

# **Ethical Conduct for Insolvency Professionals**

**San Diego Bankruptcy Forum and  
The Women's Insolvency Network of San Diego**

JANUARY 20, 2004

## **Panelists:**

**Dana Basney, CPA, CVA, CIRA, Nation Smith Hermes Diamond  
Ellen Peck, Esquire, Law Office of Ellen Peck  
Heather Rosing, Esquire, Klinedinst, PC**



# Ellen Peck, Esq.

## Law Office of Ellen Peck



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Ellen Peck is a past chair and immediate past advisor of the State Bar's Committee on Professional Responsibility and Conduct. Between 1989 - 1995, Ms. Peck served as one of nine judges appointed by the California Supreme Court to serve on the State Bar Court, and served as Assistant Supervising Judge between 1992 and 1993. She has served as Ethics Counsel to the State Bar's and the ABA's ethics committee, in addition to serving as the former Director of the State Bar's Office of Professional Standards.

As office director, Judge Peck implemented the State Bar's toll free Ethics Hotline and was managing editor of the California Compendium on Professional Responsibility. She was a member of the State Bar Commission for the Revision of the Rules of Professional Conduct from 1986-1989 and currently serves on that Commission; She is a past advisor to the Bar's Consortium on Competence; a past member of the Statewide Committee on Professionalism and Public Action, the Committee on Evaluation of Professional Standards, and the American Criminal Justice Committee on Ethical Standards. She has served as chair of the Los Angeles County Bar Association's Committee on the State Bar, as well as a member of that bar's Committee on Professional Ethics and Responsibility.

She is a co-author of The Rutter Group's *California Practice Guide - Professional Responsibility*. She also is a professor at Concord University School of Law teaching Professional Responsibility.

# Heather Rosing, Esq.

## Shareholder, Klinedinst, P.C.



### Ethical Conduct for Insolvency Professionals

Heather Rosing is an attorney and shareholder with the San Diego law firm, Klinedinst, PC where she is Co-Chair of the Professional Liability Group. She has a wide range of experience in the professional ethics and liability arena, defending and providing risk management services to lawyers, accountants, and other professionals. She has experience in the bankruptcy forum, particularly with regard to how the bankruptcy laws apply to claims against professionals.

Heather is a member of numerous organizations such as the The State Bar of California, The American Bar Association, Illinois State Bar Association, Professional Liability Underwriting Society, Women's Insolvency Network, San Diego Bankruptcy Forum, San Diego Defense Lawyers, Association of Business Trial Lawyers, The Association of Professional Responsibility Lawyers, and the California Society of Certified Professional Accountants. She has also served on several organizations - Director of the San Diego County Bar Association, Secretary of the Ethics Committee of SDCBA, Director of the San Diego Volunteer Lawyers, and News Editor of the Lawyers Club of San Diego.

Heather holds a Bachelor's of Science Degree in Journalism from the University of Illinois and received her Juris Doctor from Northwestern University School of Law in 1996.

Heather speaks and writes in the area of ethics, and is currently an instructor with UCSD Extension Program teaching *Professional Conduct & Ethics for Accountants*.

# Dana Basney, MSBA, CPA, CVA, CIRA

## Principal, Nation Smith Hermes Diamond



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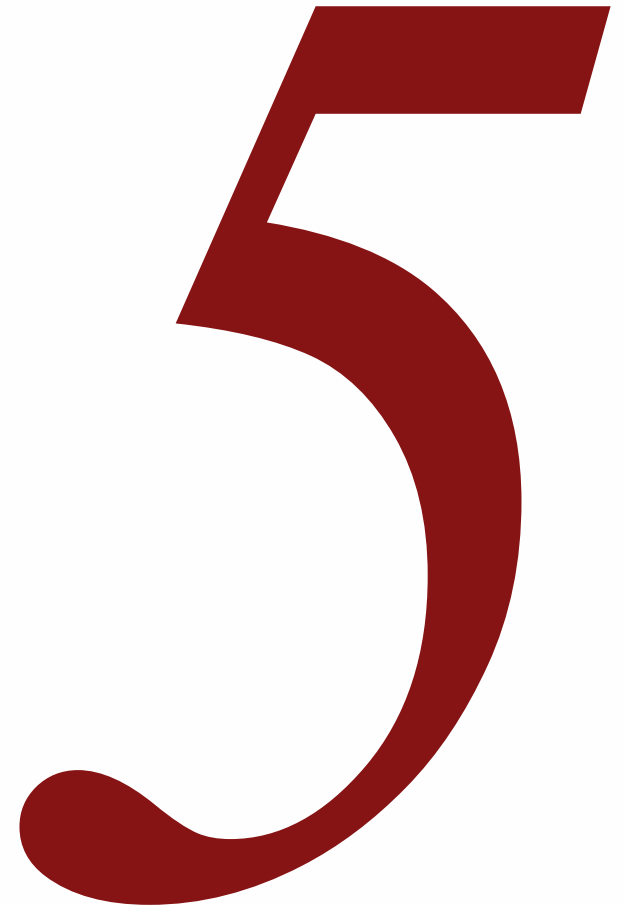
Dana Basney is a Principal in San Diego's largest locally-owned CPA and consulting firm, and has practiced public accounting for more than 30 years. He is in charge of the firm's litigation support, due diligence, and valuation departments

