2001 moral character proceeding. His argument lacks merit.

The Supreme Court has established that members may be disciplined on the basis of pre-admission conduct. (*Stratmore v. State Bar* (1975) 14 Cal.3d 887, 891 ["[W]e have authority to discipline [a member] for his pre-admission misconduct"].) In addition, the doctrine of res judicata does not bar us from considering Guillory's 1999 conviction because the Committee previously addressed that conviction *only* for admission purposes, not for discipline. (*Ibid.* [admitting member to practice is adjudication of requisite moral character for admission, not disciplinary proceeding].) Finally, contrary to Guillory's contention, we may consider evidence relating to his admissions process as "[a]ll State Bar records pertaining to admissions . . . shall be available to [OCTC] for use in the investigation and prosecution of complaints against members of the State Bar." (Bus. & Prof. Code, § 6086.2.) Notably, in the hearing below, OCTC extensively questioned Guillory about his testimony before the Committee, and Guillory did not

[10] We reject Guillory's claim that he was prevented from presenting evidence regarding his abstention from alcohol. His LAP therapist chose not to testify to preserve the confidential nature of their therapeutic relationship. Guillory did not subpoena her testimony, and has failed to identify other evidence he claims he was prevented from introducing.

object on confidentiality grounds. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522 [objections waived if not timely raised when evidence offered at trial].)

III. FACTS AND CIRCUMSTANCES INVOLVE MORAL TURPITUDE

After the State Bar transmitted Guillory's conviction records to us, we referred this matter to the hearing department to determine whether the facts and circumstances surrounding Guillory's crimes involve moral turpitude or other misconduct warranting discipline and, if so, the appropriate level of discipline. (See Bus. & Prof. Code, § 6102, subd. (e).) Guillory challenges the hearing judge's moral turpitude finding, arguing that "the courts have specifically held that DUI crimes do not involve moral turpitude." In fact, while the California Supreme Court established that misdemeanor DUI convictions do not establish moral turpitude *per se*, it also held that the circumstances surrounding a misdemeanor DUI *may* involve moral turpitude. (*In re Kelley* (1990) 52 Cal.3d 487, 494.)

The issue before us is whether the facts and circumstances surrounding Guillory's crimes, which were not committed in the practice of law or against a client, reveal moral turpitude. We are guided by the California Supreme Court's most recent definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that the facts and circumstances surrounding Guillory's four alcohol-related driving offenses meet this definition of moral turpitude.

In particular, we are troubled by Guillory's repeated attempts to leverage his position as a criminal prosecutor to avoid arrest and his lies to the officers about his alcohol consumption. He

incorrectly characterizes this behavior as typical conduct for a person facing arrest. In fact, Guillory's persistent efforts to exploit his insider status as an attorney in the criminal justice system demonstrate a disturbing lack of respect for the integrity of the legal system and the profession. (See *In re Rohan* (1978) 21 Cal.3d 195, 203 [conscious decision to not file income tax returns "evinces an attitude on the part of the attorney of placing himself above the law"]; *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 416 [discipline system is responsible for preserving integrity of legal profession as well as protection of public].)

Guillory exhibited further contempt for the law by twice violating his probation, twice driving with a suspended license, and falsely asserting to an officer that he was permitted to drive without a license. This behavior compounds his three arrests, each time with a high BAC, and shows disdain for the law and for societal norms. He also demonstrated complete disregard for public safety given his most recent arrest where he was found unconscious and then incoherent behind the wheel of his stopped vehicle on a public street, with a 0.24 percent BAC. Guillory should be well aware of the harm that can result from drinking and driving, considering his cousin's death, the extensive court-ordered alcohol education he underwent after his DUI conviction, and his firsthand experience with DUI offenders. (See *Seide v. State Bar* (1989) 49 Cal.3d 933, 938 [applicant's conduct surrounding conviction for drug trafficking more egregious due to prior law enforcement background].)

We view Guillory's three post-admission DUIs through the lens of his first wet reckless conviction, which affected his consideration for admission. During that process, the State Bar made clear to him that illegal drinking and driving is contrary to an attorney's professional obligations. Guillory acknowledged as much by promising not to drink and drive again. Nevertheless, he broke that promise. We agree with the hearing judge that Guillory's "repeated alcohol-related criminal conduct, which has spanned a period of 12 years or more, shows a

wanton disregard for the safety of the public . . . . Such conduct clearly involves moral turpitude."[11]

IV. SERIOUS AGGRAVATION AND NO MITIGATION[12]

A. Aggravation

The hearing judge found that multiple acts (std. 1.5(b)) and indifference toward rectification or atonement for the consequences of the misconduct (std. 1.5(g)) were aggravating factors. We agree. Guillory's four alcohol-related driving convictions are multiple acts that constitute significant aggravation, and his indifference is a serious aggravating factor for several reasons.

First, he minimizes the extent of his alcohol abuse problem, characterizing it as "situational" rather than chronic. This perspective conflicts with his multiple DUI convictions and his inability to stop abusing alcohol for years despite increasingly negative criminal and professional consequences. (See *Kelley*, *supra*, 52 Cal.3d at p. 495 [two convictions for alcohol-related driving offenses and surrounding circumstances "are indications of a problem of alcohol abuse"].)

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[11] We distinguish *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, a case in which we found that the circumstances surrounding multiple misdemeanor DUI convictions did not involve moral turpitude. *Anderson* involved a *former* criminal prosecutor who had prosecuted drunk drivers and then had four DUI convictions and multiple convictions for driving without a valid license over nine years. *Anderson*, however, did not involve an *active* criminal prosecutor attempting to use his position to evade criminal responsibility or an attorney with firsthand knowledge from his admissions process that his drinking and driving was within the State Bar's purview and concern. Most notably, we decided *Anderson* before the Supreme Court articulated its definition of moral turpitude in *Lesansky* — upon which we rely here.

[12] The Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence (hereafter standards). Standard 1.6 requires Guillory to meet the same burden to prove mitigation.

Second, he has not demonstrated a sustained period of abstinence from alcohol, having relapsed in December 2012, a year after his last DUI arrest and less than a year before his discipline hearing. Nor has he offered proof of his commitment to a recovery program.

Third, he minimizes the harm caused by his drinking and driving. At the hearing below, he steadfastly denied the role his drinking played in his cousin's death. He emphasized that he was never held criminally liable for the death, and pointed to the comparative negligence of the bus company. But two officers at the scene in 1999 observed Guillory to be under the influence of alcohol and concluded that he could not operate a vehicle. One officer testified at the hearing below: "I would say the driver being under the influence of alcohol would be the primary cause of the crash."

Finally, Guillory claimed that his DUIs caused no harm because they did not result in actual bodily harm or property damage. This attitude shows a lack of insight into the inherent danger in drinking and driving, and the evasive action required by motorists to avoid his reckless driving. (*People v. Eribarne* (2004) 124 Cal.App.4th 1463, 1467 [The "very reason why driving with a blood-alcohol level of 0.08 percent or higher has been criminalized is precisely because such conduct presents a threat of physical injury to other persons"]; see also *People v. Ford* (1992) 4 Cal.App.4th 32, 38-39 ["The Legislature has declared 'that problems related to the inappropriate use of alcoholic beverages adversely affect the general welfare of the people of California. These problems, which constitute the most serious drug problem in California, include . . . substantial fatalities, permanent disability, and property damage which result from driving under the influence of alcoholic beverages and a drain on law enforcement, the courts, and penal system which result from crimes involving inappropriate alcohol use.' [Citation.]")[13]

[13] The hearing judge found aggravation for Guillory's bad faith for making false statements to the officers and the improper use of his badge (std. 1.5(d)), and for significant harm to the administration of justice (std. 1.5(g)) for his violations of the law and his probation.

B. Mitigation

Guillory seeks credit for his unblemished career before his first DUI in 2007 (std. 1.6(a)),[14] the personal problems which contributed to his misconduct (std. 1.6(d)),[15] and his ethics and good character during his tenure as a district attorney (std. 1.6(f)).[16] The hearing judge found that Guillory did not prove any mitigating factors. We agree.

When Guillory committed his first DUI, he had been an attorney for only six years, an insufficient period of time to qualify for mitigation under standard 1.6(a). (See *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 417 [six or seven years of unblemished practice insufficient period to consider as substantial mitigation].) As for his personal problems, we accept that Guillory's emotional and financial difficulties contributed to his alcohol abuse and DUIs. But absent evidence of a sustained commitment to sobriety, he is at risk of committing misconduct if faced with future stressors. (Std. 1.6(d) [must prove that problems no longer pose risk that attorney will commit future misconduct].) Also, the two attorney witnesses who testified to his good character do not represent a wide range of references in the legal and general communities required to demonstrate extraordinary good character.

However, the judge properly declined to assign aggravating weight to these factors because they were already considered in assessing culpability. (See *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [improper to consider factual findings in aggravation already used to determine culpability].)

[14] Standard 1.6(a) provides mitigation credit for an "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not deemed serious."

[15] Standard 1.6(d) provides mitigation credit for "extreme emotional difficulties or physical or mental disabilities suffered by the member at the time of the misconduct and established by expert testimony as directly responsible for the misconduct, provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the member established by clear and convincing evidence that the difficulties or disabilities no longer pose a risk that the member will commit misconduct."

[16] Standard 1.6(f) provides mitigation credit for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct."

Finally, while Guillory's hard work and success as a deputy district attorney are commendable, they do not entitle him to mitigation credit under standard 1.6(f).

V. A TWO-YEAR ACTUAL SUSPENSION IS PROPER DISCIPLINE

We begin our disciplinary analysis in this conviction proceeding by acknowledging that our role is not to punish Guillory for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [The "aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

Standard 2.11(c) states that disbarment or actual suspension is appropriate for criminal convictions involving moral turpitude. OCTC submits that a two-year actual suspension with conditions, including proof of rehabilitation, should be affirmed. Guillory seeks a revised discipline recommendation of a six-month actual suspension.

Our review of the case law reveals no published cases recommending discipline for misdemeanor DUIs involving moral turpitude.[17] Accordingly, we have considered cases involving other types of misdemeanors where the surrounding facts involve moral turpitude.

In *In re Alkow* (1966) 64 Cal.2d 838, the Supreme Court imposed a six-month suspension for misdemeanor vehicular manslaughter involving moral turpitude where the attorney had a history of driving while visually impaired and violating his probation, and had received more

[17] Misdemeanor cases not involving moral turpitude generally result in minimal discipline. (See e.g., *Kelley, supra,* 52 Cal.3d 487 [public reproval for attorney's second DUI conviction and violation of criminal probation]; *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260 [two DUI convictions warranted no discipline]; but see *In re Carr* (1988) 46 Cal.3d 1089 [six-month suspension for two DUI convictions].)

than 20 traffic violations. Before the accident, he tried to renew his license, but failed the eye examination. The Supreme Court stated that Alkow "must have known that injury to others was a possible if not probable result of his driving" due to his poor vision. (*Id.* at p. 840.)

In *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111-112, the Supreme Court imposed a one-year actual suspension for a misdemeanor conviction involving moral turpitude and dishonesty. The attorney in *Chadwick* conspired with another to lie to the Securities and Exchange Commission about his stock purchase, but presented compelling mitigation that justified the one-year suspension.

Although aspects of *Chadwick* and *Alkow* are similar to this matter, those cases considered discipline for a single, albeit serious, conviction that did not involve illegal alcohol-related driving. Moreover, *Alkow* was decided in 1966 and, as the hearing judge correctly noted, "discipline imposed in 1966, is no longer applicable, in light of current societal rejection of impaired driving, especially drunk driving, and the implementation of standards for attorney sanctions that were adopted in 1986." (See *People v. Ford, supra*, 4 Cal.App.4th at p. 38 ["The community's interest in prosecuting driving under the influence cases has increased dramatically"].) Additionally, the facts here reveal Guillory's unacceptable attempts to corrupt the legal process to preserve his own interests — such instances of his dishonesty permeated his arrests. (*In re Glass* (2014) 58 Cal.4th 500, 524 ["Honesty is absolutely fundamental in the practice of law; without it ' " ' "the profession is worse than valueless in the place it holds in the administration of justice." ' " ' [Citation.]"].)

After considering the relevant factors and the range of discipline suggested by standard 2.11(c) (actual suspension to disbarment), we conclude Guillory should be suspended for a lengthy period and thereafter prove he is rehabilitated. "We cannot and should not sit back and wait until [Guillory's] alcohol abuse problem begins to affect [his] practice of law." (*Kelley,*

52 Cal.3d at p. 495.) Despite four alcohol-related driving convictions, Guillory has not presented persuasive evidence that he understands the extent of his alcohol problem and is truly on a path to rehabilitation. Therefore, discipline should be imposed now in an effort to protect the public from potential harm and to preserve the integrity of the profession.

We agree with the hearing judge's recommendation: a two-year actual suspension and a requirement that Guillory present proof at a formal hearing of his rehabilitation and fitness to practice law, pursuant to standard 1.2(c)(1). This discipline sends the proper message that DUIs involving moral turpitude, depending on the facts and circumstances, may result in severe professional sanctions. (See generally *Kelley*, *supra*, 52 Cal.3d at p. 496 ["Although it is true that petitioner's misconduct caused no harm to her clients, this fact alone does not insulate her from discipline aimed at ensuring that her potentially harmful misconduct does not recur"].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Marc Anthony Guillory be suspended for three years, that execution of that suspension be stayed, and that he be placed on probation for four years with the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of the period of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet

with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Marc Anthony Guillory be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. RULE 9.20

We further recommend that Marc Anthony Guillory be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in

subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, P. J.

WE CONCUR:

EPSTEIN, J.

HONN, J.

Panel 6
Bias in Family Law

NOTE: Excerpts from The State Bar of California New Attorney Training Program requirement e learning course appendix for course entitled "Elimination of Bias"

Elimination of Bias

We are all susceptible to bias. As a result, many of our patterns of thought and behavior may be unknown even to us.

The viability of the legal system depends on the perception and reality of fair unbiased decisions. These decisions depend on understanding our biases. Biases can be explicit or implicit.

Bias: These are our tendencies or inclinations in favor of or against a thing, person, or group compared with another and often occurs at an unconscious level.

Explicit Bias versus Implicit Bias: Explicit Biases are deliberately generated and consciously held as one's own. Explicit biases may not always be negative. For example, you might always tend to favor pumpkin pie over apple pie. But, explicit biases can be negative and harmful. For example, the Miami police department played a game they called "Black Monopoly" where every square on the game board was "Go to Jail". In addition to playing this game, the police department also was found to have circulated a series of "racially offensive and pornographic" emails. This behavior was considered acceptable in the police department and showed an explicit negative bias. Implicit Biases. reflect learned associations that can exist outside of conscious awareness or control. They are an automatic preference or response, triggered reflexively that may influence how we perceive people, situations, and our decisions without our conscious awareness. Implicit biases may enable us to make quick decisions, which may be inaccurate or harmful. But more information will force us to questions these decisions because they stand against what we consciously believe to be fair and just. A person can be implicitly biased if the person is unaware of such a bias, forms unconscious assumptions about groups or individuals and situations, and makes decisions based on such assumptions. For example, a well-intentioned HR officer selects resumes with "white-sounding male" names even though there are more qualified women available.

General Awareness
When we see a picture of a person with no individual or personal information, we tend to categorize as part of our mental description of the person. But why did you make those choices?
Why Do We Make These Choices: Neuroscience and psychology studies show two reasons we make fast and reflexive choices. First, our brains cannot process all the information it receives. So, it creates mental shortcuts or schemas for quick and efficient decision-making. But we may find that these quick responses are inaccurate when more information is considered. Second, we are influenced by our culture and past experiences, without our conscious awareness. This helps us respond quickly and reflexively to what we are comfortable with. But again this may be inaccurate when more information is received. These quick responses may draw on attitudes and stereotypes and are called System 1 thinking, as compared to System 2, which is more conscious and deliberate.

Manifestations of Disproportionality in the Legal System
Many Americans believe that the justice system treats minority groups and the poor less favorably than whites and other groups. Implicit bias, which lead to decisions that differ from our consciously held egalitarian beliefs, provide one explanation for the many manifestations of disproportional results in the

legal system. These differences exist despite decades of studies, legislation, and policy that tried to address the manifestations of disproportionalities in the legal system. Next, we will look at the School-To-Prison Pipeline. This is an example of the cumulative results of decisions made by a series of decision-makers. Even though the decision makers are acting in good faith, disproportionality results, a result that is attributable, at least in part to implicit bias.

Develop Bias Literacy

Awareness is a necessary first step to understanding implicit bias and interrupting it to achieve better and fair decision-making. Awareness of implicit bias can be created by developing literacy on: the definition, vocabulary, and related concepts of implicit bias. In System 1 thinking – without conscious awareness – three of the ways we demonstrate subtle implicit biases are categorization, group dynamics, and micro-messaging.

Categorization: Our brains create mental shortcuts or schemas for quick decision-making. As a result, our brains automatically organize and structure knowledge about the world by identifying classes of stimuli that share important properties. These kinds of responses allow us to bring order and coherence to the vast array of people, objects, and events that are encountered in daily life. Categorical representations allow us to refer to "horses", rather than having to separately name each kind of horse individually and treat each one as a wholly unprecedented and hence unpredictable entity.

Group Dynamics: We categorize people based on characteristics like age, gender, race, ethnicity, or sexual orientation. We respond to people based on this group identity, responding more positively to people that we consider as our "in-group". For example, we may consciously or unconsciously choose to interact positively with someone who is of the same race as compared to someone of another race; someone who grew up where we did rather than from somewhere else; someone who went to the same school as we did; or someone of the same sexual orientation that we identify with.

Micro-Messaging: Such implicit responses are often further played out through sometimes conscious, but often unconscious, micro-messages sent to the person we are engaged with. Micro- messages are small messages we send verbally or nonverbally through words or through observable behaviors such as facial expressions, vocal attributes, and body movements. These messages can have implicit bias and they accumulate causing negative impact. Interrupting women or otherwise failing to recognize their contributions in meetings or proceedings are examples of micro-messages.

Science on Implicit Bias and Group Dynamics

Description: Social categories are created on the basis of demographic features like race, national origin, gender, age, or sexual orientation. They reflect cultural groups, physical attributes, and socioeconomic status or social roles. Identifying an individual as belonging to a particular social category and comparing ourselves to that category (an outgroup compared to our ingroup) leads to certain labels and other associations and inferences.

Pros and Cons: Inferences that are created due to social categories can be useful in quickly processing large amounts of information or decision-making. But they can lead to discriminatory results if we are relying on attitudes and stereotypes and responding or deciding in implicitly biased ways. System 1 generalizations can lead people to ignore the individual characteristics of each person within a group and result in inaccurate and faulty conclusions.

Examples: Our implicit bias may arise in how we interact with people in particular groups. Our implicit bias has consequences when we allow it to impact decisions such as our interaction with people from different groups. Examples of potential impact in work settings include hiring, evaluation, retention, and

promotion. Implicit biases also manifest themselves in other interactions such as school admissions, and selection of clients.