Dana holds a Bachelor's Degree in Liberal Arts from Bates College in Lewiston, Maine and received a Master's Degree in Business Administration and Accounting from San Diego State University.

Dana is a licensed CPA and a Certified Reorganization and Insolvency Accountant, as well as a Certified Valuation Analyst. He is a member of The American Institute of Certified Public Accountants, The California Society of Certified Public Accountants, The Institute of Managerial Accountants, The Association of Insolvency Accountants, The Institute of Business Appraisers, Inc., and the Bankruptcy Forum. He has served on the Family Law Bar's Business Valuation Subcommittee and has previously chaired the San Diego Chapter of the CPA Society's Ethic's Committee. He Currently Chairs the San Diego Litigation Support Interest Group of the CPA Society.

Dana has extensive litigation experience and has served as an expert witness in financial and valuation matters on numerous occasions as well as a court appointed mediator and special master. Dana is also an instructor with the UCSD Extension Program teaching Advanced Accounting Topics and CPA Society approved Course on *Professional Conduct & Ethics for Accountants*.

# Five Ethical Dilemmas



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# GadgetCo: The Scene

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Bankruptcy Attorney Bob is retained to represent GadgetCo, a closely held nonpublic California corporation, in a Chapter 7 liquidation. Bob receives his instructions from President Percival, who is also a very good personal friend. Percival has personally guaranteed certain company debts, including a \$350,000 loan from GoodBank.

Percival thinks the \$350,000 loan might cause him to have to file for Chapter 7 as well, and asks Bob to represent him in that case. Bob agrees, and they sign a retainer agreement, even though Bob does not yet file.

Trustee Tyra is appointed, and notes that GadgetCo might have a very valuable lawsuit against its competitor, WidgetCo, for trademark infringement. She hires Attorney Anders to look into it and investigate the value of the claim.

# GadgetCo: The Scene

Meanwhile, Percival tells Bob at a dinner party one night about how he is hiding “one major company asset” that he might later use to pay off the loan he has personally guaranteed to avoid the personal Chapter 7 that he contemplated.

Percival later laughs and tells Bob he is kidding.

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# 1

## Dilemma One: Who Is The Client?

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Bob feels uncomfortable with Percival's disclosure, which he thinks might be true, but wonders what he should do.

**What are Bob's obligations and duties?**

# 1

## Dilemma One: Who Is The Client?

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- If only representing organization, duty is to organization. Rule of Professional Conduct (RPC) Rule 3-600. Bob has duty to explain to GadgetCo's representatives that he does not represent them. RPC 3-600(D).
- **But here, Bob has two clients!**
- Bob can theoretically represent GadgetCo and Percival, but must get a PRC 3-310(C)(1) conflict waiver signed by Percival and another representative of GadgetCo. RPC 3-600(E).

# 1

## Dilemma One: Who Is The Client?

- **Bob still has duty to “the organization” and Percival. If the duties conflict, Bob probably must withdraw from representation of both.**
- **Bob’s first challenge is figuring out who is the organization representative after the GadgetCo Chapter 7 is filed?**
- **Who holds the GadgetCo privilege?**
- ***Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985):**
  - **Court addressed the question of who controls the attorney-client privilege in a corporate bankruptcy. Found that the trustee is vested with control over exercise of the privilege with regard to pre-petition communications.**

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# 1

## Dilemma One: Who Is The Client?

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- **Ramette v. Bame, 251 B.R. 367 (Bankr.D.Minn. 2000):**
  - Trustee can waive post-petition communications when 11 converted to 7 and trustee wants information from DIP's attorney.
- **In re Boileau, 736 F.2d 503 (9<sup>th</sup> Cir. 1994):**
  - Corporate 7 converted to 11.
  - DIP and court-appointed examiner. DIP has little control over management.
  - Examiner sought to obtain pre-petition privileged documents.
  - Court found that examiner could waive privilege under facts of case.
- **Another thought: Maybe nothing Bob discusses with a corporate representative after the Chapter 7 is filed is even privileged since the company “belongs” entirely to the trustee!**

# 2

## Dilemma Two: The Hidden Asset

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Bob suspects there really is a “hidden asset” that is not reported anywhere on GadgetCo’s schedules. He prepared the schedules and signed them before Percival suggested there was a hidden asset.

**What should Bob do?**

# 2

## Dilemma Two: The Hidden Asset

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- If the attorney knows that Percival is doing (or not doing) something that is “a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization,” the attorney still cannot breach the privilege and reveal the confidential information. RPC 3-600(B).
- Bob might be able to tell others in the organization. The trustee? But Bob must “know” (have actual, subjective knowledge) that Percival is doing something against the organization’s interests before he can take steps to remedy the situation. RPC 3-600(B). If he has this knowledge, he can go to others within the organization to remedy it (the trustee?). RPC 3-600(B)(2).
- Complicated by the fact that Percival is an individual client and Bob owes a Business & Professions Code section 6068(e) duty of confidentiality to him. Was Percival confiding in Bob as his attorney?

# 2

## Dilemma Two: The Hidden Asset

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- **Evidence Code section 956: No privilege where the services of the lawyer are “sought or obtained” to enable or aid a crime or fraud. Is Percival using Bob to perpetrate fraud on the bankruptcy court (18 U.S.C. 3284 makes it a continuing offense to conceal assets of the bankruptcy estate)?**
- **Bob is allowed to consult with his own lawyer. *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294.**

# 3

## Dilemma Three: Interviewing Employees

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Attorney Anders decides to scope out WidgetCo, GadgetCo's competitor, and runs into a low level employee on his lunch break. Anders interviews him.

**Was Anders out of line?**

# 3

## Dilemma Three: Interviewing Employees

- ***Snider v. Superior Court* (December 3, 2003) 7 Cal.Rptr.3d 119**
- **Fourth DCA Opinion reversing disqualification of defense counsel in misappropriation of trade secrets action. Court concludes attorney's *ex parte* contact with all but limited category of adverse party's current and former employees does not violate Rule 2-100 prohibiting contact with "represented party." Also contains guidance for both sides to avoid problems.**

# 4

## Dilemma Four: Candor to the Court

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Anders files a suit on the trustee's behalf against WidgetCo. At a preliminary motion hearing, Anders' opposing counsel makes an offhand remark about Anders being wholly uninformed as to the facts. Anders responds, "While it is true I haven't yet spoken to anyone at WidgetCo, because discovery has not started, I am confident that my client has a great case." The remarks of both counsel have absolutely no bearing on the issue in front of the court that day.

**Did Anders do anything wrong?**

# 4

## Dilemma Four: Candor to the Court

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- **B&P Code section 6068(d):** It is the duty of an attorney to... employ, for the purpose of maintaining the causes confided to him or her those 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.
- **RPC 5-200:** “In presenting a matter to a tribunal, a member:
  - **(A)** Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;
  - **(B)** Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law...”

# 4

## Dilemma Four: Candor to the Court

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- ***Lowe v. State Bar* (1953) 40 Cal.2d 564:** It makes no difference if the misstatement of fact is material or relevant to the inquiry before the court.”
- ***Vaughn v. The Municipal Court of Los Angeles* (1967) 252 Cal.App.2d 348:** The court found that “the presentation to the court of a statement of fact known to be false presumes an intent to secure a determination based upon it and is a clear violation of the quoted provision . . . The conduct denounced by the Business and Professions Code is not the act of an attorney by which he successfully misleads the court, but the presentation of a statement of fact, known to him to be false, which tends to do so. It is the endeavor to secure an advantage by means of falsity which is denounced.”