Scientific Testing of Biases

The Implicit Association Test is a method of measuring our implicit biases.
https://implicit.harvard.edu/implicit/
Implicit Association Test: The Implicit Association Test measures our associations under tight time parameters. Various types of the Implicit Association Test can be done online at Project Implicit.

Theory: The underlying theory of the Implicit Association Test is that we respond more quickly to associations that fit with our schemas.

Results: Based on the Implicit Association Test, social scientists and neuroscientists have learned that implicit biases are pervasive. Implicit biases are used by our brain to respond to people who fit into particular groups. We are often unaware of our implicit biases. People differ in their levels of implicit bias. Implicit biases can predict behavior.

Situational Bias

Many legal professionals consciously believe that their decisions are fair and unbiased but the data clearly shows disproportionate results in terms of race, gender, and other groups in the legal system. For example, between 2005 and 2012, black men received roughly 5% to 10% longer prison sentences than white men for similar crimes, after accounting for the facts surrounding the case.
Latino youth are 65% more likely than whites to be detained. Native American youth are three times more likely to be incarcerated than white youth.

Bias Manifested in the Legal System
Attorneys, judges, jurors, and law enforcement are engaged in critical decision-making that influences the lives of the participants in the legal system. They are regularly called upon to exercise their discretion in making decisions. Discretionary decisions may be subject to implicit bias, especially where there is ambiguity. The decisions we examined in the school-to-prison pipeline are examples of discretionary decisions influenced by implicit bias.

Bias Manifested at Decision Points in the Legal Profession – Taking on a Client
To eliminate the influence of implicit bias, attorneys must monitor their reflexive responses and assumptions when making decisions. An important critical decision point when you must consciously avoid implicit bias is when you take on a client. Studies suggest that when clients are racially, criminally, or socioeconomically stereotyped, implicit bias can influence how they are treated.

Other Critical Decision Points – Evidence Evaluation
Another critical decision point where implicit bias has to be checked is when you evaluate evidence against a client. For example, when reviewing a case file and determining how strong the evidence is, reflect on whether you have been influenced by implicit bias based on the client's race, socioeconomic status, or similar stereotyped attributes. This can cause even public defenders to unintentionally interpret information as more probative of guilt. If implicit bias is influencing you on this decision point, you are less likely to expend resources to go into the details of the case.

Disrupting Bias

Because implicit biases are human nature, it is easy to dismiss them as something for which we do not carry individual responsibility. But to achieve a fair and impartial legal system, this cannot be the case. We need to be mindful and adopt approaches that may minimize the negative or inequitable results of implicit bias. Some of the strategies for disrupting biases include adopting an open mind, finding your motivation, developing awareness, seeking diversity in your work group and contacts, creating an unbiased environment, practicing perspective, individuating, and intervening.

Adopt an Open Mind

The first strategy is to adopt an open mind. With a careful mindset, an attorney can interrupt the habit of implicit bias. Attorneys are trained to "think like a lawyer," which we consider to be analytical, rational, and logical thinking or System 2 thinking. Given this training, it is hard to recognize that some of our responses may arise from implicit System 1 thinking. To understand and mitigate the impact of implicit biases, we need to recognize the possibility that our reflexive responses are influencing our decisions.

Find Your Motivation

Another key strategy that you can employ to interrupt bias is to motivate yourself. But, unfortunately, research shows that motivating yourself to manage and eliminate implicit bias can be tiring. This means it's important to understand critical decision points and focus our energy on those. Attorneys can still find their motivation by reviewing the manifestations we discussed earlier and recognizing how implicit bias may be creating a discrepancy between their goals and their actions.

Attorneys can also motivate themselves by recognizing that implicit bias affects their ability to achieve a fair and impartial result for their individual client. You should reflect on how implicit bias may be influencing your decisions and creating these discrepancies.

Develop Awareness

Developing your awareness is another strategy that can be used to recognize bias. To develop awareness, consider enrolling in anti-bias training which addresses implicit bias and its manifestations. Taking the Implicit Association Test is a way to discover and measure your bias. Recognizing and interrupting biases is an ongoing process. You should also consider reviewing critical decision points that you or your office have made. While these may vary with the kind of practice involved, adding accountability to various decision-making processes can help de-bias decisional outcomes. If we think we are being monitored or may have to explain our decisions, we are more likely to act in an unbiased or de-biased way.

Create an Unbiased Environment

People are surrounded by micro-messages that prompt or reinforce implicit bias. Ensuring that environments project a positive message is an important strategy to interrupt bias. For example, a courthouse displaying portraits of former judges, all of whom are white and male sends an implicit message that white men are more likely to be judges, or perhaps that women have less stature in that courthouse. In order to counteract micro-messages such as this, Judge Bennett, of the U.S. District Court in Iowa, has included photos of a diverse group of people being sworn in as US citizens.

Practice Perspective

Practicing perspective is another way to interrupt our biases. Two effective ways to avoid defaulting to our implicit biases are considering the opposite and taking other's perspective.

Consider the Opposite: We can interrupt our implicit biases by considering the opposite circumstance. For example, ask yourself if you would make the same decision to advise your client to plead guilty if the client was middle-class and white as compared to low-income and non-white. Or, if you would make the same decision to advise your client to settle on custody if your client was female and not male.

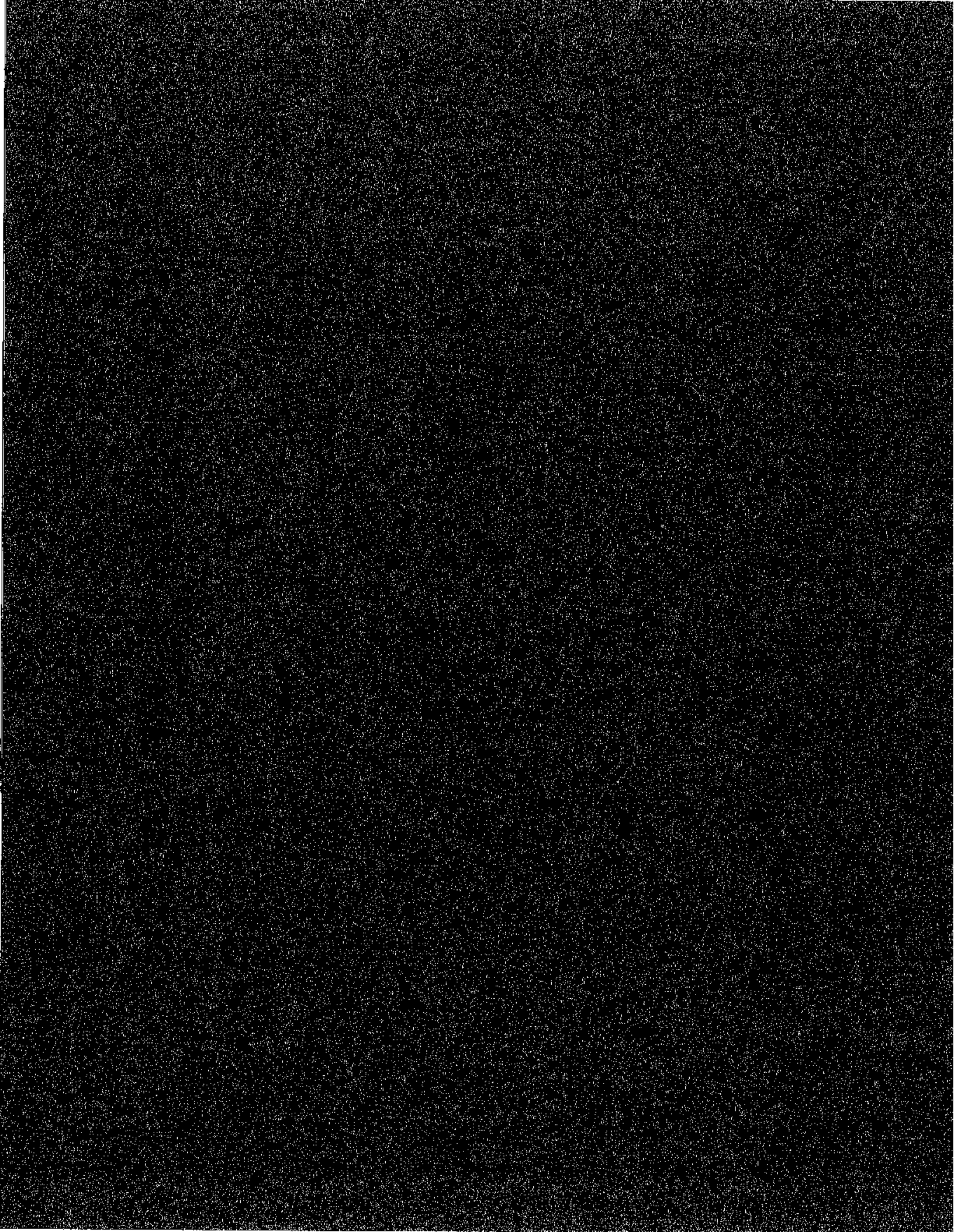
Take Other's Perspective: You can also interrupt implicit bias by being empathetic. You can achieve this by visualizing yourself in the place of your client. Think about the situation from the perspective of your client. For example, think about how you would react if you were unemployed for a long period of time? Or if you couldn't attend your place of worship?

Individuate

We categorize people into a group and assign characteristics and labels to them that are consistent with stereotypes about that group. This can lead us to miss important attributes and facts. For example, a youth seen hanging out on a street corner is perceived more negatively than one in front of a church. To avoid this, you must individuate by distinguishing individuals within a group. You can do this with information that counters stereotypes. One way to gain such information is to increase your contact with individuals from other groups. Another important aspect is to think about context, which may help reduce implicit bias.

Intervene to Improve Procedural Justice

Research finds that people react less to a judicial outcome than to whether or not they are treated with dignity and respect. The degree to which people feel they have been treated fairly helps to shape their acceptance of the legal process. This is referred to as procedural justice. To improve the perception of justice, you must treat clients with basic attention and courtesy. You can do this by reducing their waiting time. This will demonstrate that you value their time. During introductions, shake hands with everyone, ensure that you address them properly, and pronounce their names correctly. During discussions, ask the client for their opinions. This will make them feel heard.



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Socioeconomic Bias in the Judiciary

Michele Benedetto Neitz
Golden Gate University School of Law, mneitz@ggu.edu

SOCIOECONOMIC BIAS IN THE JUDICIARY

MICHELE BENEDETTO NEITZ*

ABSTRACT

Judges hold a prestigious place in our judicial system, and they earn double the income of the average American household. How does the privileged socioeconomic status of judges affect their decisions on the bench? This Article examines the ethical implications of what Ninth Circuit Chief Judge Alex Kozinski recently called the "unselfconscious cultural elitism" of judges.** This elitism can manifest as implicit socioeconomic bias.

Despite the attention paid to income inequality, implicit bias research and judicial bias, no other scholar to date has fully examined the ramifications of implicit socioeconomic bias on the bench. The Article explains that socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations. The Article reviews social science studies confirming that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias. The Article verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

The Article contends that the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the document designed to regulate the behavior of judges, fails to effectively eliminate implicit socioeconomic bias. The Article recommends innovative revisions designed to strengthen the Code's prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial decisions, and will bring this issue to the forefront of the judicial agenda.

* Professor of Law, Golden Gate University School of Law, San Francisco, California. The author served as a law clerk for the Honorable Napoleon A. Jones, Jr., in the Southern District of California. I am grateful to Professor Deborah L. Rhode, Professor Eric C. Christiansen, Professor Kathleen Morris and Jennifer Pesetsky for their thoughtful comments on earlier drafts. I appreciate the assistance of research assistants Sharon Alkire and Richard Hullinger. This Article is dedicated to Wiley Neitz.

** United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting).

I. INTRODUCTION

In the early 1970s, Robert William Kras asked the United States Supreme Court to allow him to proceed in bankruptcy court without paying the requisite filing fees.[1] Mr. Kras lived in a small apartment with multiple extended family members and his younger child was hospitalized with cystic fibrosis.[2] Mr. Kras had been unemployed for several years, after losing his job with a life insurance company when the premiums he had collected were stolen out of his home.[3] His wife had to give up her employment due to her pregnancy, and she was focused on caring for their ill son. The family lived on public assistance benefits and had no real assets.[4]

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[1] United States v. Kras, 409 U.S. 434, 437 (1973).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 438.

Mr. Kras was indisputably living in poverty. Hoping to improve his prospects for future employment, Mr. Kras desired a discharge in bankruptcy. However, Mr. Kras was turned away before he even reached the bankruptcy courtroom because he could not afford the $50 in filing fees to submit his bankruptcy petition.[5]

The Supreme Court denied Mr. Kras's request to waive his filing fees, holding that the statute requiring payment of fees to access bankruptcy courts did not violate the United States Constitution. The majority opinion, written by Justice Blackmun, noted that the filing fees, when paid in weekly $1.92 installments, represented a sum "less than the price of a movie and little more than the cost of a pack or two of cigarettes."[6] Justice Blackmun declared that if Mr. Kras "really needs and desires [bankruptcy], this much available revenue should be within his able-bodied reach."[7] Using disparaging words such as "little more" and "able-bodied," the Court presumed that any individual could afford the $50 filing fee.[8]

In dissent, Justice Thurgood Marshall declared the majority of the Court had demonstrated a fundamental misunderstanding of the lives of poor people.[9] Justice Marshall explained, "It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with poor people can fail to understand how close to the margin of survival many of them are."[10] Despite the majority's apparent belief that poor people go to the theater on a weekly basis, Justice Marshall made clear that poor people rarely, if ever, see a movie.[11] Instead, the "desperately poor" must choose to use their limited funds for more important things, including caring for a sick child as Mr. Kras was required to do.[12] Justice Marshall rebuked his colleagues for their insensitivity to the plight of poor people: "[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how [poor] people live."[13]

Nearly forty years later, the Chief Judge of the Ninth Circuit echoed Justice Marshall with similar observations about the assumptions of his colleagues on the bench. In *United States v. Pineda-Moreno*, a Fourth Amendment case upholding the placement of a Global Positioning System (GPS) device on a defendant's car parked outside his modest home, the Ninth Circuit denied the defendant's petition for a rehearing en banc on his motion to suppress the GPS evidence.[14] Dissenting from

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[5] *Id.* This amount represents approximately $250 in 2011 dollars. Deborah L. Rhode, *Thurgood Marshall and His Clerks, in* IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 314, 321 (Todd C. Peppers & Aremus Ward eds., 2012).

[6] *Kras*, 409 U.S. at 449.

[7] *Id.*

[8] Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting On and Beyond* United States v. Kras, 2 AM. BANKR. INST. L. REV. 57, 60 (1994).

[9] *Kras*, 409 U.S. at 460 (Marshall, J., dissenting).

[10] *Id.* (Marshall, J., dissenting)

[11] *Id.* (Marshall, J., dissenting).

[12] *Id.* (Marshall, J., dissenting).

[13] *Id.* (Marshall, J., dissenting).

[14] United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir. 2010).

the denial of the petition for rehearing, Chief Judge Kozinski took the analysis one step beyond the case's constitutional implications.[15] Chief Judge Kozinski deplored the fact that his fellow Ninth Circuit judges failed to appreciate how their decision, allowing the placement of the GPS tracking device on the defendant's car because he had not shielded it from public view, would impact poor people differently than wealthy people. Constitutional interpretation should not give preference to wealthy individuals, yet "when you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep."[16]

Why do some judges overlook the impacts of their decisions on poor people? Chief Judge Kozinski posited that the reason lies in "unselfconscious cultural elitism."[17] Most likely, the *Kras* Court and the *Pineda-Moreno* majority were not actively attempting to create laws favoring the rich over the poor. But this consequence is one result of the lack of socioeconomic diversity on the bench.[18] Chief Judge Kozinski noticed that "No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity, or sex, are selected from the class of people who don't live in trailers or urban ghettos."[19] Accordingly, his colleagues did not appreciate that "the everyday problems of people who live in poverty are not close to our hearts and minds because that's not how we and our friends live."[20]

Justice Marshall and Chief Judge Kozinski acknowledged the difference between judges and most of their litigants: Judges overwhelmingly come from wealthy backgrounds, and many have never walked in the shoes of economically disadvantaged people.[21] In effect, elite judges may render decisions that negatively impact poor individuals simply because they do not recognize that they are doing so.

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[15] *Pineda-Moreno*, 617 F.3d 1120. For a full examination of this case, see *infra* Part III.A.

[16] *Pineda-Moreno*, 617 F.3d at 1123.

[17] *Id.* (Kozinski, C.J., dissenting).

[18] *Id.* (Kozinski, C.J., dissenting).

[19] *Id.* (Kozinski, C.J., dissenting).

[20] *Id.* (Kozinski, C.J., dissenting).

[21] Of course, there are some judges who overcame great poverty and other challenges to achieve their roles on the bench. *See, e.g.*, Bob Egelko, *Federal Judge Nominee Troy Nunley Works His Way Up*, SAN FRANCISCO CHRONICLE, July 9, 2012, *available at* http://www.sfgate.com/default/article/Federal-judge-nominee-Troy-Nunley-works-his-way-up-3692208.php?cmpid=emailarticle&cmpid=emailarticle#photo-3170832 (describing Judge Troy Nunley's path from childhood poverty to a judgeship). Judge Nunley, a Sacramento County Superior Court judge, was nominated by President Obama to the U.S. District Court in Sacramento on June 25, 2010. But such judges are a rarity, particularly in the prestigious federal courts. For example, Supreme Court justices disproportionately come from three Ivy League law schools: Harvard, Yale, and Columbia. SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010 (2010). Eight of the nine current justices attended one of those three law schools. *Id.* Moreover, as discussed *infra* Part II.A., even those judges who came from poverty now earn much higher incomes than average Americans.

Opponents seeking to deny Chief Judge Kozinski's charge of elitism may point to the American Bar Association (ABA) Model Code of Judicial Conduct (the Code), the model standard of ethics intended to provide guidance for judicial behavior.[22] The Code specifically prohibits judges from employing bias on the basis of socioeconomic status when adjudicating cases.[23] Judicial ethicists might therefore argue that Chief Judge Kozinski's observations about the wealthy positions of judges are irrelevant to judicial decision-making processes; judges may be wealthier than some litigants, but the Code forbids judges from being influenced by socioeconomic bias. Yet the Code's success in preventing socioeconomic bias is subject to some debate. For example, did the conduct of the Supreme Court majority in *Kras* or the Ninth Circuit panel in *Pineda-Moreno* rise to the level of bias?

This Article examines the ethical implications of the "unselfconscious cultural elitism" of judges.[24] Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities and those of poor people. These gaps have contributed to patterns of judicial decision-making that appear to be biased against poor people as compared to others.

Although judges are required to decide cases in a neutral and impartial manner, every judge may be influenced in some way by his or her personal beliefs. Many judges, aware of the potential for this influence, actively work to separate their judicial determinations from their personal opinions. In some cases, however, a judge's particular viewpoints may result in biased decision-making processes—whether or not the judge is aware that such bias exists. Bias is defined as "inclination; prejudice; predilection," and judicial bias is "a judge's bias toward one or more of the parties to a case over which the judge presides."[25] Moreover, judicial bias may be subtle and implicit.

Part II of this Article begins with consideration of the two manifestations of bias at issue in this context: Socioeconomic bias and implicit bias. Socioeconomic bias may be more obscure than other forms of bias, but its impact on judicial decision-making processes can create very real harm for disadvantaged populations.

Because socioeconomic bias is subtle, most judges do not explicitly display bias against poor people. Nonetheless, new scientific research confirms that implicit bias can be prevalent even in people who profess to hold no explicit prejudices. Thus, Part II explains that even those judges who believe their wealthy backgrounds play no role in their judicial deliberations may be influenced by implicit socioeconomic bias.

Part III verifies the existence of implicit socioeconomic bias on the part of judges through examination of recent Fourth Amendment and child custody cases. These cases reveal that judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.

Part IV assesses the role of the ABA Model Code of Judicial Conduct (the Code) in the elimination of such bias. The Model Code is designed to ensure fairness and neutrality on the bench. This section recommends changes designed to strengthen

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[22] *See generally* MODEL CODE OF JUDICIAL CONDUCT (2011).

[23] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

[24] *Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, C.J., dissenting).

[25] BLACK'S LAW DICTIONARY 183 (9th ed. 2009).

the Code's prohibition against bias, and suggests improvements to judicial training materials in this context. These changes will serve to increase judicial awareness of the potential for implicit socioeconomic bias in their judicial deliberations, thus minimizing the impact of such biases on poor litigants.

II. THE CHALLENGES OF IDENTIFYING IMPLICIT SOCIOECONOMIC BIAS

A. The Economic Status of Judges

Judicial salaries are much higher than those earned by average Americans. Nearly all state and federal judges in the United States earn a six figure salary. For example, in 2010, district court judges earned a set salary of $174,000, and circuit court judges made $184,000.[26] Supreme Court justices make over $200,000.[27] Depending on the jurisdiction, state court judges may make more or less than federal judges. For example, state appellate judges earn salaries ranging from $105,050 in Mississippi (the state with the lowest paid state appellate judges) to $204,599 in California (the state boasting the highest salaries for its appellate judges).[28] In 2010, the median household income was $49,445.[29] Thus, judges earn more than double the income of the average American.

Like all people, judges are influenced by their economic backgrounds.[30] Since people are "more favorably disposed to the familiar, and fear or become frustrated with the unfamiliar," the wealthy positions of most judges may prevent them from fully appreciating the challenges faced by poor litigants in their courtrooms.[31] Low-income people "are not just like rich people without money."[32] Workers in low-wage jobs are often teetering on the edge of abject poverty: "They cannot save, cannot get decent health care, cannot move to better neighborhoods, and cannot send their children to schools that offer a promise for a successful future."[33]

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[26] *Judicial Salaries Since 1968*, U.S. COURTS, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalariesJudi.pdf (last visited Jan. 23, 2013).

[27] *Id.* Notably, federal judges have not received reliable cost of living pay increases in the last decade, and are paid less than some federal employees in the executive branch and banking industries. *Federal and Judicial Pay Increase Fact Sheet*, U.S. COURTS, http://www.uscourts.gov/JudgesAndJudgeships/JudicialCompensation/JudicialPayIncreaseFact.aspx (last visited Jan. 23, 2013).

[28] NAT'L CTR. FOR STATE COURTS (NCSC), 36(2) SURVEY OF JUDICIAL SALARIES (Jan. 1, 2011). These differences can be attributed to the cost of living discrepancies among various states.

[29] *Income Poverty and Health Insurance Coverage in the United States: 2010*, U.S. CENSUS BUREAU (Sept. 13, 2011), http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html. This amount represented a 2.3% decline from the median in 2009 as a result of the recent recession. *Id.*

[30] Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 53 (1985).

[31] *Id.*

[32] Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049, 1049 (1969-1970).

[33] DAVID SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 4 (2005).

Additionally, living in poverty "creates an abrasive interface with society; poor people are always bumping into sharp legal things."[34] Thus, for poor people, everyday living requires the "the ability to live with [the] unrelenting challenges and chronic instability of being poor."[35] Judges, on the other hand, generally have well-paid and stable employment positions.[36] This discrepancy creates an economic imbalance in courtrooms that may result in socioeconomic bias.

The difference in economic status between judges and litigants has not gone unnoticed, and the public is increasingly equating wealth with the ability to obtain fairness in American courts. A recent survey by the National Center for State Courts found that Californians believe the level of fairness in state courts is least for those with low incomes and non-English speakers.[37] Nationally, 62% of Americans believe the courts favor the wealthy.[38]

These statistics reveal the importance of evaluating judicial socioeconomic bias in American courtrooms. If judges' decisions are influenced—consciously or unconsciously—by their elite and privileged status, the public trust in the American judicial system will continue to be undermined. Conversely, increased judicial attention to the problem of socioeconomic bias will signal to the public that judges recognize the importance of justice for all litigants, regardless of economic class.

B. Socioeconomic Bias vs. Class Privilege

The elite status of most judges enables them to enjoy the benefits of class privilege, meaning that their life experiences are different than those of lower-income people.[39] Some judges may not recognize their privileged positions, since they "believe that their success is based on their individual merit, gaining the 'supreme privilege of not seeing themselves as privileged.'"[40]

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[34] Wexler, *supra* note 32, at 1050.

[35] Eden E. Torres, *Power, Politics, and Pleasure: Class Differences and the Law*, 54 RUTGERS L. REV. 853, 863 (2002) (citing Alan Wald, *A Pedagogy of Unlearning: Teaching the Specificity of U.S. Marxism*, *in* PEDAGOGY, CULTURAL STUDIES, AND THE PUBLIC SPHERE 125, 143 (Amitava Kumar ed., 1997)).

[36] Federal judges enjoy lifetime tenure. U.S. CONST. art. III § 1. Appointed federal judges may serve specific terms. 28 U.S.C.A. § 631(a), (e) (West 2012) (District Court judges appoint magistrate judges to their respective jurisdictions to eight-year terms); *cf.* CAL. CONST. art. VI, § 16(d)(2) (When vacancies arise on the California Supreme Court or a court of appeal, the Governor appoints judges who hold office until the first general election following their appointment.) By contrast, elected judges may have to run for election to retain their positions. CAL. CONST. art. VI, § 16(c) (California superior court judges are elected to 6-year terms.)

[37] NAT'L CTR. FOR STATE COURTS (NCSC), TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS (Dec. 2006), *available at* http://www.courts.ca.gov/documents/Calif_Courts_Book_rev6.pdf.

[38] Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 900 (2007).

[39] *See supra* Part II.A.

[40] Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1195 (2008) (quoting PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 163 (1990)).

Nevertheless, the influence of class privilege may contribute to implicit assumptions about members of particular socioeconomic groups, resulting in class bias. For example, class privilege may rise to the level of bias in the case of a judge who "acquired his judicial predispositions through the sympathies instilled by a corporation practice and other schools of privilege."[41] This type of judge is "conscientiously predisposed to favor privileged classes," and may then "carr[y] that predisposition into every case by him considered."[42] While it can be difficult to recognize these predispositions, "the conscientious judge who believes in class privileges and undemocratic distinctions is . . . more pernicious than the judge who is occasionally corrupt."[43]

Class privilege may also manifest as the presumption that all persons have similar experiences, exemplified by Justice Blackmun's assumption in *Kras* that all persons could afford the price of a movie.[44] Unlike ordinary citizens, judges have a duty to receive information, fairly assess it, and incorporate it into their judgments without bias.[45] A judge who adjudicates cases based on the implicit assumption that all persons are situated similarly to that judge is not properly assessing or investigating the facts of a given case. Treating all parties as though they were socioeconomically identical rises beyond privilege to the level of bias, precisely because judges have a duty to consider the unique facts of every case.

C. The Challenge of Identifying Socioeconomic Bias

1. The ABA Model Code of Judicial Conduct's Prohibition of Socioeconomic Bias

The American Bar Association's Model Code of Judicial Conduct is intended to provide disciplinary guidance to all full-time judges, as well as "anyone who is authorized to perform judicial functions," including a "justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary."[46] Although the first Canons of Judicial Ethics (Canons) were released by the ABA in 1924, the specific prohibition of bias based on socioeconomic status was not added until 1990. During the 1974 revisions to the Code of Judicial Conduct, language was proposed that would have prohibited judges from treating indigent or welfare litigants differently from their nonindigent counterparts.[47] The Committee revising the Code rejected this proposal, believing that such a specific standard was not required when a judge was already directed to be "faithful to the law."[48] Since this standard applied regardless of a litigant's status

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[41] Theodore Schroeder, *Social Justice and the Courts*, 22 YALE L. J. 19, 25 (1912).

[42] *Id.*

[43] *Id.*

[44] United States v. Kras, 409 U.S. 434, 449 (1973).

[45] MODEL CODE OF JUDICIAL CONDUCT R. 2.2 and R. 2.3 (2011).

[46] MODEL CODE OF JUDICIAL CONDUCT § I(B) (2011).

[47] E. WAYNE THODE, THE REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 51 (1973).

[48] *Id.*

as an indigent or otherwise, further elaboration of the standard was deemed "counter-productive."[49]

A different view prevailed during the 1990 revisions to the Code, when the Committee chose to include a list of specific classes of prohibited biases on the premise "that a specific listing of examples of prohibited bias or prejudice would provide needed strength to the rule."[50] Thus, by 1990, the rule prohibiting judicial bias changed from a general guideline concerning a judge's general obligation to remain impartial into a specific rule with clear examples of the types of biases prohibited by the Code.

The most recent version of the ABA Model Code of Judicial Conduct, released in 2007, retained the list of examples of bias and added the categories of gender, ethnicity, marital status, and political affiliation.[51] Thus, Rule 2.3 now provides that judges shall not "manifest bias or prejudice," including but not limited to biases based on "race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation."[52] This enumerated list is not meant to be exclusive; the language "included but not limited to" indicates that the list of prohibited biases provides illustrative examples.[53]

The inclusion of socioeconomic bias as one of the specific examples of bias in the 1990 Code and subsequent revisions may certainly be seen as progress, since it brings judicial attention to the fact that this type of bias exists. However, this obscure form of bias is not clearly explained, leaving judges uncertain about what is meant by the phrase "socioeconomic bias."

The term "socioeconomic" is defined by *Webster's New International Dictionary* as "of, relating to, or involving a combination of social and economic factors."[54] Without any explanation of what these "factors" may be, this vague general definition is ambiguous. Yet the Code's drafters failed to define the term "socioeconomic" in the "Terminology" section of the Code, and it is not defined anywhere else in the Code.[55] The same is true for the term "bias," which is also not defined in the Code's "Terminology" section.[56]

The failure to define these key terms is problematic in a Code intended to provide guidance and serve as the basis for disciplinary procedures for judges. Assuming the Code's drafters intended to prohibit judicial bias against the poor and

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[49] *Id.*

[50] LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 18 (1992).

[51] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(B) (2011).

[52] *Id.*

[53] MILORD, *supra* note 50, at 18. Judicial bias has been extensively studied in other contexts. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821 (2011) (empirical study of judicial bias revealed that "[j]udges, it seems, are human. Like the rest of us, they use heuristics that can produce systematic errors in judgment.")

[54] WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed.1986).

[55] MODEL CODE OF JUDICIAL CONDUCT, Terminology (2011).

[56] A definition of the term "bias" was proposed, but rejected. Am. Bar Ass'n (ABA) Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Summary of Teleconference Minutes (Nov. 17, 2003). The Code does list examples of manifestations of bias. MODEL CODE OF JUDICIAL CONDUCT R. 2.3, cmt. 2 (2011).

disadvantaged economic classes as well as the wealthy and privileged classes, it is unclear how these groups should be characterized. As a term, "the poor" can include "all races, colors, ethnicities, regions, and ages of people, although it is heavy on women and children . . . . in short, those who at some period of time populate the low end of the income distribution scale in the United States are indescribably varied and multifaceted."[57] Yet, the Code makes no mention of how the term "socioeconomic" should be considered in this context. Thus, judges are prohibited from engaging in a type of bias that is undefined in the Code, raising concerns about the enforceability of the Code's prohibition against socioeconomic bias.

2. The Unique Nature of Socioeconomic Bias

Socioeconomic bias is different from other forms of bias. First, this type of bias is distinctive because American law treats socioeconomic status differently than other identities. There is no fundamental right to be wealthy or "free of poverty,"[58] and the Constitution does not protect socioeconomic rights by assuring all Americans economic stability.[59] Unlike race or gender, poverty is not a classification deserving strict or intermediate scrutiny, and the federal government does not ensure full participation in the economic life of the nation.[60] Thus, there is no constitutional provision requiring judges to stop and carefully deliberate the impact of their decisions on poor people.[61] In addition, the focus of most legal scholars and activists on race, gender, and other bases for bias has "shifted attention away from socioeconomic class."[62] For example, judicial ethics scholars have extensively considered racial and gender bias, but have placed little to no emphasis on socioeconomic bias in courtrooms.[63] In light of our country's historical oppression of women and minority populations, this focus makes sense. However, the growing gap between rich and poor people in the United States demands renewed attention to the problem of judicial bias against the poor.[64]

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[57] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 358 (2010) (citing JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 20-21 (2001)).

[58] Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 111 (2009).

[59] *Id.*

[60] *Id.* at 112-13.

[61] Similarly, there is no constitutional or statutory requirement for employers, government agencies, landlords, etc., to consider socioeconomic status in the same way as race or gender.

[62] Barnes & Chemerinsky, *supra* note 58, at 124.

[63] Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994) ("There is little research on the issue of poverty bias.").

[64] The economic gap between rich and poor persons is rising in the United States. From 1973 to 2008, the top 1% of Americans saw their share of national income more than double, from 8% to 18%. Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, 118(1) Q. J. OF ECON. (Feb. 2003) (updated to include the years 1998-2008). The 2008 financial crisis had a significant effect on the share of total net worth for American households: In 2010, the wealthiest 1% held 34.5% of the nation's wealth, while the bottom

Second, and more problematic, is the fact that class bias is "much more elusive to define" than other forms of bias.[65] Poor populations are disproportionately people of color, and the "line between poverty and racial bias is very blurred."[66] Judges rarely display explicit bias against poor litigants in courtrooms, and statements about poverty are deemed less inflammatory than racist or sexist comments made by a judge.[67]

Moreover, although a person may be born into poverty, the concept of the "American dream" implies that "unlike race and gender, poverty is not immutable."[68] As a result, many members of society view poor people as responsible for their socioeconomic status.[69] This viewpoint has historical roots in the early American conception of poor people as lazy or immoral.[70] The poor have traditionally been stereotyped as "welfare queens" whose behavior merits the "reasonable suspicion and disdain of broader society."[71] Poor persons who apply for welfare benefits may be viewed as "presumptive liars, cheaters, and thieves."[72]

This stereotype has severe implications for the fate of poor people in the United States: If an individual's laziness or immorality is responsible for making someone poor, why should society (and by extension the justice system) not treat poor people accordingly? The President's Crime Commission issued a report in 1972

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half of American households held only 1% of all American wealth. Dan Froomkin, *Half of American Households Hold 1 Percent of Wealth*, HUFFINGTON POST, July 19, 2012.

[65] Barnes & Chemerinsky, *supra* note 58, at 125 (2009). Other types of biases, such as gender bias, may be more readily identifiable in the courtroom. For example, a New York judge's statement in 1997 that "[E]very woman needs a good pounding now and then" is a clear manifestation of gender bias. *In re* Roberts, 689 N.E.2d 911, 913 (N.Y. 1997).

[66] Nugent, *supra* note 63, at 49.

[67] Manifestations of bias against the poor may be overlooked or unnoticed. For example, California Municipal Court Judge Stephen Drew was publicly admonished in 1995 for a number of improper judicial actions. Among the facts giving rise to Judge Drew's admonishment was his failure to appoint counsel for an unemployed defendant, stating that he was potentially employable. Judge Drew ordered the defendant to apply for work to afford private counsel. This action demonstrated socioeconomic bias, but it alone did not result in disciplinary action; it was considered as only one of numerous improprieties committed by Judge Drew on the bench. Comm'n on Judicial Performance, Judicial Performance Commission Issues Public Admonishment of Judge Stephen Drew (July 29, 1995) (public admonishment release for Judge Stephen Drew of the Tulare County Municipal Court, Dinuba Division), *available at* http://cjp.ca.gov/res/docs/Public_Admon/Drew_07-96.pdf.

[68] Barnes & Chemerinsky, *supra* note 58, at 122 ("The American Dream is that, through hard work, a person can rise from even a seriously disadvantaged background.").

[69] *Id.* at 125.

[70] Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355, 407 (2010) (this viewpoint "has animated public discourse since the European settlement of North America and served to exclude the poor from equal participation in our civic life for over two centuries.").

[71] Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, 19 WM. & MARY BILL RTS. J. 751, 772-73 (2011).

[72] Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646 (2009).

recognizing the dangers of a system in which wealthy judges adjudicate criminal cases brought against poor litigants:

> [M]any defendants are not understood by and seem threatening to the court and its officers. Even such simple matters as dress, speech, and manners may be misinterpreted. Most city prosecutors and judges have middle class backgrounds and a high degree of education. When they are confronted with a poor, uneducated defendant, they may have difficulty judging how he fits into his own society of culture. They can easily mistake a certain manner of dress or speech, [as] alien or repugnant to them, but ordinary enough in the defendant's world as an index of moral worthlessness. They can mistake ignorance or fear of the law as indifference to it. They can mistake the defendant's resentment against social evils with which he lives as evidence of criminality.[73]

Thus, judges are not immune from the influence of this stereotype.[74] In some cases, the fact that poor people are different than lawyers and judges may serve as the basis for socioeconomic bias in courtrooms. Judges, lawyers, and other officers of the court are perceived by themselves as hardworking, and they act in expected ways. Poor people may act or appear differently, which can be interpreted by judges as a failure to exhibit some of the admirable qualities of the members of the legal profession. Because the experiences of poor litigants are unfamiliar to judges, socioeconomic bias may infect a judge's own decision-making processes.[75]

For example, a study commissioned by the Georgia Supreme Court in the mid-1990's concluded that the justice system is biased against the poor.[76] According to an assistant district attorney who participated in the Georgia study, poor people were more likely to end up in court, notwithstanding their skin color, because "the problems lie not directly with race but rather with financial and social problems."[77] The study included "attitude surveys" of judicial officers, court clerks, and lawyers. Survey comments suggested that "[t]he real evil is not racial bias but lack of empowerment for the poor; [p]oor people of little education are victims of bias; [t]his is also a class/money problem; i.e.—the better dressed, educated, and wealthier litigants are treated better by everyone in the court system."[78] As the study noted, socioeconomic bias in courtrooms affects minority populations more seriously, since these populations are a "greater portion of the economically and educationally

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[73] Ochi, *supra* note 30, at 8 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 50 (1967)).

[74] Budd, *supra* note 71, at 773 ("This conception of the indigent influences judicial perceptions as well.").