# 4

## Dilemma Four: Candor to the Court

**If the court discovers Bob's misrepresentation, Bob can be held in contempt and reported to the Bar, which will most likely find him in violation of the above-cited rules.**

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# 5

## Dilemma Five: What Rules Govern?

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Bob finally breaks down and decides he needs to turn Percival in. He's not sure if he can do it, though, and decides to consult some ethical rules on when he can breach confidentiality.

**Which rules govern Bob's conduct?**

# 5

## Dilemma Five: What Rules Govern?

- **Cal. B&P Code section 6068(e):** It is an attorney's duty... to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.
- **Cal. Ev. Code section 956. Crime or fraud:** There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

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# 5

## Dilemma Five: What Rules Govern?

- **ABA Model Rule 1.6 (recently amended):** A lawyer may reveal information relating to the representation of a client to the extent the lawyer believes is reasonably necessary to... (2) prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services [or]... (3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

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# 5

## Dilemma Five: What Rules Govern?

California law and ABA conflict? What to do?

**Duty of confidentiality much stronger in California. Much clearer that lawyer can tell third parties (even creditors) that Percival is hiding an asset if ABA Model Rule 1.6 applies, since Percival is using Bob to hide the asset and keep it off the schedules.**

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# 5

## Dilemma Five: What Rules Govern?

- **Local Rules for the Federal District Court, Southern District of California, Rule 83.4: Every member of the bar of this court and any attorney permitted to practice in this court should be familiar with and comply with the standards of professional conduct required by the State Bar of California, and decisions of any court applicable thereto, which are hereby adopted as standards of professional conduct of this court... The Code of Professional Responsibility of the American Bar Association should [also] be noted...**

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# 5

## Dilemma Five: What Rules Govern?

- **Local Rules for the United States Bankruptcy Court, Southern District of California, Rule 1001-3: Adopts previously-cited local rule.**
- **Differs for every federal district.**

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# Spoilation of Evidence

You are an expert witness in a litigation proceeding. You email to your client's attorneys a draft copy of your report. The attorney corrects several errors in your report and sends it back to you. You review the attorney's changes, conscientiously get appropriate support for the changes made, and update your report accordingly. The original draft of your report is electronically written over in the course of updating it as you do not have a copy of the original draft you emailed to the attorney as it was never printed out.

**Do you have a problem?**

# Sarbanes Oxley

**Sarbanes Oxley provides an individual may be fined or imprisoned for up to 20 years for altering, destroying concealing, or falsifying any record, with the intent to impair the use of the record in a governmental investigation or proceeding.**

*Trigon Insurance Co. v. U.S., Cite as 88 AFTR 2n 2001-6883, 11/09/2001, Code Sec(s) 7402*

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# Attorney Consultant Privilege

## Regarding Dual Purpose Engagements of Consultants

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You are the attorney for a bankrupt company which retained waste silver from old x-rays and other sources. The company is under investigation by the EPA for possible criminal action for unlawful disposal of toxic chemicals used in the process.

You hire a reputable CPA firm as consultants to assist you in tracing purchases and usage of the chemical inventories in question. The CPAs interview warehouse and accounting personnel as part of the process in order to assist you in responding to the criminal investigations and litigation which is being brought against your client.

The CPAs report shows massive crimination violations and flagrant violations of EPA rules and statutes.

**Should you produce the information that was gathered for such a “Dual Purpose” engagement?**

# Grand Jury Subpoena (Torf)

Case Number 03-30102 (9th Circuit) November 26, 2003

**Answer:** The 9th Circuit ruled that because the consultant was working for counsel in anticipation of litigation, all of his work including interviews with employees was protected from discovery despite the dual purpose of his employment.

**IT IS IMPORTANT TO HAVE ATTORNEYS HIRE CONSULTANTS. IF THE COMPANY HAD HIRED THE CONSULTANTS, THEY WOULD HAVE HAD TO PRODUCE THE DAMAGING REPORT.**

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# Attorney Client Privilege

## Regarding Intercepted E-Mails

As a bankruptcy attorney you are constantly emailing documents to your client.

One critical email is intercepted and winds up in the hands of the opposing party.

**Has the Attorney client privilege been waived because the email was sent over the internet in an unencrypted form?**

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# Attorney Client Privilege

## Regarding Intercepted E-Mails

In the *City of Reno v. Police Protective Ass'n*, 59 P.3d 1212 (Nev. 2002) modified, 2003 Nev. Lexis 25 (Nev. May 14, 2003), The Nevada Supreme Court held that a privileged Communication retained its privileged status despite claims by the opposing side claiming that the privilege had been waived by the fact that the message had been emailed.

The court relied in part, on ABA Formal Opinion 99-413 (1999), which held that sending unencrypted internet email does not violate a lawyer's duty of confidentiality. The court also noted that both Federal and California Statutes say that unlawfully intercepted electronic communications do not lose their privileged status.

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# Attorney Client Rights

## Regarding Disclosure of Unreported Assets in Bankruptcy

An Attorney's firm was retained by a California resident for whom it provided services and by whom it is owed fees. The client then declares bankruptcy and seeks to discharge the debt to the law firm. The bankruptcy is treated as a "no asset" proceeding and the attorney has been told not to file a claim.

As a result of his representation of the client, the attorney has reason to believe his former client has not disclosed all of his assets to the court.

**As part of an effort to collect his fees, is it permissible for the attorney to reveal to the bankruptcy court the existence of these unreported assets?**

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# Attorney Client Rights

Regarding Disclosure of Unreported Assets in Bankruptcy

**Rule 1.6(d)(5) provides that:**

**A lawyer may use or reveal client confidences or secrets to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fees. Los Angeles County Bar Association Opinion 452 (11/21/88)**

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# Is Loyalty Relative?

## Ethical Conduct for Insolvency Professionals

Bart Kounsel (BK) represented Debtor in a bankruptcy proceeding. Creditor named Accountant as his expert to prove losses due to Debtor's fraud, in an adversary proceeding. Just before trial, BK learned that Accountant had been represented by his firm's Los Angeles office in a bankruptcy proceeding involving misappropriation charges and that his firm currently represented Accountant in a Board of Accountancy disciplinary matter. BK refused to recuse himself and the bankruptcy judge denied Creditor's motion to disqualify BK. At trial, BK absolutely humiliated Accountant by reading all of the charges leveled against him by former clients and by making him out to be a thief and a blackguard. Creditor appealed. How should an appellate court rule?

***Hernandez v. Paicius* (2003) 109 Cal.App.4th 452 134  
*Cal.Rptr.2d* 756.**

# Hernandez v. Paicius -2

(2003) 109 Cal.App.4th 452 134 Cal.Rptr.2d 756

**Held:** Malpractice judgment for defense reversed.

Disqualification should have been ordered if the conflict had not resolved prior to trial.

**Issue:** Duty of loyalty: defense counsel concurrently represented defendant and the expert witness for the plaintiff

Case expands duty of loyalty beyond prohibiting suing clients or giving legal advice against a current client.

**Rationale:** “The spectacle of an attorney skewering her own client on the witness stand in the interest of defending another client demeans the integrity of the legal profession and undermines confidence in the attorney-client relationship.”

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# Hernandez v. Paicius -3

(2003) 109 Cal.App.4th 452 134 Cal.Rptr.2d 756

## Practice pointers:

- Add all known witnesses and expert witnesses to your conflict checking systems.
- Always determine whether a witness is a current or former client.
- Resolve any actual or potential conflicts early.

**Query:** Should plaintiff be able to use an expert that is the client of opposing counsel's firm, knowing that it will create a conflict?

- When interviewing an expert or percipient witness, ask if they have any affiliation with opposing counsel's firm.
- Should plaintiff be accorded an opportunity to get a new expert?
- Seek the Court's assistance in fashioning remedies such as in limine orders or other procedures to prevent an actual conflict.
- Will the conflict be cured by hiring independent counsel to deal with all issues relating to the witness/client if there is an ethics wall between them, supervised by the Court?

# No Note Unchallenged

After real estate deal went sour, Debtor and Creditor agreed to restructure. Under restructuring, Creditor agreed to advance money to Debtor at \$1.50 return on each \$1.00 lent. Creditor did not want to incur attorney's fees, so Debtor had his lawyers, ABC law firm, draft the necessary documents and promissory note.

After another falling out, ABC sued Creditor, on behalf of Debtor, asserting, inter alia, that the promissory note it had drafted was usurious. Creditor moved to disqualify ABC.

*Should the court disqualify ABC?*

*Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 1 Cal.Rptr.3d 472.