[75] Nugent, *supra* note 63, at 49.

[76] Ga. Supreme Court Comm'n on Racial & Ethnic Bias in the Court Sys., *Let Justice be Done: Equally, Fairly, and Impartially*, 42 GA. ST. U. L. REV. 687, 700 (1996).

[77] *Id.*

[78] *Id.*

disadvantaged."[79] To compound the problem, persons living in poverty are increasingly marginalized and alienated from other members of society.[80]

Thus, those seeking to quantify socioeconomic bias on the part of judges face a daunting challenge: The elusive nature of socioeconomic bias, and the fact that it is often obscured by racial or gender bias, make it difficult bias to recognize. In fact, the more insidious form of socioeconomic bias is likely to be implicit—an unconscious bias against the poor on the part of the judges.[81]

Of course, many judges are sympathetic to the plight of the economically disadvantaged, and actively work to be aware of their own personal biases.[82] As discussed in Part II.C *infra,* this awareness may work to reduce the prevalence of biases against poor litigants in courtrooms.[83] However, not all biases are overtly recognized and consciously reduced; unconscious beliefs about poor people may play a larger role in judicial decision-making than has been previously acknowledged.

3. The Challenge of Identifying Implicit Bias

Any type of bias can be explicit or implicit. The term "explicit bias" is used to indicate that a person recognizes his or her bias against a particular group, believes that bias to be appropriate, and acts on it.[84] This is the type of bias that "people knowingly—and sometimes openly—embrace."[85]

Explicit bias on the basis of race or ethnicity has declined significantly over time, and is now mostly viewed as "unacceptable" in society.[86] As discussed above, judges are prohibited by the ABA Model Code of Judicial Conduct from displaying such bias on the bench.[87]

Implicit bias is a more subtle form of bias. It is unintentional,[88] representing "unconscious mental processes based on implicit attitudes or implicit stereotypes which play an often unnoticed role in day to day decision-making."[89] An individual

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[79] *Id.* at 701.

[80] Budd, *supra* note 71, at 772.

[81] *See supra* Part II.C.

[82] Torres, *supra* note 35, at 854 (" . . . it is important to think about the way in which working-class Chicana/o defendants, law students, and lawyers will be experienced by judges, juries, professors, and opposing council [sic] who may be of a different class, ethnic, or racial background.").

[83] Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 963-64 (2006).

[84] Irene V. Blair et al., *Unconscious (Implicit) Bias and Health Disparities: Where do We Go from Here?*, 15 PERMANENTE 71, 71 (2011).

[85] Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

[86] Blair et al., *supra* note 84, at 71.

[87] MODEL CODE OF JUDICIAL CONDUCT R. 2.3(b) (2011).

[88] Blair et al., *supra* note 84, at 71.

[89] John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 3 (2010).

who is careful not to display explicit bias against a particular group may nonetheless be influenced by "situational cues," such as a person's accent or race, which are feeding unconscious stereotypes.[90] This type of bias is "largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly . . . that people have no time to deliberate."[91]

Even those persons who diligently and consciously combat their own explicit biases may be influenced to act on the basis of unconscious prejudices.[92] This raises a particular problem for judges, who are directed by the Code to act free of bias and risk being accused of judicial misconduct if they make decisions in favor of one group over another. This also raises concerns for litigants in courtrooms, who may be disadvantaged by a judge's prejudice without the litigants—or even the judge—being aware of it. For example, well-meaning judges may not intend to adjudicate cases in accordance with social stereotypes regarding the poor. However, the "caricature of the poor" may influence a judge's decision "whether or not the courts consciously acknowledge the connection."[93]

Thus, it is critical to recognize the role that implicit bias may play in judicial decision-making. But given the unconscious and automatic nature of implicit bias, how can its existence be identified or measured? Simply asking survey questions, as did the Georgia Supreme Court in the study referenced in Part II.C.2., may expose explicit bias but will not reveal the presence of implicit bias.

i. The Implicit Association Test

Recognizing this problem, a psychologist from the University of Washington developed the "Implicit Association Test" (IAT) in 1995 to measure unconscious biases.[94] The computerized test "seeks to measure implicit attitudes by measuring their underlying automatic evaluation."[95]

The IAT can take different forms, and has been used in hundreds of studies spanning many disciplines.[96] The most common test "consists of a computer-based sorting task in which study participants pair words and faces."[97] The test presumes

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[90] Blair et al., *supra* note 84, at 71; Mahzarin R. Banaji et al., *How (Un)ethical are You?*, 81 HARV. BUS. REV. 56, 57 (2003).

[91] Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006); *see also* Anthony G. Greenwald, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCH. 1464, 1464 (1998) ("Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer's awareness of that causation.").

[92] Banaji et al., *supra* note 90, at 57 (implicit bias "is distinct from conscious forms of prejudice, such as overt racism or sexism.").

[93] Budd, *supra* note 71, at 774.

[94] Banaji et al., *supra* note 90, at 57; Blair et al., *supra* note 84, at 71. For access to the IAT, see *Project Implicit*, https://implicit.harvard.edu/implicit/demo/takeatest.html (last visited Jan. 23, 2013)

[95] Greenwald, *supra* note 91, at 1464.

[96] Blair et al., *supra* note 84, at 72 ("including psychology, health, political science, and market research.").

[97] Rachlinski et al., *supra* note 85, at 1198.

that participants will respond more quickly to a concept that has a stronger association for that particular individual.[98] Subjects are asked "to rapidly classify words or images displayed on a computer monitor as 'good' or 'bad.'"[99] The speed with which the participants respond demonstrates the "well-practiced associations" they hold between a particular object and attribute, which essentially measures their implicit beliefs.[100] In other words, the researchers infer that "the larger the performance difference, the stronger the implicit association or bias for a particular person."[101]

There is some scholarly dispute about the usefulness of IAT results in predicting actual behavior.[102] For example, some scholars argue that the IAT may not be a measure of unconscious bias, but rather a "subtle measure of conscious bias that study participants are unable to conceal."[103]

Despite this debate about the IAT's limitations, legal scholars have used IAT results over the last decade to examine implicit biases in antidiscrimination law,[104] including employment discrimination law,[105] and bias in jury selection.[106] One study, conducted in 2009, analyzed IAT results from a large sample of trial judges nationwide.[107]

Led by Jeffrey Rachlinski, a professor at Cornell Law, the study sought to understand why racial disparities persist in the criminal justice system. Judges were asked to complete the IAT in a form "comparable to the race IAT taken by millions

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[98] Blair et al., *supra* note 84, at 72.

[99] Irwin & Real, *supra* note 89, at 3. For example, in tests measuring implicit racial bias, white respondents tend to respond faster "when 'black and bad' items require the same response and the 'white' and 'good' items require another response, compared to when 'black' and 'good' responses are the same and 'white' and 'bad' responses are the same." *Id.* at 72.

[100] IMPLICIT RACIAL BIAS ACROSS THE LAW 17 (Justin D. Levinson & Robert J. Smith eds., 2012).

[101] Blair et al., *supra* note 84, at 72.

[102] *See, e.g.*, Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?*, 58 EMORY L.J. 1053, 1064 (2009) ("In IAT results, 'levels of implicit bias consistently diverge from levels of conscious bias, but it is difficult to know whether that apparent divergence reflects a real underlying difference or is merely an artifact of the systematic understatement of levels of conscious bias. Conscious bias might well be underreported.'"); *see also* Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons From "Big Judge Davis,"* 99 KY. L.J. 259, 321 (2010-2011).

[103] Banks & Ford, *supra* note 102, at 1111.

[104] Jolls & Sunstein, *supra* note 91.

[105] Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006).

[106] Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149 (2010). For a comprehensive look at implicit racial bias in various areas of law, see IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100.

[107] Rachlinski et al., *supra* note 85, at 1232.

of study participants around the world."[108] The study found that implicit biases on the basis of race were "widespread" among judges.[109] In addition, "these biases can influence their judgment."[110] On a positive note, the study's authors noticed that judges were aware of potential biases and, if motivated to do so, could compensate for implicit bias and avoid its influence.[111]

It is perhaps no surprise that "judges, like the rest of us, possess implicit biases."[112] However, the results of the Rachlinski study present significant implications for judicial ethics guidelines, and the dialogue must be broadened in scope. If judges are found to harbor implicit biases based on race, it is reasonable to assume that implicit biases based on other factors, including socioeconomic status, may also subtly influence judicial decision-making. [113]

ii. How Can We Measure Implicit Socioeconomic Bias?

The IAT has not yet been used to analyze implicit *judicial* bias based on socioeconomic status. However, two recent studies used the IAT to analyze socioeconomic bias in other contexts.

The first study, published by the American Medical Association (AMA) in 2011, analyzed IAT scores in order to "estimate unconscious race and social class bias among first-year medical students" at the Johns Hopkins School of Medicine in Baltimore.[114] The IAT portion of the study used a race test and a "novel" social class IAT to identify implicit prejudices based on membership in upper or lower social classes.[115] The study included clinical vignettes based on race and social class, in order to analyze the "relationship between unconscious bias and clinical assessments and decision making."[116]

The study produced striking results: 86% of the first-year medical students displayed "IAT scores consistent with implicit preferences toward members of the upper class."[117] These results were "significantly different" from the student's stated preferences, meaning that implicit bias was prevalent in a majority of the medical

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[108] *Id.* at 1209.

[109] *Id.* at 1225.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1232.

[113] Banaji et al., *supra* note 90, at 56 (2003) (at least 75% of IAT test takers show implicit biases "favoring the young, the rich and whites."); *id.* at 58.

[114] Adil H. Haider et al., *Association of Unconscious Race and Social Class Bias with Vignette-Based Clinical Assessments by Medical Students*, 306 J. AM. MED. ASS'N 942 (2011).

[115] *Id.* at 942. The social class IAT used terms such as "wealthy," "well-to-do," "poor," and "disadvantaged." *Id.* at 943. This social class portion of the IAT has not yet been completely validated. *Id.*

[116] *Id.* at 944. The high and low socioeconomic class determinations were completed using patient occupations. *Id.*

[117] *Id.* at 949. 69% of the students displayed implicit preferences toward white people. *Id.*

students despite their spoken beliefs that they did not hold such prejudices.[118] These findings have important implications for the medical profession, since implicit social class biases held by physicians may be a contributing factor to disparities in the health care system.[119]

The second study, conducted by Irish professors from University College Dublin and the University of Limerick, was also published in 2011. This study sought to "establish the presence of prejudice against people from disadvantaged areas" in the context of social attitudes in Ireland, in order to examine how such prejudice creates "further social exclusion."[120] The study's authors created an IAT using pleasant and unpleasant words with pictures of Limerick city landmarks and disadvantaged areas.[121] Of the 214 Irish participants, 88 were residents of disadvantaged areas, while 126 were from other, more affluent areas.[122]

Like the AMA study, the Limerick study revealed significant implicit bias on the basis of socioeconomic status. In fact, all participants exhibited negative associations with persons from the disadvantaged parts of Limerick City.[123] Participants who themselves resided in disadvantaged areas were no less biased.[124] The portion of the study examining explicit bias found similar outcomes. All participants viewed persons from disadvantaged areas as "less concerned for others and less responsible" than individuals from non-disadvantaged areas.[125] The study's authors concluded that residents of poorer communities face prejudice not just on the part of outsiders, but also from within their own communities.[126]

Hence both studies examining implicit bias based on socioeconomic class identified the presence of such bias, one in a group of American medical students and the other in an economically diverse group of Irish residents. Together, these results offer evidence to support the theory that implicit socioeconomic bias exists in varied populations.

There is no reason to believe that judges are exempt from implicit bias against the poor and disadvantaged. In light of the extraordinary discretionary power granted to judges in the United States, and the potential impact of judicial determinations on the lives of individual litigants, this possibility could hold

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[118] *Id.* The discrepancy between results showing implicit bias and self-reported explicit attitudes is a common feature of IAT tests. *See* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 17-18

[119] Haider et al., *supra* note 114, at 949.

[120] Niamh McNamara et al., *Citizenship Attributes as the Basis for Intergroup Differentiation: Implicit and Explicit Intergroup Evaluations*, 21 J. CMTY. APPLIED SOC. PSYCH. 243, 246 (2011).

[121] *Id.* at 247.

[122] *Id.*

[123] *Id.* at 251.

[124] *Id.* Other IAT studies have also found individuals from "bias-affected groups" who "sometimes harbor implicit biases against their own group." IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 100, at 18.

[125] McNamara et al., *supra* note 120, at 251.

[126] *Id.* at 252.

significant consequences for the fairness of the judicial system. It is also crucial to identify implicit biases because recognition of such bias may enable judges to minimize its influence.[127]

How can we measure whether implicit bias on the basis of socioeconomic status exists in American courtrooms? In the absence of systematic empirical data, this Article will examine cases demonstrating the prevalence of implicit bias against the poor in American courtrooms.

III. IMPLICIT SOCIOECONOMIC BIAS IN FOURTH AMENDMENT AND CHILD CUSTODY CASES

A. Implicit Socioeconomic Bias in Fourth Amendment Cases

As the federal courts slowly chip away at the constitutional rights of poor people,[128] the implicit biases of federal judges who are removed from the realities of poor people are becoming increasingly apparent. This section will examine two recent Fourth Amendment cases through the lens of judicial socioeconomic bias. These cases reveal the failures of federal judges to appreciate the unique challenges faced by low-income populations.

The first case, *United States v. Pineda-Moreno*, is notable for the dissenting opinion written by Ninth Circuit Chief Judge Alex Kozinski.[129] The police came onto Mr. Pineda-Moreno's driveway in the middle of the night to attach a GPS tracking device to his car.[130] Using this device, police were able to track Mr. Pineda-Moreno's movements.[131] After he was charged with conspiracy to manufacture marijuana and manufacturing marijuana, Mr. Pineda-Moreno sought to suppress the evidence obtained from the GPS tracking device.[132]

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[127] Rachlinski et al., *supra* note 85, at 1225.

[128] *See, e.g.*, Sanchez v. City of San Diego, 464 F.3d 916 (9th Cir. 2006); *see also* Budd, *supra* note 71, at 751; Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

[129] United States v. Pineda-Moreno, 617 F.3d 1120, 1120 (9th Cir. 2010). Eighteen months after the opinion discussed in this Article was published, the United States Supreme Court held in *United States v. Jones* that attachment of a GPS tracking device to a vehicle, and subsequent use of the GPS device to monitor the vehicle's movements on public streets, was a Fourth Amendment search. United States v. Jones, 132 S. Ct. 945, at Syllabus (2012). In light of the *Jones* decision, the Supreme Court vacated the judgment in *Pineda-Moreno* and remanded the case to the United States Courts of Appeals for the Ninth Circuit. The Ninth Circuit held on remand that the police's conduct in attaching the tracking devices in public areas and monitoring them was authorized by then-binding circuit precedent, and suppression of the GPS evidence was not warranted. United States v. Pineda-Moreno, 688 F.3d 1087, 1091 (9th Cir. 2012). The Supreme Court denied a petition for writ of certiorari in the case on January 22, 2013. Pineda-Moreno v. United States, 133 S. Ct. 994 (2013). The ultimate disposition of this case does not impact the observations about socioeconomic bias made by Chief Judge Kozinski in his dissent to the denial of rehearing en banc. Nor does the Ninth Circuit's decision on remand affect the analysis described herein.

[130] *Pineda-Moreno*, 617 F.3d at 1121.

[131] *Id.*

[132] *Pineda-Moreno*, 591 F.3d at 1214, *vacated*, 132 S. Ct. 1533 (2012).

Pineda-Moreno claimed that the police actions on his property violated his Fourth Amendment search and seizure rights.[133] The court disagreed, reasoning that the driveway was "only a semi-private area," and that "'[i]n order to establish a reasonable expectation of privacy in [his] driveway, [Pineda-Moreno] must support that expectation by detailing the special features of the driveway itself (i.e. enclosures, barriers, lack of visibility from the street) or the nature of activities performed upon it.'"[134]

Pineda-Moreno's petition for rehearing en banc was denied.[135] In his dissenting opinion, Chief Judge Kozinski noted the legal erosion of Fourth Amendment privacy protections. He specifically discussed the connection between poverty and diminished Fourth Amendment rights.[136] Recognizing that wealthy persons are able to protect their privacy with "the aid of electric gates, tall fences, security booths, remote cameras, motions sensors and roving patrols," Chief Judge Kozinski explained that those who are not able to afford such protections will be subject to police searches on their property.[137] In contrast, if Mr. Pineda-Moreno had been able to afford a gate, a garage, or some other method of shielding his car from the street, his privacy rights would have been protected.[138]

Chief Judge Kozinski was clearly frustrated by his fellow judges' failure to recognize how their ruling would impact poor people. The Ninth Circuit judges either did not understand or chose to ignore the fact that this decision created a two-tiered structure of privacy rights: Wealthy people with gates and garages would be protected from police incursion onto their properties, while poor people who parked on the street would be subject to police searches without Fourth Amendment protection. This is the crux of implicit socioeconomic bias: Judges without exposure to the lives of low-income people simply don't appreciate the realities faced by poor individuals. As a result, these judges make critical legal decisions from a place of privilege, detrimentally impacting people from lower economic classes.

Similar implicit bias against the poor is apparent in *Sanchez v. County of San Diego*, another Fourth Amendment case.[139] San Diego County implemented a program in 1997 requiring all welfare applicants to consent to a warrantless home visit from an investigator.[140] This mandatory visit, which included an interview and a "walk through" the home by district attorney fraud investigators, was designed to ensure that applicants were not committing welfare fraud.[141] An applicant who

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[133] *Id.*

[134] *Id.* (quoting Maisano v. Welcher, 940 F.2d 499, 503 (9th Cir. 1991)).

[135] *Pineda-Moreno*, 591 F.3d at 1215.

[136] *Pineda-Moreno*, 617 F.3d at 1123; *see also* Budd, *supra* note 71, at 765.

[137] *Pineda-Moreno*, 617 F.3d at 1123.

[138] *Id.*

[139] Sanchez v. Cnty of San Diego, 464 F.3d 916, 916 (9th Cir. 2006). When the Ninth Circuit denied Rocio Sanchez's petition for rehearing en banc, Judge Harry Pregerson filed a dissenting opinion noting that, "This case is nothing less than an attack on the poor." *Id.* at 969 (Pregerson, J., dissenting).

[140] *Id.* at 918.

[141] *Id.* at 919.

refused the home visit would be deemed as failing to "cooperate" and would be denied benefits.[142]

Welfare applicants filed a class action lawsuit claiming that the home visit program violated the U.S. and California Constitutions and California welfare regulations. The U.S. District Court held the program constitutional, relying on the U.S. Supreme Court's determination in *Wyman v. James* that "rehabilitative" visits to welfare recipients' homes were constitutional.[143]

When the case reached the Ninth Circuit, a divided panel affirmed the lower court's decision. The majority opinion, written by Judge Tashima, equated San Diego County's home visits with the rehabilitative home visits at issue in *Wyman.* Since the visits were not related to a criminal investigation, and welfare applicants could deny consent to the home visits without incurring criminal consequences, the majority held that the home visits were reasonable.[144] Additionally, the majority held that the County's welfare system constitutes a "special need" beyond general law enforcement purposes, finding that, on balance, the government interests at stake justified the privacy intrusion of a home visit.[145] Judge Raymond C. Fisher dissented from the majority opinion, writing that the San Diego program in *Sanchez*, which allowed district attorney investigators with no social work training to enter welfare applicants' homes for the purposes of fraud detection, differed from the rehabilitative visits at issue in *Wyman.*[146]

The majority opinion in *Sanchez* has significant implications for the privacy rights of poor people, and the case has been thoroughly considered in that context by other scholars.[147] From a judicial ethics perspective, the majority's opinion exposes implicit socioeconomic bias and a profound disregard for the realities of poor people.

For example, explaining the court's justification for the premise that home visits are not searches under the Fourth Amendment, Judge Tashima wrote that "there is no penalty for refusing to consent to the home visit, *other than denial of benefits.*"[148] But as the Supreme Court recognized in *Goldberg v. Kelly,* welfare aid represents "the very means by which to live" for poor people.[149] For many welfare applicants, receipt of benefits represents the difference between life and death. Yet in effect, the *Sanchez* court assumed that welfare applicants do not actually need benefits.[150] The

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[142] *Id.*

[143] *Id.* at 922-23; Wyman v. James, 400 U.S. 309, 320 (1971); *see also* Recent Cases, *Constitutional Law—Fourth Amendment—Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits*—Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006), 120 HARV. L. REV. 1996, 1997 (2007).

[144] *Sanchez,* 464 F.3d at 925.

[145] *Id.* at 927-928.

[146] *Id.* at 932 (Fisher, J., dissenting).

[147] *See* Budd, *supra* note 71, at 771 (2011); Recent Cases, *supra* note 143, at 1996.

[148] *Sanchez,* 464 F.3d at 921 (emphasis added).

[149] Goldberg v. Kelly, 297 U.S. 254, 264 (1970); *see also* Recent Cases, *supra* note 143, at 2002.

[150] Recent Cases, *supra* note 143, at 2002.

court's treatment of welfare aid as an option which can be easily denied "evinces a stark refusal to acknowledge the dire situation of welfare recipients."[151]

Judge Fisher's dissent, like Chief Judge Kozinski's in *Pineda-Moreno*, pointed out that the court's analysis would likely be different if it were the judges' own residences subject to intrusion by government investigators. Observing that the San Diego home visit program essentially permits "snooping" in "medicine cabinets, laundry baskets, closets and drawers for evidence of welfare fraud," Judge Fisher doubted "my colleagues in the majority would disagree that an IRS auditor's asking to look in such places within their own homes to verify the number of dependents living at home would constitute snooping."[152]

Judge Fisher's point highlights the implicit socioeconomic bias in this case. According to the majority, poor welfare recipients being forced to open their homes to government examination makes sense, since the government must ensure poor people are not committing fraud. But requiring wealthy individuals to do the same thing for purposes of detecting tax fraud would be unjustifiable.

Embedded in this line of reasoning is the unspoken belief that poor people are often dishonest and deserving of government inspection.[153] The *Sanchez* court, "while not confessing bias" in an explicit manner, demonstrated bias "without apology or pretense" and embraced "the stereotype of the immoral poor."[154] This is, of course, an unmistakable example of implicit socioeconomic bias.

Statements made during oral argument in *Sanchez* illuminate this point more clearly. Judge Kleinfeld, perhaps inadvertently, revealed a fundamental misconception of the lives of poor people:

> I mean, you walk in and you see the $5,000 widescreen TV, and the person says, "oh, I have all this trouble supporting my children 'cause I don't have a man to help me in the house, and there's obviously a man to help her in the house—and that's seeing if the charity is going where it's supposed to go . . . . And you open a closet and you see four suits . . . and the golf clubs of the person that doesn't live there, supposedly—same thing, isn't it?[155]

As Professor Jordan Budd explains, when a federal judge adjudicating a welfare case "suggests that the question plausibly turns on the prospect of welfare recipients cashing government checks to help cover the cost of greens fees, business attire, and in-home theatre systems, the reality of judicial bias is apparent."[156] Even Judge Kleinfeld's choice of words is revealing: According to Supreme Court precedent, welfare benefits are not considered to be "charity."[157] Much like the Supreme Court

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[151] *Id.*

[152] *Sanchez*, 464 F.3d at 936.

[153] For a discussion of stereotypes about the poor, see *supra* Part II.C.2.

[154] Budd, *supra* note 57, at 406.

[155] *Id.* at 403.

[156] *Id.*

[157] Recent Cases, *supra* note 143, at 2001-02 ("The *Sanchez* majority, by dismissing the unconstitutional conditions doctrine—according to which 'government may not grant a

judges excoriated by Justice Marshall in *Kras* for their lack of awareness of the real challenges facing poor people, the majority in *Pineda-Moreno* and *Sanchez* came to their conclusions from mistaken assumptions about people who live in an economic class different from their own. These judicial assumptions have consequences; the implicit beliefs about poverty underlying these court opinions resulted in a substantial abrogation of the constitutional protections of poor persons.

B. Implicit Socioeconomic Bias and Child Custody Determinations

Federal judges are not the only members of the bench who exhibit implicit socioeconomic bias. In family court, child custody determinations may also be affected by implicit judicial bias against poor parents.

The general standard for determining which parents should take custody of a child is the "best interests of the child" test, which "asks judges to determine custody 'according to the best interests of the child' and to 'consider all relevant factors.'"[158] Most states and the District of Columbia provide statutory factors to be considered in such cases.[159] A handful of states draw the relevant factors from common law.[160]

Some states require judges to consider the capacity of a parent to provide a child with material needs, including food, clothing, and medical care.[161] It is certainly true that the ability to provide necessary resources should be considered in determining where to place a child.[162] But beyond these basic needs, most states do not include the wealth of either parent as a factor to consider in child custody cases. Indeed, a few states, such as California, prohibit judges from considering "the relative economic positions of two parents" as a "basis upon which to base a determination of child custody."[163]

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benefit on the condition that the beneficiary surrender a constitutional right'—reverted to a pre-*Goldberg* vision of welfare.").

[158] Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2075 (1993).

[159] *See, e.g.*, D.C. CODE § 16-914(a)(3)(A)-(Q) (2001); ALASKA STAT. ANN. § 25.24.150(C)(1)-(9) (West 2012); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(I)-(XI) (West 2012); CONN. GEN. STAT. ANN. § 46b-56(c)(1)-(16) (West 2012); DEL. CODE ANN. tit. 13, § 722(a)(1)-(8) (West 2012); FLA. STAT. ANN. § 61.13(3)(a)-(t) (West 2012); GA. CODE ANN. § 19-9-3(a)(3)(A)-(Q) (West 2012); IDAHO CODE ANN. § 32-717(1)(a)-(g) (West 2012); 750 ILL. COMP. STAT. ANN. 5/602(a)(1)-(10) (West 2012); IND. CODE ANN. § 31-17-2-8(1)-(8) (West 2012); NEV. REV. STAT. ANN. § 125.480(4)(a)-(l) (West 2012); VA. CODE ANN. § 20-124.3(1)-(10) (West 2012).

[160] *See, e.g.*, Martin v. Martin, 623 So. 2d 1167, 1169 (Ala. Civ. App. 1993); Wagner v. Wagner, 674 A.2d 1, 19 (Md. 1996); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983); Martin v. Martin, 846 N.Y.S.2d 696 (N.Y. App. Div. 2007); Johnson v. Johnson, 163 S.E.2d 229,232 (S.C. 1968); Wiedenfeld v. Wiedenfeld, 774 N.W.2d 288, 291 (S.D. 2009); Vazquez v. Vazquez, 292 S.W.3d 80, 85 (Tex. Ct. App. 2007).

[161] *See, e.g.*, LA. CIV. CODE ANN. art. 134(3) (2012); MICH. COMP. LAWS ANN. § 722.23(c) (West 2012); VT. STAT. ANN. tit. 15, § 665(b)(2) (West 2012).

[162] Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 220 (2000) ("The view that financial resources are not relevant to children's positive experience of life is rightly dismissed as 'idealistic.'").

[163] Burchard v. Garay, 724 P.2d 486 (Cal. 1986); *see also* R.I. GEN. LAWS ANN. § 15-5-16(d)(2) (West 2012) ("In regulating the custody and determining the best interest of children,

Despite these statutory and common law guidelines, child custody is an area of adjudication with a great deal of judicial discretion.[164] This discretion may give "free reign to . . . distorting unconscious biases, resulting in custody awards that are not necessarily in the best interests of a child."[165] Judicial discretion, coupled with the fact that most judges are economically privileged and may "exaggerate" the importance of wealth in a child's life, creates the potential for implicit socioeconomic bias in child custody cases.[166]

For example, the Supreme Court of North Dakota recently reversed a child custody determination in *Duff v. Kearns-Duff*, holding that the lower court impermissibly relied on wealth as a relevant factor.[167] North Dakota's statutory factors do not include the consideration of economic status,[168] and case precedent explicitly held that "money alone" does not signify a parent's inclination to provide for the children.[169] Even so, the lower court in *Duff*, faced with making a "difficult choice for custody between two apparently fit parents," resolved the case by relying on the parties' recent financial contributions to the marriage.[170] Since the mother in *Duff* was a radiologist earning $600,000 annually, while the father was enrolled in a doctoral program at North Dakota State University, the mother had supported the family "almost exclusively" for the last few years.[171] The lower court held that the mother's income should be viewed in her favor, and granted custody to her.[172]

The father appealed to the state Supreme Court, arguing the lower court's decision to award custody to the parent earning the most money was erroneous.[173] The Supreme Court agreed, rejecting the idea that a parent's financial contribution to a marriage is rationally related to the best interests of the children.[174] The Supreme

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the fact that a parent is receiving public assistance shall not be a factor in awarding custody."); OHIO REV. CODE ANN. § 3109.04(F)(3) (West 2012) ("When allocating parental rights and responsibilities for the care of children, the court shall not give preference to a parent because of that parent's financial status or condition."); VT. STAT. ANN. tit. 15, § 665(c) (West 2012) ("The court shall not apply a preference for one parent over the other because of the financial . . . resources of a parent.").

[164] For an assessment of judicial ethics issues in juvenile courts, see Michele Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97 (2011).

[165] Frantz, *supra* note 162, at 227.

[166] *Id.*

[167] Duff v. Kearns-Duff, 792 N.W.2d 916 (N.D. 2010).

[168] N.D. CENT. CODE ANN. § 14-09-06.2(1) (West 2012).

[169] *Duff*, 792 N.W.2d at 920 (citing P.A. v. A.H.O., 757 N.W.2d 58 (N.D. 2008)).

[170] *Id.* at 921.

[171] *Id.* at 920.

[172] *Id.*

[173] *Id.* at 919.

[174] *Id.* at 920.

Court held that the lower court misapplied state law with its reliance on financial contributions, and remanded the case for reconsideration.[175]

The lower court's decision in *Duff* was clearly influenced by the belief that a wealthier parent is better able to raise her children. As the Supreme Court pointed out, this is not a legally correct assumption upon which to build a child custody determination. But the fact that the lower court defied case precedent to include wealth as a relevant factor indicates the presence of socioeconomic bias: The father was penalized solely for the fact that he made less money than his spouse.

This case exemplifies the complex nature of socioeconomic bias. The lower court arguably displayed explicit socioeconomic bias in his decision, since the mother's wealth was openly relied upon as the basis for the custody decision. However, neither the North Dakota Supreme Court nor any other observer has called for the lower court judge to be disciplined for socioeconomic bias. Thus, though the judge's assumptions about wealth were inaccurate, legally erroneous, and served as the basis for judicial bias, his assumptions were not questioned by judicial disciplinary authorities.

Yet, this is also a case of *implicit* socioeconomic bias; without any proof, the lower court judge presumed that wealth equaled the best interests of the children. Nothing in the case record would support this assumption. To reach this conclusion, the judge must have held an implicit belief that a wealthy parent is a better parent than a less wealthy parent.

A similar pattern of implicit socioeconomic bias is apparent in *West v. West*, a 2001 case.[176] In *West*, the Supreme Court of Alaska reversed a decision granting sole custody to a father on the ground that the father was going to remarry. [177] The mother relied on her parents to assist with caring for her child. She could not afford to stay home all day with her son, but instead needed to work for a living.

In a conclusory fashion, the lower court had accepted that living in a two-parent household, rather than with a less wealthy single working mother, would be in the best interest of the child. The Supreme Court vacated and remanded the case, holding that the lower court's "assumption that a divorced parent who remarries can provide a better home than an otherwise equally competent parent who remains single" is erroneous.[178]

The Supreme Court chastised the lower court judge for its "unexplained assumption that the added physical convenience of in-home care that [the child] might receive from his new second parent" outweighed the "less tangible, but potentially vital emotional benefits he might receive by maintaining his close and

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[175] *Id.* at 921.

[176] Some child custody cases demonstrate implicit socioeconomic bias with an erroneous emphasis on a parent's need to place a child in childcare while the parent works. *See, e.g., In re* Marriage of Bryan and Shannan Loyd, 106 Cal. App. 4th 754 (2003) (finding that trial court's decision based on fact that mother could provide better care for children because she was home during the day, in contrast to father's need to place children in daycare while he worked, was an abuse of discretion); Ireland v. Smith, 214 Mich. App. 235, 246 (1995) ("[T]rial court committed legal error in considering the 'acceptability' of the parties' homes and child care arrangements"; media frenzy surrounding case created an appearance of bias requiring a different judge to hear the case on remand. *Id.* at 251.).

[177] West v. West, 21 P.3d 838 (Ala. 2001).

[178] *Id.* at 839.

already-established ties to [his mother] and his maternal grandparents."[179] The Supreme Court also found fault with the lower court for ignoring the potential stress that comes from living with a step-parent.[180]

The lower court judge in *West* manifested implicit bias based on socioeconomic grounds. The judge did not overtly cite financial considerations in his decision, and there was no evidence in the record that the child would receive superior care with his father and stepmother than with his single working mother.[181] Nevertheless inherent in the lower court's conclusion that the father's two-parent household "will be the better one for [the child]'s future"[182] is the implicit belief that a stay-at-home stepparent who could afford not to work would provide a better home than a working parent. If this belief were permitted to guide child custody determinations, the wealthier parent who could stay at home would always be deemed the better parent.

These cases raise troubling implications for family court adjudications. While some degree of judicial discretion is necessary in family court, judges should not be permitted to be influenced by stereotypes regarding the connection between economic wealth and one's fitness as a parent. In addition, there are fewer published appellate opinions from family courts than from federal district courts.[183] As a result, litigants may not even be aware that their financial status is being inappropriately considered by the judge deciding their case. These risks highlight the need for action to address implicit socioeconomic bias in judicial determinations.

IV. PROPOSED RECOMMENDATIONS

The problem of implicit socioeconomic bias on the part of judges is increasingly recognizable, raising significant concerns for judicial ethics observers. Litigants must be assured of fairness when they enter a courtroom, regardless of their economic status. Although this elusive problem may not be easily resolved, the proposals discussed herein represent low-cost ways to address these concerns.

A. Judicial Discipline: An Ineffective Solution

A deceptively simple solution to the problem of implicit socioeconomic bias on the bench would be judicial discipline: Reprimand or remove those judges who violate the Code's prohibition of socioeconomic bias. Unfortunately, judicial discipline under the Code in its current form would not succeed. Recognizing that most incidents of judicial socioeconomic bias are based on implicit (and therefore unconscious) biases, "judges may not be aware of the errors they are making. The result is still corruption and bias, but this explanation does not rely on some ethical

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[179] *Id.* at 843.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 842.

[183] In 2011, only twenty-two published appellate opinions originated from family courts. Westlaw search of database "California State Reported Cases" using search terms (DA(aft 12-31-2010 & bef 01-01-2012) & "family court")). In 2011, there were 422 published opinions from California District Courts alone. Westlaw search of database "California Federal District Court Reported Cases" using search terms DA(aft 12-31-2010 & bef 01-01-2012).

failing on the part of the judge."[184] Indeed, no observer has called for disciplining the Ninth Circuit judges who demonstrated implicit socioeconomic bias in the *Pineda-Moreno* or *Sanchez* cases, or the judges in the child custody cases discussed above. Thus, disciplining judges for unconscious biases is not a realistic solution.

But if "instead of worrying about crooked judges, we should worry about decent judges who are susceptible to the same sort of cognitive errors that affect the rest of us," how can the justice system (and judicial disciplinary systems) ensure that judicial decisions are fair and unbiased?[185] The natural place to implement more effective debiasing strategies is within the document designed to guide judicial behavior: The ABA Model Code of Judicial Conduct.

B. Clarifying the ABA Model Code of Judicial Conduct

Several changes in the Code would bring awareness of implicit socioeconomic bias on the bench. First, the Code must properly define the term "socioeconomic" in its Terminology section. The definition should be more specific than that offered by *Webster's New International Dictionary*,[186] and should include the following language:

> Socioeconomic: of, relating to, or involving a combination of social and economic factors, including living situation, employment status, financial net worth, and family circumstances.

This expanded definition would instruct judges about the varied factors within the term "socioeconomic," offering clear guidance to judges seeking to avoid socioeconomic bias on the bench. Moreover, because socioeconomic bias is often unconscious, expanding this definition would make judges more aware that this type of bias exists.

Second, the Code should bring much-needed focus to the problem of socioeconomic bias by removing this form of bias from the enumerated list of prohibited bias. Rather than being listed as the second-to-last form of prohibited biases, socioeconomic bias merits a separate sentence. A sentence should be included at the end of Rule 2.3(b) reading:

> A judge shall pay particular attention to avoid bias or prejudice on the basis of a litigant's socioeconomic status.

Singling out socioeconomic bias in this way would encourage judges to reflect on the possibility that their own economic status affects their judicial decision-making process. In addition, it would empower litigants by stressing the importance of the Code's prohibition of this form of bias. Litigants who believe their cases were inappropriately influenced by socioeconomic bias would likely feel empowered to challenge a judicial determination with this stronger Code language to support their claims.

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[184] W. Bradley Wendel, Symposium, *Judicial Ethics and Accountability: At Home and Abroad: The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 38-39 (2010).

[185] *Id.*

[186] *See supra* Part II.C.1.

Third, the Code must include some reference to the problem of implicit bias. This issue was raised during the public comment period for the 2007 revisions to the Code. In a statement submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Jennifer Juhler of the Iowa State Court Administrator's Office and Judge Mark Cady of the Iowa Supreme Court recommended the following additions:

> (1)Judges should set aside time to examine personal views and to uncover unconscious bias. Such activities will promote fairness and justice.
> (2)A judge should take part in activities designed to uncover subconscious bias and to learn as much about how to understand the role of such bias in decision-making. Each judge must be diligent to a process of self-examination to minimize the impact of personal bias in the administration of justice.[187]

These suggested comments were not adopted by the ABA Commission. In light of studies demonstrating the prevalence of implicit bias, as well as cases revealing implicit socioeconomic bias on the bench, the Commission's rejection of these comments was inappropriate. As the history of the Code of Judicial Conduct demonstrates, judicial standards should evolve with our new understanding of implicit bias.