# Hetos Investments, Ltd. v. Kurtin -2

(2003) 110 Cal.App.4th 36, 1 Cal.Rptr.3d 472.

**Issue:** Should ABC be disqualified because they drafted a note which they now contends is illegal, thereby violating CRPC 3-210?

- "A member shall not advise the violation of any law ... unless the member believes in good faith that such law ... is invalid."
- If loan was usurious, Creditor is violator.
- ABC never represented Creditor.
- No violation of CRPC 3-210 in failing to advise Debtor that loan payments excessive.
- No authority – illegality of Debtor agreeing to pay an interest rate that exceeds what the law permits the payee to demand.
- No violation; no disqualification

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# Hetos Investments, Ltd. v. Kurtin -3

(2003) 110 Cal.App.4th 36, 1 Cal.Rptr.3d 472.

**Issue:** Should ABC be disqualified because of the “appearance of impropriety” by inducing Creditor to violate law?

- If true, conduct may create “appearance of impropriety.”
- Appearance of impropriety is not a standard for disqualification
- While awkward for ABC to argue the invalidity of its own work product, continued involvement in the case does not affect the outcome of the case.
- Replacement counsel would not make a difference.

**Issue:** ABA Model Rules are not binding in CA and DO NOT create a ground for disqualification.

# Who You Know and What You Know

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Over a number of years while with his former law firm, Clara Counsel represented InsuredCo in 17 separate matters, several of which involved allegations of bad faith denial of coverage. Several years pass. At her new firm, Clara now represents a plaintiff Pea, who is suing InsuredCo, alleging bad faith denial of coverage. InsuredCo has filed a motion to disqualify Clara and her firm because of her previous representations. Pea's case was not pending when Clara represented InsuredCo.

*What should the trial court do?*

Jessen v. Hartford Casualty Ins. Co. (5th Dist. 8/25/2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877.

# Jessen v. Hartford Casualty Ins. Co. -2

(5th Dist. 8/25/2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877.

**Issue:** Confidentiality – “successive representation”  
[past client, now adverse party].

## **New proposed test for disqualification:**

- **The nature and extent of lawyer’s prior representation of former client**
  - **Direct involvement [lawyer personally involved in providing legal advice and services to former client’ = presumption that confidential information passed to lawyer**
    - **No delving into specifics of communications between lawyer and former client to show that attorney did or did not receive confidential information during relationship.**
  - **Attenuated or peripheral involvement:**
    - **Presumption not applied unless:**
      - **Adequate showing that lawyer in position to have acquired confidential information material to current relationship.**

# Jessen v. Hartford Casualty Ins. Co. -3

(5th Dist. 8/25/2003) 111 Cal.App.4th 698, 3 Cal.Rptr.3d 877.

**Issue:** Confidentiality – “successive representation”  
[past client, now adverse party].

## **New proposed test for disqualification (Cont.):**

- **Successive representations are substantially related when:**
  - **Information material to the evaluation, prosecution, settlement or accomplishment of former representation, given its factual and legal issues is...**
  - **Material to the evaluation, prosecution, settlement or accomplishment of former representation, given its factual and legal issues.**
  - **“Playbook” information is relevant.**

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# “The Lie’s The Limit”

Finding contractor engaged in fraud in building home, arbitrator awarded \$300,000 plus \$25,000 in punitive damages. Limit, coverage lawyer for contractor’s insurer, InsuredCo, sent homeowners check for \$120,000 for attorney fees and arbitration costs, but reserved rights as to judgment on grounds InsuredCo had no legal duty to indemnify contractor for fraudulent acts. In fact, InsuredCo had agreed to indemnify contractor for willful acts.

**Shafer v. Berger, Kahn, et al. (2d Dist. 2003) 107 Cal.App.4th 54, 131 Cal.Rptr.2d 777.**

# Shafer v. Berger, Kahn, et al.

(2d Dist. 2003) 107 Cal.App.4th 54, 131 Cal.Rptr.2d 777

**Issue:** Do homeowners have direct claim vs. Limit?

**Yes** – Fraud and making false statements actionable.

No license for InsuredCo.'s lawyer to lie on behalf of client.