Implicit bias may be difficult to identify, especially in the elusive form of socioeconomic bias, but the Code should bring awareness to judges that this type of bias may be pervasive. Inclusion of the comments above would pressure judges to consider implicit bias in all forms. Since many persons can overcome implicit biases with enough knowledge and intent to do so,[188] the Code's recognition of this problem would serve as a catalyst to persuade judges to minimize implicit bias on the bench.

C. Judicial Trainings

Clarifying the Code is not the only way to minimize implicit socioeconomic bias. Indeed, some would argue that the impact of the Code is limited, since "[j]udicial ethics, where it counts, is hidden from view, and no rule can possibly ensure ethical judicial conduct."[189]

Although judges may not regularly review the Code of Judicial Conduct, all judges must attend regular educational trainings. For example, every new judge in California takes part in two ethics courses within the first year on the bench, one within the first few weeks of a judicial appointment and the second within the first year of appointment.[190] Federal judges are also thoroughly trained in their first

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[187] Jennifer Juhler, Domestic Abuse Coordinator, Iowa State Court Adm'r Office & Justice Mark Cady, Iowa Supreme Court, Morality, Decision-Making, and Judicial Ethics (not dated) (unpublished article submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/resources/comm_code_cady_undateddt_summ.authcheckdam.pdf.

[188] Rachlinski et. al., *supra* note 85, 1225.

[189] Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095, 1106 (2004).

[190] Am. Bar Ass'n (ABA) Joint Comm'n to Evaluate the Model Code of Judicial Conduct, Minutes of the Public Hearing and Meeting 180 (Mar. 26, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/judicialethics/meetings/transcript_

years on the bench, with week-long orientation programs offered to district judges and separate trainings for appellate judges.[191] The Federal Judicial Center, the education and research agency of the federal judicial system, conducts continuing education trainings for federal judges and court employees.[192] These trainings include updates on judicial ethics.[193]

The National Center for State Courts, recognizing the pervasive nature of implicit bias on the bench, produced a film and other resources about implicit bias as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts.[194] This campaign includes: (1) an implicit bias "tool box" with resource materials to raise awareness; (2) a video discussing "implicit bias in the justice system; and (3) a curriculum/ follow-up discussion outline that can be tailored to specific jurisdictions."[195] It is encouraging to note that implicit racial and gender biases on the part of judges are increasingly recognized by scholars and judicial training experts. However, these training materials must be expanded to include implicit socioeconomic bias.

Admittedly, not all forms of judicial training may be useful. Simply learning about unconscious bias generally may not change judicial behavior.[196] It would be more valuable to provide judges the opportunity to recognize and address their own implicit biases, since "making someone aware of potential biases, motivating them to check those biases, and holding them accountable should have some effect on the translation of bias to behavior."[197]

An effective training model would therefore include the presentation of an Implicit Association Test to judges, specifically designed to test implicit socioeconomic bias. The IAT test has been characterized as "a powerful and personalized starting point in educating about implicit bias."[198] Once judges discover that they may hold implicit biases against the poor, the training should provide explanatory hypotheticals to demonstrate how this implicit bias can affect

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032604.authcheckdam.pdf. Even a temporary judge in California must receive mandatory training in judicial ethics. CAL. RULES OF COURT GOVERNING TEMP. JUDGES R 2.812(c)(2) (2007),

[191] *The Federal Judicial Training Center Offers Training and Research*, FED. LAW., Oct. 2009, at 36-37, *available at* http://www.fjc.gov/public/pdf.nsf/lookup/FedL1009.pdf/$file/FedL1009.pdf.

[192] *About the Federal Judicial Center*, FED. JUD. CTR., http://www.fjc.gov/.

[193] FED. LAW., *supra* note 191, at 36-37.

[194] *Implicit Bias in the Judicial System*, AM. BAR ASS'N, http://www.americanbar.org/groups/litigation/initiatives/good_works/implicit_bias_in_the_judicial_system.html.

[195] *Id.*

[196] Banks & Ford, *supra* note 102, at 1100 ("[G]reater awareness of unconscious bias would not prompt courts to strike down practices that, for a variety of reasons, they don't want to strike down.").

[197] Sande L. Buhai et. al., *The Role of Law Schools in Educating Judges to Increase Access to Justice*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 161, 185 (2011).

[198] McKoski, *supra* note 102, at 321.

judicial determinations. The cases discussed in Part III, *supra,* would provide glaring examples of this effect. Finally, rather than simply admonishing judges to avoid the influence of this bias, the judges should be asked to brainstorm about concrete ways to minimize implicit socioeconomic bias in their own decision-making processes. In this way, judges can create their own methods to combat implicit biases. The ideas generated during these brainstorming sessions could be shared with other judges in subsequent trainings. Regardless of the specific format, judges must be made aware of the prevalence of implicit socioeconomic bias on the bench.

Off-site visits represent another way for judges to combat implicit biases. Studies show that implicit biases are "malleable" and may be reduced through exposure to examples that go against stereotypes.[199] Federal judges visit federal prisons as part of their orientation programs, in order to "view firsthand the conditions that defendants they sentence will confront."[200] Similarly, judges could visit low-income neighborhoods to learn more about the struggles faced by poor persons in their jurisdictions. Housing court judges could visit housing projects and other low-income homes. The *Pineda-Moreno* majority may have benefited from visiting the home of Mr. Pineda-Moreno; seeing the street where Mr. Pineda-Moreno parked may have sparked an understanding of the differences between his life and theirs.

V. CONCLUSION

When Justice Marshall retired, one of his colleagues on the bench observed that Justice Marshall "characteristically would tell us things that we knew but would rather forget; and he told us that we did not know due to the limitations of our own experience."[201] Some judges need to be reminded that their own experiences are often limited to the world of the privileged elite. Without those reminders, the discrepancy between rich judges and poor litigants can result in socioeconomic bias.

Studies showing the pervasive nature of implicit bias highlight the need to devote more attention to identifying socioeconomic bias in its implicit form. Indeed, a review of Fourth Amendment and child custody cases reveals that this bias is indeed present in American courts. It falls squarely within the role of the ABA Model Code of Judicial Conduct to alert judges to the problem of implicit socioeconomic bias. However, without specifically defining the term "socioeconomic" or even addressing implicit bias, the Code in its current form is failing in this task. Revising the Code and requiring training would help to put the issue of implicit socioeconomic bias on the judicial agenda.

The widening social and economic gap between America's rich and poor must remain outside the doors of our courtrooms. Judges may enjoy the privileges of economic wealth in their personal lives, but they have an obligation on the bench to further the fact and appearance of fairness in their decision making.

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[199] Greenwald & Krieger, *supra* note 83, at 963-64.

[200] FED. LAW., *supra* note 191, at 36-37.

[201] Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992).

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No bias found against solos

By SHARON LERMAN
Staff Writer

The perils of flying solo are evident in a new study showing that a lack of support and managerial skills, rather than built-in bias against independent attorneys, fuels the State Bar's largely complaint-driven disciplinary system. More than 78 percent of respondents to bar prosecutions are sole practitioners and small-firm lawyers, a number that seems disproportionate in light of 1995 American Bar Association statistics which showed 61.5 percent of lawyers are employed at practices with five or fewer attorneys.

But the year-long study by independent consulting firm Hilton Farnkopf & Hobson LLC counters a long-held suspicion that the bar unfairly targets solo practitioners. A State Bar report on the study's findings, made public in July, says small-scale attorneys are more likely to attract investigation, prosecution and discipline because clients lodge a disproportionate number of complaints against them.

During the one-year study, 89 percent of complaints to the bar concerned solos and firms with fewer than 10 attorneys. And when such complaints come in, no data is gathered on the attorney's size or type of practice, more evidence the study cited to support its contention that the bar is unbiased.

The study was conducted in response to legislation requiring the bar to examine possible bias against solos and small firm lawyers in its discipline system. It is the nation's first independent, statistical study comparing discipline and law-firm size.

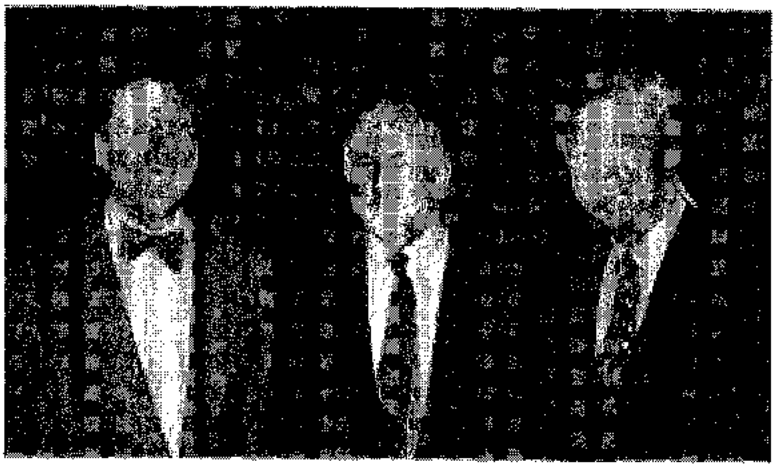
The report suggests large-firm lawyers have the corporate backing and resources that put them at a great advantage over mom-and-pop practitioners, who often are overworked, experience financial difficulties or lack support staff. These problems can lead to missed deadlines, failure to communicate with clients, borrowing

against client trust accounts and other mismanagement, the report suggested.

In addition, these practitioners - unlike their large-firm counterparts - frequently do not cooperate with bar investigations, which is itself a violation of State Bar ethical rules. And when they do cooperate, they often cannot provide the documentation needed to defend themselves against allegations of misconduct or lack the money to hire a lawyer of their own.

"In this day and age, we realize that solo practitioners are operating under tremendous stress in a competitive profession and economy," said Judy Johnson, the bar's executive director.

"The bar is committed to providing support to those attorneys who don't have ample resources that lawyers in larger firms have at their fingertips," Johnson continued. "We will continue to be responsive to public complaints, but at the same time will continue to provide educational resources and assistance to help solos in their practice."



New State Bar President Patrice O. Bailey (left) with Chief Justice Ronald M. George (center) and outgoing bar president Andrew J. Guilford at the Annual Meeting last month.

Los Angeles judge accused of making false statements faces investigation

By NANCY McCARTHY
Staff Writer

In apparently unprecedented charges, a Los Angeles judge is accused of misrepresenting his educational and military background and faces a hearing before a panel of special masters appointed by the Supreme Court.

Patrick Couwenberg, a superior court judge in Los Angeles County's Norwalk court, has denied exaggerating his qualifications but acknowledges that some of the statements he allegedly made were not true. He is charged by the Commission on Judicial Performance with violating the Code of Judicial Ethics by providing false information or making false statements on six separate occasions.

"I think it's the first instance I can recall in which formal charges have been brought

See JUDGE ACCUSED

Despite great efforts, gender bias remains enormous challenge

Lynn Hecht Schafran

Despite tremendous progress in eliminating gender bias in Ameri-can courtrooms, the problem is so deeply rooted that it remains an ongoing challenge of enormous proportions, says an expert who has devoted most of her career to educating judges.

In fact, Lynn Hecht Schafran, director of the New York-based National Judicial Education Program, ticks off a list of 60 areas of substantive and procedural law where she says

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Gender bias

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gender bias remains rampant, ranging from decisions in domestic violence cases to right-to-die issues.

"Activity does not equal progress," she says. "For all that's been done, there's still a tremendous problem."

In a recent address to the Queen's Bench in San Francisco, Schafran credited California with leading the way on many fronts, beginning with a 1981 course for federal judges.

Almost 20 years later, she said, "gender bias in the courts" is a legal concept, institutionalized in the law. Judges and lawyers can be sanctioned under codes of judicial conduct which expressly prohibit gender bias, and judicial rulings can be overturned when gender bias undermines due process.

But enacting and amending rules, laws and judicial canons do not necessarily translate into real accomplishment, Schafran says. "A law means nothing if it doesn't change the landscape," she says.

She defines gender bias as a three-part issue: stereotyped thinking about the nature and roles of men and women, how society values women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives.

Central to the decades-long movement to end gender bias, she explains, is women's lack of credibility — the notion of who is credible, who is important and who is an individual of consequence. She cites a variety of sociological studies showing that women's resumes, writings, opinions and actions frequently generate less respect than men's, or at the least are perceived differently.

Schafran fears that over the last 20 years, the level of credibility has not changed much. "Although we've made progress," she says,

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"the problems run so deep that it doesn't surprise me that there is still a question of who has authority, who do we listen to, who is important."

Those questions are reflected constantly in courtrooms, she says, despite heightened awareness of many issues that traditionally involve women. For example, sex discrimination cases, which originally were brought 30 years ago to win equality for women in the job market, have moved into a second generation of cases. "But we're still in the second generation and may never get out of it," Schafran says. "Sexual harassment continues to go on as if nobody ever knew it's against the law. It's horrifying to read these cases."

Domestic violence is another area she cites as benefitting from increased public awareness, yet one where judges continue to make bad decisions. "There is still a large cadre of judges who do not appreciate the impact of domestic violence on children," Schafran says. "Some-times we get wonderful decisions in these cases, but by the same token this is an issue that is a constant problem across the country."

She cites other, less traditional "women's issues" that also suffer the effects of gender bias, including bankruptcy, Social Security and right-to-die cases.

The impact of bankruptcy on child support, alimony and equitable distribution as well as questions of what debts are dischargeable can be affected by gender bias. Likewise, bias creeps into disability hearings where men and women seeking identical disability payments are perceived differently. Studies by physicians of right-to-die cases show that without an advance directive, a woman's wish to die, as communicated by family and friends, is honored less often than a man's wish to die.

"It's not having substantive factual information about the social and economic realities of men's and women's lives that can create problems," she explains.

Although Schafran believes much remains to be accomplished, she says judicial education continues to produce results. A course on understanding sexual violence, presented to a group of Nebraska judges, prompted immediate changes in the way the judges deal with both victims and offenders. "When we give judges the opportunity to see how information relates to the work they do and how to incorporate this knowledge into the court process, we can make real progress," Schafran said. "There's no question there has been real change."

The State Bar *of California*

MCLE Self Study

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Diversity matters: In-house counsel need to demand better

By Goldie Gabriel Johnson & Alex Ponce de Leon

The business benefits of a diverse workforce are well-documented. Several studies make clear that companies are more successful when they commit themselves to hiring and retaining diverse leadership.

Just last year McKinsey & Co. published its 24-page "Diversity Matters Report," which examines proprietary data sets for 366 public companies across a range of industries. In its research, McKinsey looks at metrics such as financial results and the composition of top management and board. The study clearly showed that diversity helps win the war for talent, increases employee satisfaction, improves decision making and enhances the corporate image. Although corporate America has made significant strides on diversity, the legal profession has consistently and dramatically fallen short.

In May 2014, The American Lawyer magazine announced that the legal profession is suffering a "diversity crisis." According to the Bureau of Labor statistics, 88 percent of all lawyers are white. The

MCLE Self-Assessment Test

March 2016

SAMPLE TEST QUESTIONS

Below are sample questions from this month's MCLE self-assessment test.

1. Only 50 percent of law firm associates last past five years at a law firm.

○ True ○ False

2. The "Call to Action" was adopted 16 years ago.

○ True ○ False

bottom line is that we remain the "palest profession" with fewer diverse attorneys than physicians, surgeons, financial managers and even accountants. In fact, the National Association for Law Placement's (NALP) 2005 report on attrition revealed "that 42 percent of male associates of color leave their law firms within 28 months. Within 55 months, 78 percent have left ... while minority female attorneys have the highest attrition rate at 41 percent within 28 months and 81 percent within 55 months."

Only one in five minority associates stays longer than five years at a law firm. Although women make up close to a third of the profession, only a fifth of law firm partners, general counsels of Fortune 500 corporations and law school deans are women. Law firms and legal departments have failed to hire, retain and promote diverse attorneys. Their career pipeline, training and mentoring programs have simply failed.

In-house legal departments have been better than law firms when it comes to diversity, but there's still room for improvement. According to a recent study by the Minority Corporate Counsel Association (MCCA), 20 percent of legal departments are headed by minority lawyers. The MCCA also reports that 36 percent of legal departments were run by women. Legal departments have increasingly developed diversity and inclusion programs to address not just hiring, but promotion and leadership as well.

Despite such formal programs, few legal departments can point to specific efforts to diversify, for example, 13 percent of respondents to the MCCA study said they had made specific efforts to attract women attorneys, yet 54 percent had attracting women attorneys as part of their diversity plan.

3. In-house legal departments do a better job of hiring and retaining diverse attorneys.

○ True ○ False

To complete the test, you must pay a $25 fee online. Click the button below and follow the onscreen instructions.

Take Test

In-house counsel have consistently been pushing outside counsel to become increasingly diverse. Nearly 12 years ago, Rick Palmore, executive vice president and general counsel of Sara Lee, wrote the "Call to Action," which galvanized more than 200 chief legal officers from America's largest corporations to commit to promoting diversity in corporate legal departments, as well as in the law firms that corporations engage. The initiative later grew into the Leadership Council on Legal Diversity, a collaboration between general counsel and managing partners, which was formed in 2009 and now includes more than 225 corporate chief legal officers and law firm managing partners.

For most in-house attorneys, however, diversity is not just about departmental diversity. More than half of large legal departments measure the diversity of their outside counsel. Legal departments have been at the forefront of change in the industry and have been demanding increased inclusiveness from their outside counsel. In-house counsel control legal spending and therefore have been able to use this influence to push law firms in the right direction. Although change has been difficult, law firms have been receptive to these efforts.

In-house legal departments can increase their support for diversity in the legal profession by making certain that tracking diversity efforts is more robust, consistent, and scalable. Tracking hours worked by diverse attorneys, for example, can help corporate clients make sure that their outside counsel is diverse in practice, not just select figureheads. Diversity has to go beyond the pitch meeting and a relationship partner. Sadly, however, only about 12 percent of departments do so, according to the MCCA.

In-house counsel need to leverage technology to quantify diversity, set the tone and lead on pushing for better results. Modern electronic billing platforms make this quantitative measurement process easier than ever. This enables consistent tracking of hours worked and dollars billed across multiple cases. Some legal departments require monthly or quarterly monitoring of the billable hours of the diverse lawyers working on their matters. In-house legal departments have also been savvy about ensuring that diverse relationship partners receive the points and credit they deserve. Increasingly, in-house counsel will specifically require transparency into the point allocation process for a given matter.

Law firms and corporate legal departments also need to address how unconscious bias permeates the hiring, retention, promotion and development of diverse attorneys. The Nextions 2014 "Written in Black & White Report" revealed that identical memos written by hypothetical Caucasian and African American attorneys both named Thomas Meyer had substantially different feedback due to confirmation bias. Research indicates that commonly held perceptions are biased against African Americans and in favor of Caucasians. This was evidenced in the two identical memos that resulted in two very different sets of feedback. Undoubtedly, this sort of bias impacts mentorship and attorney development.