**Issue:** Were Limit's statements actionable?

**Yes**

**Issue:** Does the litigation privilege protect Limit? **No**

# Taking Responsibility - The Office

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Plaintiff sued Def for breach of contract. Def's lawyer, Len, filed an answer but missed a status conference. The Court issued an OSC why Def's answer should not be struck. Len failed to appear at the OSC and court ordered default. Len's paralegal, Pear, filed an affidavit stating that he made mistakes in calendaring OSC. Len filed a motion to set aside default and argued Pear's mistake should be imputed to Len.

CCP § 473(b) states court "shall" vacate default unless "not ... caused by the attorney's mistake..."

*How should the court rule?*

*Hu v. Fang (2002) 104 Cal.App.4th 61, 127 Cal.Rptr.2d 756.*

# Hu v. Fang

(2002) 104 Cal.App.4th 61, 127 Cal.Rptr.2d 756.

**The attorney is the professional responsible for supervising the work of his or her legal assistants.**

**Lawyer is was responsible for supervising Pear's work and is responsible for Pear's work product, including his mistake in calendaring the OSC hearing.**

**Where Lawyer acknowledges error in the moving papers, Court must grant relief.**

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# Nip and Tuck

Dr. Nip and Dr. Tuck were plastic surgeons, partners and close friends for more than 20 years. Their partnership broke up when Dr. Nip's wife left him to marry Dr. Tuck and have his baby. After "le divorce," Dr. Tuck loaned Dr. Nip \$100,000 to develop an anti-anthrax vaccine. Actually, Dr. Nip used the money to pay his Las Vegas gambling debts. Dr. Nip then filed a Chapter 7 bankruptcy petition, represented by Ann Attorney.

Dr. Tuck objected to his debt being discharged claiming fraud. Dr. Nip told Ann that he was going to resolve his debt the "old-fashioned" way by spreading a little anthrax around the Tuck household. Ann is convinced that Dr. Nip means to do away with Dr. Tuck and his new family.

*What can she do?*

**AB 1101**

# Cal. Bus. & Prof. Code § 6068(e)

Code until July 1, 2004

**It is the duty of California lawyers to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”**

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# Cal. Bus. & Prof. Code § 6068(e)

- **No express exceptions to § 6068(e)**
- **There may be exceptions developed through case law:**
  - *Arden v. State Bar (1959)*
  - *Carlson Collins v. Banducci (1967)*
- **No exception for life-threatening injury**

•

## Cal. Evidence Code § 956.5

Provides exception to attorney-client privilege “if the lawyer reasonably believes that disclosure of any confidential communication relating the representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.”

# Cal. Evidence Code § 956.5

Ethical  
Conduct for  
Insolvency  
Professionals

Do the exceptions contained in Evidence Code § **956.5** (Evidentiary Attorney-Client Privilege) also apply to Bus. & Prof. Code § **6068(e)** (Duty of Confidentiality)?

## AB 1101 – Exception to 6068(e)

- In spring 2003, Assemblyman Steinberg introduced AB 1101
- Exception to 6068(e), permitting lawyer to reveal confidential information
  - To *extent* lawyer reasonably believes *necessary*
  - To *prevent criminal act*
  - *Likely* to result in *death* or *substantial bodily harm* to an individual

# AB 1101 – Exception to 6068(e)

- **Senate Amendments:  
Appointment of Tax Force**
  - Draft Rule of Professional Conduct
  - Elaborate on certain issues AB 1101 raises
- **Composition of Task Force**
  - Civil and criminal law practitioners
  - Judicial, legislative and executive reps
  - COPRAC & Rules Revision Commission
  - Public

# Issues Identified in AB 1101

- **“Miranda” warning required? When?**
- **Must I first try to dissuade the client before revealing confidential info?**
- **Whether conflict arises as soon as L elects to disclose, and how to avoid.**

# AB 1101 – Other Issues

- **What does “confidential information” mean?**
  - Does “confidential *information*” mean the same as “confidence” in 6068(e)?
- **What is within the scope of “relating to the representation”?**
- **“Miranda” warning:**
  - Prospective clients?
  - All current clients?
- **Must harm be “imminent”?**

# AB 1101 – Other Issues

- **Client’s criminal act:**
  - Must L confront client to “reasonably believe” disclosure necessary?
  - What if L perceives threat to self?
  - What if future harm tied to past act (e.g., toxic waste discharge)?
  - Client’s suicide?
- **Third party’s criminal act:**
  - Higher threshold for L’s reasonable belief.
  - What if C is object of threat?