In-house counsel need to take the lead and have consistent dialogues based on the quantitative data. Legal departments need to educate firms on their company's diversity efforts and ensure that the firm and associates handling the organization's matters align with those efforts. It is up to legal departments to let law firms know how they are doing, what they are doing right and where they have room to improve. It is sometimes helpful to provide comparisons and contrasts with how some of the other firms are performing. Providing quantitative data is important for these comparisons, along with qualitative examples. Similarly, law firms need to educate clients on their diversity efforts and get the client's buy-in. Celebrating diverse attorneys who lead arguments in court, who manage certain motions, or who lead certain parts of a negotiation can help motivate other law firms. Law firms can also proactively offer these opportunities to diverse attorneys even before the client demands it.

In-house counsel can also reward firms that perform well with more business or give firms a bonus if they improve diversity in measurable ways. Alternatively, corporations can limit or eliminate their association with law firms whose performance consistently shows evidence of a lack of meaningful commitment to diversity. The quantitative tracking of hours will be a crucial starting point for these more difficult, but more impactful decisions.

What else can law firms and legal departments do to address diversity? Beginning in 2011, the State Bar of California's Council on Access and Fairness (COAF) convened a series of focus groups to study and develop

recommendations for legal employers to increase diversity in the legal profession. COAF conducted the study, collected and assessed data over a two-year period, and reported its findings. Here is a list of 10 areas with accompanying specific tips that the report recommends law firms and legal departments focus on in order to make systemic changes in recruiting, retaining and advancing diverse attorneys.

1. **Mandate diversity training and maintain an inclusive environment**. Support diversity policies that encompass consideration of socio-economic background, racial and ethnic ties, disability status, LGBT status, national origin and gender, i.e., respond to consumers' demands that organizations look like the communities in which they operate by requiring diverse staff. Change policies that negatively impact diversity efforts. Foster an environment that nurtures initiatives that improve on best practices. Bring in speakers to address the importance of diversity and inclusion and to emphasize the benefits and strengths of diversity, rather than moral reasons to promote it. Conduct workshops and coaching for upper management. Train attorneys on acculturation. Retain a welcoming and diverse environment. Make sure people feel comfortable being openly LGBT. Recognize hostility and make bold and direct moves to address it. Provide training focused on the impacts of implicit bias.

2. **Participate in focused recruiting**. Train recruiters and hiring managers about the impacts of unconscious bias and how to eliminate it. Participate in diversity job fairs and outreach to diverse law schools, student organizations and bar associations to identify diverse talent. Lateral hiring is a good way to supplement diversity with proven talent. Recruit nationally. Involve the entire office in the interview and selection process. Create in-house summer programs for first-year law students. Identify specific traits and skills that are needed to be successful and focus on them during the hiring process.

3. **Focus on retention.** "The key to retention is that people feel supported. It's the intangibles that make people stay." Encourage attorneys to put their families first. Programs that allow for more involved parenting have encouraged lawyers who are mothers to stay in the work force. Address misperceptions regarding

clients not supporting diversity issues, difficulty of reduced hour programs to allow work on matters and incompatibility of reduced/flexible schedules with working on exciting and challenging assignments. Evaluate the legal group's work/life balance policies. Focus performance reviews on quality more than quantity by considering factors beyond the number of hours billed and trial successes. Implement destigmatized and gender-neutral flexible work programs and job retention programs to deal with maternity and eldercare matters. Ensure that alternative work schedules do not unfairly interfere with promotion and partnership opportunities. Train diverse attorneys on rainmaking.

4. **Support career development**. Have diverse partners and diverse attorneys in senior management. Champion diverse attorneys. Make sure diverse attorneys obtain appropriate attention, quality assignments, guidance while working on projects, timely feedback, career development and networking opportunities. Consistent production of excellent work, attention to detail, reliability, diligence and integrity are key components of having a solid career. Provide resources to ensure this message is clear and to provide comments to ensure diverse attorneys are aware of how they are perceived. Make compensation, promotions and skills matrices transparent.

5. **Offer and incentivize mentoring programs**. Mentoring programs are important tools to improve diversity. Identify and work with nondiverse mentors to assist diverse attorneys with professional development and to champion diverse attorneys' promotion and success. Use mentoring programs to foster connections between diverse attorneys and influential people in the organization. Reward mentees and mentors for participating. Tie compensation to diversity efforts, e.g., list diversity initiatives in job descriptions with an appropriate salary adjustment for efforts.

6. **Encourage confidence and risk-taking**. Diverse attorneys must take credit for work done well and must celebrate and boast of their achievements. Diverse attorneys should be encouraged to volunteer for high-profile assignments and challenging work.

7. **Create affinity groups**. Support inclusive affinity groups with no discrimination for attending. Establish affinity groups that link diverse attorneys to leadership in their law firms and corporations. Make affinity groups and activities visible on company websites and in recruiting materials. Offer financial support to diversity-related events.

8. **Establish diversity committees**. Set up committees in local offices and have them participate in recruiting. Task these committees with analyzing whether including diversity as a metric in law school rankings results in increased diversity in the legal profession. Share best practices between firms and organizations through these committees.

9. **Support minority bar associations**. Encourage attorneys to celebrate diversity and to connect with community and minority bar associations. Law firms and legal departments can participate and support diverse bar association initiatives and encourage attorneys to become leaders in those associations. Active involvement in bar associations can lead to higher visibility in the legal profession. Diversity bars should also be encouraged to work more closely and collaboratively with one another on achieving diversity goals.

10. **Teach elimination of implicit bias**. Implicit bias is the silent killer of diversity efforts because it is subtle and unconscious. Recognize the impact of hidden biases and the barriers they create for diverse attorneys. To overcome implicit bias, diversity is needed at all levels of an organization, especially in leadership and decision-making positions. Perceptions that diverse attorneys are hired because of their color and not their skill must be eliminated. Address apprehensions about hiring attorneys with disabilities. Have attorneys and senior management measure their biases by taking an Implicit Association Test (IAT) then train them to change their biases that are based on personal values.

Our profession's "diversity crisis" will not be solved overnight and cannot be corrected by any single initiative. It will take committed collaboration between in-house and outside counsel to implement programs that make a long-term investment in diversity and the future of our profession. Otherwise, the legal profession will remain the least diverse profession.

Goldie Gabriel Johnson is senior counsel for 20th Century Fox Film Corp.'s feature film legal group and a member of the State Bar's Council on Access and Fairness. A proud wife and mother of two, she also serves a board member for the John M. Langston Bar Association and Push To Win Outreach Inc. Alex Ponce de Leon is corporate counsel for Google Inc. who focuses on discovery issues. He is a member of the Google Legal Diversity Council and was named a 2015 "Rising Star" by the Minority Corporate Counsel Association. He formerly served on the Council on Access and Fairness. These views expressed in this article are the personal views of the authors.

If you're having trouble taking the test, click here.

180 Howard St.
San Francisco, CA 94105
415-538-2000

LOS ANGELES

845 S. Figueroa St.
Los Angeles, CA 90017
213-765-1000

ADDITIONAL RESOURCES FOR BIAS

Self-Monitor Scale. **openpsychometrics.org/tests/SMS** from M Snyder (1974) Self Monitoring of Expressive Behavior, Journal of Personality and Social Psychology, Vol.30, Number 4, 526

Project Implicit. **implicit.harvard.edu** Self tests.

Avoiding Heterosexual Bias in language, American Psychologist, Sept. 1991, Vol. 46, issue 9, 973-974. **apa.org/pi/lgbt/resources/language.aspx**. Committee on Lesbian and Gay Concerns of American Psychological Association.

Dovidio and Gaertner, Adverse Racism & Selection Decisions, Psychological Science, July 2000, Vol. 4, number 4, 315-319 (10 year study from 1989 to 1999 of employment practices)

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Module 1 – Civility and Professionalism	
Screen Title	**Citation / Link**
A Story About Civility	Owen M. Praskievicz, Esq., Keep It Cool: The Benefits of Professionalism and Civility in Discovery Practice, Trial Bar News (December 2015)
Attorney Oath	California Rules of Court rule 9.7, *renumbered effective January 1, 2018* (previously rule 9.4) Cal. Bus. & Prof. Code, § 6067
Importance of Public Confidence in the Administration of Justice	California Attorney Guidelines of Civility and Professionalism
California Attorney Guidelines of Civility and Professionalism	California Attorney Guidelines of Civility and Professionalism ABA Model Rule of Professional Conduct 1.3
Offensive Litigation Tactics	Scott B. Garner, Civility Among Lawyers: Nice Guys Don't Have to Finish Last, Orange County Bar Association (March 2016) California Civil Discovery Act, Cal. Code Civ. Proc., §§ 2016.010 et seq. (*Note: In criminal matters refer to Cal. Pen Code, § 1054 et seq.*)
Scenario	Ahanchian v. Xenon Pictures, Inc. (9th Cir. 2010) 624 F.3d 1253
Scenario Debrief	Ahanchian v. Xenon Pictures, Inc. (9th Cir. 2010) 624 F.3d 1253
Contempt and Sanctions, Self-Reporting – Sanctions	Cal. Code Civ. Proc., §§ 2023.010-040
Contempt and Sanctions, Self-Reporting – Self-Reporting	Cal. Bus. & Prof. Code, §§ 6000-6243
Contempt and Sanctions, Self-Reporting – Disciplinary Action	Cal. Bus. & Prof. Code, §§ 6075-6088 Cal. Bus. & Prof. Code, § 6000 et seq.
Duties Under the State Bar Act	Cal. Bus. & Prof. Code, § 6068(b), (f), & (g)

The State Bar of California

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Module 2 – Pro Bono Legal Services	
Screen Title	**Citation / Link**
Access to Justice Crisis	Legal Services Corporation, The 2017 Justice Gap Report: Measuring the Unmet Civil Legal Needs of Low-income Americans (June 2017) The Campaign for Justice: The Justice Gap Fund Website
Statutory Declaration	Cal. Bus. & Prof. Code, § 6073 Cal. Bus. & Prof. Code, § 6068(h)
Definition of Pro Bono Legal Services	Pro Bono Resolution of the State Bar of California Cal. Bus. & Prof. Code, § 6072(d)
Examples of Pro Bono Legal Services	Pro Bono Resolution of the State Bar of California
How to Engage in Pro Bono Services	California Pro Bono Website
Contributions of Financial Support	Cal. Bus. & Prof. Code, § 6073 Justice Gap Fund Website
Pro Bono in the Rules of Professional Conduct	Cal. Rule of Professional Conduct 1.0, Comment [5] ABA Model Rule of Professional Conduct 6.1 Cal. Bus. & Prof. Code, § 6073 Pro Bono Resolution of the State Bar of California
Providing Legal Services to the State of California or Statutory Contracting Guideline	Cal. Bus. & Prof. Code, § 6072 Cal. Rule of Professional Conduct 6.5 The State Bar of California Committee on Professional Responsibility and Conduct, An Ethics Primer on Limited Scope Representation (2004)

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Module 1 – Formation of the Attorney-Client Relationship (Express and Implied-In-Fact)	
Screen Title	**Citation / Link**
Module Objectives	Cal. Rule of Professional Conduct 1.6 Cal. Bus. & Prof. Code, § 6068(e) In re Peavey (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483
Who is a Client? Who is a Lawyer?	Cal. Rule of Professional Conduct 1.18 Cal. State Bar Formal Opn. No. 2003-161 John DeCure, Determining when a client really becomes one, California Bar Journal (December 2015)
Implied-in-Fact Attorney-Client Formations	Cal. State Bar Formal Opn. No. 2003-164 Ellen R. Peck, Ghosts and goblins can haunt your practice, California Bar Journal (August 2010)
Risks of Implied-in-Fact Relationships	Cal. Rule of Professional Conduct 1.18 John DeCure, Determining when a client really becomes one, California Bar Journal (December 2015) People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] Cal. State Bar Formal Opn. No. 2003-161 Ellen R. Peck, Careful How You Market Yourself, California Bar Journal (October 2006) Wendy L. Patrick, With "Friends" like these, California Bar Journal (June 2010)
Avoiding the Risks Arising from Implied-In-Fact Relationships	People v. Gionis (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]

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Module 2 – Key Considerations for Express Relationships	
Screen Title	**Citation / Link**
Formation in Private Practice - Written Fee Agreement	Cal. Rule of Professional Conduct 1.5(b)(13) Cal. Bus. & Prof. Code, § 6147 Cal. Bus. & Prof. Code, § 6148 Cal. Civ. Code, § 1632 In the Matter of Harney (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266 Sample Written Fee Agreement Forms prepared by the State Bar of California Committee on Mandatory Fee Arbitration
Limited Scope Representation	Cal. Rule of Professional Conduct 1.2(b) Cal. Rules of Court, rule 3.35 Cal. Rules of Court, rule 3.37 Cal. Rules of Court, rule 5.425 The State Bar of California, An Ethics Primer on Limited Scope Representation, Ethics Hotliner (Fall 2014) In the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498
Benefits of Limited Scope Representation	Ellen R. Peck, "Unbundling:" A Hot-button Ethical Issue, California Bar Journal, (January 2002)
Limited Scope Representation – Attorney's Duties	Cal. Rule of Professional Conduct 1.8.8 Nichols v. Keller (1993) 15 Cal.App.4th 1672 [19 Cal.Rptr.2d 601] Janik v. Rudy, Exelrod & Zieff et al. (2004) 119 Cal.App.4th 930 [14 Cal.Rptr.3d 751] In the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498
Allocation of Authority	Cal. Rule of Professional Conduct 1.2 Blanton v. Womancare (1985) 38 Cal.3d 396 [212 Cal.Rptr. 151] Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2009) ¶3:132-3:153 (CAPROFR Ch. 3-D)

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Module 3 – Best Practices in Selecting Clients	
Screen Title	**Citation / Link**
Client Selection – Competency Issues	Cal. Rule of Professional Conduct 1.1 (Competence) Segal v. State Bar (1988) 44 Cal.3d 1077 [245 Cal.Rptr. 404]
Prohibited Discrimination	Cal. Rule of Professional Conduct 8.4.1
Module Summary; Additional Information	Cal. State Bar Formal Opn. No. 2003-163 (parent-subsidiary) Cal. State Bar Formal Opn. No. 2001-156 (government attorney duties to officers, employees, and stakeholders) Lynn v. George (2017) 15 Cal.App.5th 630 [223 Cal.Rptr.3d 407] (relationship with prospective principles of a corporation to be formed or prospective partners of a partnership) Cal. Rule of Professional Conduct 3.1 (Meritorious Claims and Contentions) Cal. Rule of Professional Conduct 1.8.10 (Sexual Relations With Current Client) Cal. Bus. & Prof. Code, § 6106.9 (Sexual Relations Between Attorney and Client) Cal. Bus. & Prof. Code, § 6104 (Appearing for Party without Authority)

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Module 4 – Termination of Attorney-Client Relationships	
Screen Title	**Citation / Link**
Preparation for Termination	Cal. Rule of Professional Conduct 1.16
Duties of an Attorney at the Time of Termination	Steven D. Wasserman and Joel A. Kane, Ending the Client Relationship (Part 1), California Lawyer (October 2015) Steven D. Wasserman and Joel A. Kane, Ending the Client Relationship (Part 2), California Lawyer (November 2015)
Module Summary; Additional Information	Cal. State Bar Formal Opn. No. 1989-111 (the missing client) Cal. State Bar Formal Opn. No. 2002-160 (the missing client) Cal. Bus. & Prof. Code, § 6185 (Power of Practice Administrator to Control Practice of Deceased or Disabled Member's Practice) Agreement to Close Law Practice in the Future prepared by the State Bar of California (securing a practice administrator to wind down a law practice) Jay G. Foonberg, Knowing When to Hold'em and Knowing When to Fold'em (2013) (securing a practice administrator to wind down a law practice) Cal. Rule of Professional Conduct 1.17 (Sale of a Law Practice) Guidelines for Closing or Selling a Law Practice prepared by the State Bar of California (sale and purchase of a law practice) Transfer of Estate Planning Documents Form prepared by the State Bar of California Cal. Prob. Code, §§ 730-735 (Termination by Attorney)

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Module 1 – General Awareness	
Screen Title	**Citation / Link**
Splash	Sarah E. Redfield, Enhancing Justice: Reducing Bias (2017) Mahzarin R. Banaji & Anthony G. Greenwald, Blindspot: Hidden Biases of Good People (2013) American Bar Association, Hidden Injustice: Bias on the Bench (video) Sarah E. Redfield, Eclectic Reading List (2017)
Introduction	Jerry Kang, National Center for State Courts, Implicit Bias: A Primer for Courts (2009) United States District Court, Western District of Washington, Unconscious Bias (video)& Criminal Jury Instructions – Unconscious Bias Chief: Miami Beach police sent hundreds of racist, pornographic emails, CBS News (May 2015) Brian A. Nosek & Rachel G. Riskind, Policy Implications of Implicit Social Cognition (2012) 6 Soc. Issues & Pol'y Rev. 113 Daniel Kahneman, Thinking Fast and Slow (2011) Kristen Pressner, Are You Biased? I Am (video) Marianne Bertrand & Sendhil Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? (2004) 94 Am. Ec. Rev. 991 Project Implicit, Frequently Asked Questions
Introduction – Explicit Bias vs. Implicit Bias	Jeffery J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, Does Racial Bias Affect Trial Judges? (2009) 84 Notre Dame L. Rev. 1195 Justin D. Levinson & Robert J. Smith, Implicit Racial Bias Across the Law (2012)
Implicit Bias Activity – Observations	Wikipedia, Dual Process Theory

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Module 1 – General Awareness	
Screen Title	**Citation / Link**
Manifestations of Disproportionality in the Legal System	Cheryl Staats et al., State of the Science: Implicit Bias Review, Kirwan Institute (2016) American Bar Association, Judicial Division Lawyers Conference, Perceptions of Justice: A Dialogue on Race, Ethnicity, and the Courts (2011) Adam Benforado, Unfair: The New Science of Criminal Injustice (2015)
School-to-Prison Pipeline	The Sentencing Project, Disproportionate Minority Contact in the Juvenile Justice System Daniel Losen et al., Are We Closing the School Discipline Gap? (2015) U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection (2011-2012) U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, Data Snapshot: School discipline 7 (2014) Sarah E. Redfield & Jason Nance, Reversing the School-to-Prison Pipeline Preliminary Report (2016) 25 U. Mem. L. Rev. 859
Implicit Bias in School-to-Prison Pipeline	Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion (2012) 35 Seattle U. L. Rev. 795, 797–98
Develop Bias Literacy	Patricia G. Devine, Patrick S. Forscher, Anthony J. Austin & William T.L. Cox, Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention (2012) 48 Journal of Experimental Social Psychology 1267 Anthony G. Greenwald & Thomas F. Pettigrew, With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination (2014) 69 Am. Psychologist 669 Mary Rowe, The Saturn's Rings Phenomenon (1975) 50 Harv. Med. Alumni Bull. 14]
Science on Implicit Bias and Group Dynamics	Nilanjana Dasgupta, Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestation (2004) 17 Social Justice Research 143 L. Song Richardson & Phillip A. Goff, Implicit Racial Bias in Public Defender Triage (2013) 122 Yale L.J. 2626, 2636–37

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Module 1 – General Awareness	
Screen Title	**Citation / Link**
Implicit Bias Activity – Observations	Project Implicit Website
Scientific Testing of Biases – Results	David M. Amodio, The Neuroscience of Prejudice and Stereotyping (2014) 15 Nature Rev. Neurosci. 640

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Module 2 – Situational Bias	
Screen Title	**Citation / Link**
Introduction	Mark W. Bennett, The Implicit Racial Bias in Sentencing: The Next Frontier (2017) 126 Yale L.J. Forum 381 American Bar Association, Achieving an Impartial Jury: Addressing Bias in Voir Dire and Deliberations (video)
Bias Manifested in a Legal Professional – Example1	The Sentencing Project Website
Bias Manifested in a Legal Professional – Example 2	Cal. Welf. & Inst. Code, § 707

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Module 3 – Strategies for Disrupting Bias	
Screen Title	**Citation / Link**
Create an Unbiased Environment	Cal. Rule of Professional Conduct 8.4.1
Individuate	Nilanjana Dasgupta & Luis M. Rivera, When Social Context Matters: The Influence of Long-Term Contact and Short-Term Exposure to Admired Outgroup Members on Implicit Attitudes and Behavioral Intentions (2008) 26 Soc. Cognition 112, 115
Intervene to Improve Procedural Justice	Tom R. Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from Law and Legal Institutions (2001) 19 Behav. Sci. & L. 215, 233–34

In preparing this course, there were many resources considered. For a full list of resources, please contact Professor Redfield at: sarah.redfield@gmail.com.

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Module 1 – Personal Organization Skills	
Screen Title	**Citation / Link**
Time Management Techniques	Maintain a Time Log Deadline Management Time Management
Time Management Techniques: Build a Prioritized List	Prioritizing Your Task List

Module 2 – Office Management Skills	
Screen Title	**Citation / Link**
Client Acquisition	Summary of Lawyer Advertising and Solicitation Regulations Cal. Rule of Professional Conduct 7.1 – 7.5 Cal. Bus. & Prof. Code, § 6132 Cal. Bus. & Prof. Code, §§ 6157 - 6159.2 Cal. Bus. & Prof. Code, §§ 17529 – 17529.9 Cal. Bus. & Prof. Code, §§ 17538.41, 17538.43, and 17538.45 Cal. State Bar Formal Opn. No. 2012-186 Cal. State Bar Formal Opn. No. 2004-167 Cal. State Bar Formal Opn. No. 2004-166 Cal. State Bar Formal Opn. No. 2001-155 Cal. State Bar Formal Opn. No. 1995-142 The State Bar Lawyer Referral Services FAQ
Managing Client Expectations	Neil Pedersen, Esq., Managing Client Expectations, The Bottom Line (August 2015)
Client Communication	Cal. Rule of Professional Conduct 1.4

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Module 1 – Conflict Resolution Skills	
Screen Title	**Citation / Link**
Approaches to Conflict Resolution	Alessandra Sgubini, Mara Prieditis & Andrea Marighetto, Arbitration, Mediation and Conciliation: differences and similarities from an International and Italian business perspective, Mediate.com (August 2004)
Approaches to Conflict Resolution: Arbitration	Steven C. Bennett, Non-Binding Arbitration: An Introduction, Dispute Resolution Journal, (May-July 2006) Superior Court of California, County of San Diego, Arbitration Frequently Asked Questions
Evaluation of Conflict Resolution Options and Development of a Strategic Plan for Achieving an Acceptable Result	FindLaw, Alternative Dispute Resolution (ADR): Overview FindLaw, Mediation vs. Arbitration vs. Litigation: What's the Difference? HG.org, Alternative Forms of Dispute Resolution

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Module 2 – Interpersonal and Communication Skills	
Screen Title	**Citation / Link**
The Written Word: Writing	Richard C. Wydick, Plain English for Lawyers (2005)
The Written Word: Using Plain Language	Merri Bame, 3 Communication Areas for Lawyers to Develop, Breaking Down Barriers (2013) Marcia Penningtom Shannon, Cultivating the Art of Effective Client Communications, ABA Law Practice Magazine Vol. 37, No. 5 (2011)

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Module 3 – Risks and Rewards of Modern Technology	
Screen Title	**Citation / Link**
Ethical Obligations	Cal. Rule of Professional Conduct 1.6(a) Cal. Bus. & Prof. Code, § 6068(e)
Evaluation of Technology	Cal. State Bar Formal Opn. No. 2010-179 American Bar Association Cybersecurity Legal Task Force, Vendor Contracting Project: Cybersecurity Checklist (October 2016); Florida Bar Standing Committee on Technology, Due Diligence Considerations for Lawyers Evaluating Cloud Computing Service Providers (March 2017)
Remote Work	Cal. State Bar Formal Opn. No. 2010-179
Metadata	Cal. State Bar Formal Opn. No. 2010-179, footnote 11
Social Media Posting and Blogging	Cal. Rule of Professional Conduct 7.1 – 7.5 Cal. Bus. & Prof. Code, § 6157 et seq. Cal. State Bar Formal Opn. No. 2016-196 Cal. State Bar Formal Opn. No. 2012-186
E-Discovery	Cal. State Bar Formal Opn. No. 2015-193
Ways to Avoid Cyberattacks: Encryption	Cybersecurity Tips

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Module 1 – Communication with Clients	
Screen Title	**Citation / Link**
Responding to Clients' Requests and Informing Them About Significant Developments	Cal. Rule of Professional Conduct 1.4 Cal. Bus. & Prof. Code, § 6068 Cal. Bus. & Prof. Code, § 6148(b) In the Matter of Lais (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907 In the Matter of Kaplan (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547
Providing Copies of Significant Documents to a Client	Cal. Rule of Professional Conduct 1.4 Cal. Bus. & Prof. Code, § 6068 Cal. Bus. & Prof. Code, § 6148(b)
Additional Client Communication Duties	Cal. Rule of Professional Conduct 1.4(a)
Communicating Settlement Offers in Civil and Criminal Matters	Cal. Rule of Professional Conduct 1.4.1 Cal. Bus. & Prof. Code, § 6103.5
Handling Communications When the Client is an Organization	Cal. Rule of Professional Conduct 1.13 Cal. State Bar Formal Opn. No. 1994-137
Willful Failure to Communicate a Frequent Disciplinary Complaint	In re Tenner (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 688
Disclosure of Professional Liability Insurance	Cal. Rule of Professional Conduct 1.4.2
Willful Failure to Communicate a Frequent Disciplinary Complaint	Cal. State Bar Formal Opn. No. 1994-138 Wendy L. Patrick, How much is enough?, California Bar Journal (September 2011)

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Module 2 – Communication with Opposing Parties, Jurors, and Witnesses	
Screen Title	**Citation / Link**
Restrictions on Communication with a Represented Person	Cal. Rule of Professional Conduct 4.2 Cal. State Bar Formal Opn. No. 1993-131 Dane S. Ciolino, Can I Be Disciplined for My Investigator's Questionable Conduct?, Louisiana Legal Ethics Blog (July 2013) Cal. State Bar Formal Opn. No. 1991-125 Cal. State Bar Formal Opn. No. 1977-43 Cal. Bus. & Prof. Code, § 6149.5 Cal. State Bar Formal Opn. No. 1983-73 R. Addison Steele II, Talking to a Represented Witness, California Defender (Summer 2013) at page 42
Threatening Criminal, Administrative, or Disciplinary Charges	Cal. Rule of Professional Conduct 3.10
Communication with Unrepresented Persons	Cal. Rule of Professional Conduct 4.3
Restrictions on Communication with Jurors	Cal. Rule of Professional Conduct 3.5(d) – (l) Cal. State Bar Formal Opn. No. 1987-95
Restrictions on Communication with Witnesses	Cal. Rule of Professional Conduct 3.4 Cal. Pen. Code, § 136.1 In re Lee (1988) 47 Cal.3d 471 [253 Cal.Rptr. 570]

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Module 3 – Communication with Judicial Officers, Tribunals, and the State Bar	
Screen Title	**Citation / Link**
Duty of Candor	Cal. Rule of Professional Conduct 3.3 Cal. Rule of Professional Conduct 3.4 Ellen R. Peck, The Meryl Terpitude Adventures, California Bar Journal (December 2005)
Prohibited Contact with Officials	Cal. Rule of Professional Conduct 3.5
Other Related Communication Duties	Cal. Bus. & Prof. Code, § 6068(b) (respect due to courts and judicial officers) Cal. Bus. & Prof. Code, § 6068(f) (advance no fact prejudicial to party or witness) Cal. Bus. & Prof. Code, § 6068(i) (participate in investigation and cooperate with the State Bar when subject to disciplinary proceeding) Cal. Bus. & Prof. Code, § 6068(o) (self-report to the State Bar)
Social Media and Judiciary	Cal. Jud. Ethics Comm. Opn. No. 66 Cal. Bus. & Prof. Code, § 6068 Cynthia Gray, Social media and judicial ethics: Part 1, Judicial Conduct Reporter, National Center for State Courts Center for Judicial Ethics (September 2017)

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Module 1 – Duty of Confidentiality	
Screen Title	**Citation / Link**
A Story About the Duty of Confidentiality	Cal. State Bar Formal Opn. No. 1988-96
Statute and Rules	Cal. Bus. & Prof. Code, § 6068(e) Rules of Professional Conduct 1.6
Scope of Duty	Rules of Professional Conduct 1.18 Cal. Bus. & Prof. Code, § 6068(e) Cal. State Bar Formal Opn. No. 1984-84 Cal. State Bar Formal Opn. No. 2003-163 In the Matter of Johnson (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179
Exception to the Duty of Confidentiality: 1	Cal. Rule of Professional Conduct 1.6(a)
Exception to the Duty of Confidentiality: 2	Cal. Rule of Professional Conduct 1.6(b) – (c) Cal. Bus. & Prof. Code, § 6068(e)

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Module 2 – Attorney-Client Privilege	
Screen Title	**Citation / Link**
Duty of Confidentiality Versus Attorney-Client Privilege	Cal. State Bar Formal Opn. No. 2016-195
Attorney, Client, and Confidential Information	Cal. Evid. Code, §§ 950-953
Holder of Privilege	Cal. Evid. Code, §§ 950-953 Cal. Prob. Code, § 12252
Duty to Assert Privilege	Cal. Evid. Code, § 955
Codified Exceptions	Cal. Evid. Code, § 958 (self-defense exception) Cal. Evid. Code, § 962 (joint-client exception) Cal. Evid. Code, § 956 (crime-fraud exception) Cal. Evid. Code, § 956.5 (death or substantial bodily harm exception)

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Module 3 – Attorney Work-Product Doctrine	
Screen Title	**Citation / Link**
Introduction	Merri A. Baldwin, Discoverability of Witness Interviews: To What Extent Do the Work Product Doctrine and/or the Attorney-Client Privilege Apply?, California Bar Journal (February 2013)
Work-Product Doctrine	Cal. Code Civ. Proc., §§ 2018.010 et seq. Cal. Code Civ. Proc., § 2018.050 (crime-fraud exception) Cal. Code Civ. Proc., § 2018.080 (self-defense exception) Cal. Code Civ. Proc., § 2018.070 (State Bar disciplinary exception) People ex rel. Lockyer v. Superior Court (2000) 83 Cal.App.4th 387 [99 Cal.Rptr.2d 646] (holder of the work-product privilege)
Scope of Protection	Cal. Code Civ. Proc., § 2018.030 Cal. Code Civ. Proc., §§ 2018.010 et seq.

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Module 4 – Inadvertent Transmission of Information	
Screen Title	**Citation / Link**
Duties When Handling Inadvertent Transmission of Information	Cal. Rule of Professional Conduct 4.4 Rico v. Mitsubishi (2007) 42 Cal.4th 807 [68 Cal.Rptr.3d 758] Clark v. Superior Court (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361] McDermott Will & Emery, LLP v. Superior Court (Hausman) (2017) 10 Cal.App.5th 1083 [217 Cal.Rptr.3d 47] Cal. State Bar Formal Opn. No. 2013-188

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Module 5 – Adverse Representations	
Screen Title	**Citation / Link**
Representations Adverse to Current Clients	Cal. Rule of Professional Conduct 1.0.1(e) and (e-1) Cal. Rule of Professional Conduct 1.7 Flatt v. Superior Court (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537] Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]
Representations Adverse to Former Clients	Cal. Rule of Professional Conduct 1.9
Imputation, Vicarious Disqualification, and Ethical Walls	Cal. Rule of Professional Conduct 6.5 Cal. Rule of Professional Conduct 1.10 In re Complex Asbestos Litigation (1991) 232 Cal.App.3d 572 [283 Cal.Rptr. 732] Kirk v. First American Title Ins. Co. (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620]
Joint or Multiple Client Representations	Cal. Rule of Professional Conduct 1.7 Cal. Rule of Professional Conduct 1.8.7
Accepting Payment of Fees from Someone Other than the Client	Cal. Rule of Professional Conduct 1.8.6 Cal. State Bar Formal Opn. No. 2013-187

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Module 6 – Disclosure of Interests and Relationships	
Screen Title	**Citation / Link**
Examples of Interests and Relationships	Cal. Rule of Professional Conduct 1.7
Examples of Interests and Relationships: Existing Interests and Relationships	Cal. Rule of Professional Conduct 1.7 Cal. State Bar Formal Opn. No. 1997-148
Examples of Interests and Relationships: Prior Interests and Relationships	Cal. Rule of Professional Conduct 1.7(b) and Comment [2] and [4]
Examples of Interests and Relationships: Existing / Prior Interests and Relationships Affected by Resolution of Matter	Cal. Rule of Professional Conduct 1.7(b) and Comment [4] Cal. State Bar Formal Opn. No. 1995-140 Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal.4th 525, 546 [28 Cal.Rptr.2d 617]
Cautionary Note	Cal. Rule of Professional Conduct 1.7(c)
Personal Relationships Between Attorneys	Cal. Rule of Professional Conduct 1.7(c)(2)
Module Summary	Cal. Rule of Professional Conduct 1.8.1 Cal. State Bar Formal Opn. No. 2006-170 Connor v. State Bar (1990) 50 Cal.3d 1047 [269 Cal.Rptr. 742]

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Module 1 – Client Trust Accounting	
Screen Title	**Citation / Link**
Opening a Client Trust Account	Cal. Rule of Professional Conduct 1.15 Cal. Bus. & Prof. Code, § 6211 et seq. Cal. State Bar Formal Opn. No. 1988-97 State Bar of California, Client Trust Accounting Handbook, Signatories on Client Trust Account State Bar of California, Client Trust Accounting Resources (webpage)
Opening a Client Trust Account: IOLTA	Cal. Bus. & Prof. Code, § 6213(j) Cal. Bus. & Prof. Code, § 6211 State Bar of California, Client Trust Accounts and IOLTA (webpage)
Avoiding Misappropriation and Commingling	Cal. Rule of Professional Conduct 1.15 Grossman v. State Bar (1983) 34 Cal.3d 73 [192 Cal.Rptr. 397] Cal. State Bar Formal Opn. No. 2007-172 (acceptance of credit cards for fees/costs)
Handling Disputed Trust Funds	Cal. Bus. & Prof. Code, §§ 6200 et seq. Cal. State Bar Formal Opn. No. 2006-171 Cal. State Bar Formal Opn. No. 2008-175 Cal. State Bar Formal Opn. No. 2005-169 Baranowski v. State Bar (1979) 24 Cal.3d 153 [154 Cal.Rptr. 752] In the Matter of Fonte (Rev. Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752 In the Matter of Song (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273 In the Matter of Heiner (Review Dept. 1993) 1 Cal. State Bar Ct. Rptr. 301 Friedman v. State Bar (1990) 50 Cal.3d 235 [266 Cal.Rptr. 632] State Bar of California, Client Trust Accounting Handbook, Interpleader Example

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Module 1 – Client Trust Accounting	
Screen Title	**Citation / Link**
Maintaining Records and Responding to Client's Request for an Accounting	Cal. Rule of Professional Conduct 1.15(e) and Standards Cal. Bus. & Prof. Code, § 6091 State Bar of California, Client Trust Accounting Handbook, Appendix 5: What to Do When the Reconciled Total and the Bank Statement Balance Don't Exactly Match
Handling Unclaimed Trust Funds or Property	Cal. Code Civ. Proc., § 1518
Reporting Insufficient Funds Transactions on a Client Trust Account to the State Bar	Cal. Bus. & Prof. Code, § 6091.1 State Bar of California, Annual Discipline Report (2015), at page 19

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Module 2 – Duties to Non-Clients	
Screen Title	**Citation / Link**
Lienholders	Cal. Welf. & Inst. Code, §§ 14124.70 et seq. Johnstone v. State Bar of California (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] Crooks v. State Bar (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] Cal. Rule of Professional Conduct 1.15
Lienholders: Medical Liens / Lienholders: Summary	Kaiser Foundation Health Plan v. Aguiluz (1996) 47 Cal.App.4th 302 In the Matter of Riley (Rev. Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91 In the Matter of Respondent P (Rev. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622 Simmons v. State Bar (1969) 70 Cal.2d 361 [74 Cal.Rptr. 915]

The State Bar of California

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Module 1 – Law Students: Substance Use and Mental Health Distress

No Resources

Module 2 – Legal Profession: Substance Use and Mental Health Distress	
Current Study on the Substance Use and Mental Health Problems of Lawyers (2016)	P. R. Krill, R. Johnson, & L. Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. Addiction Med. 46 (2016)
Mental Health (Measured with DASS)	Psychology Foundation of Australia Depression Anxiety Stress Scales (DASS) Website

Module 3 – Reasons Behind the Prevalence of Substance Use and Mental Health Disorders in the Legal Profession	
Screen Title	**Citation / Link**
Addiction: A Moral Failing?	Stephanie Desmon and Susan Morrow, Drug addiction viewed more negatively than mental illness, Johns Hopkins study shows, John Hopkins University (October 2014)
Definition of Addiction	Definition of Addiction, American Society of Addiction Medicine

Module 4 – Signs of Problem Drinking, Depression, and Suicide	
Screen Title	**Citation / Link**
Basics of Depression	Depression, National Institute of Mental Health

Module 5 – Why, How, and When to Seek Help	
Screen Title	**Citation / Link**
Why Should You Care: Ethical	Cal. Rule of Professional Conduct 1-120 (assisting, soliciting, or inducing misconduct) ABA Model Rule of Professional Conduct 8.4 (misconduct) Cal. Rule of Professional Conduct 3-110 (competence) ABA Model Rule of Professional Conduct 1.1 (competence) ABA Model Rules of Professional Conduct 5.1, 5.2, 5.3 (supervision) ABA Model Rule of Professional Conduct 8.3 (reporting misconduct)
Resources Available for Help – Lawyer Assistance Program (LAP)	State Bar of California Lawyers Assistance Program Website Cal. Bus. & Prof Code § 6230 et seq.

