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# the PRACTITIONER

## FEATURED IN THIS ISSUE:

**2019 Bills Pertaining to Sexual Harassment in the Workplace**

*Cindy Elkins, p 20*

**MCLE Article: Elimination of Bias: You Should Try to Change What You Should Be Able to See**

*Angelica Sciencio, p 28*



The Magazine of the Solo & Small Firm Section of the California Lawyers Association

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# Letter From the Chair

By Renee N. G. Stackhouse



**Renee Stackhouse** is a San Diego trial attorney and founder of Stackhouse, APC who focuses on plaintiff's personal injury, military, and criminal defense. She is Chair of the CLA Solo & Small Firm Section, Immediate Past President of California Women Lawyers, President of the CWL Foundation, and sits on the San Diego County Bar Association. She is faculty at the prestigious Gerry Spence Trial Lawyers College and the founder of MSheLE.com. She can be reached at [Renee@StackhouseAPC.com](mailto:Renee@StackhouseAPC.com).

**D**on't settle this year; thrive.

As Solo and Small Firm business owners, managers, and stakeholders, we are the law firm. Have you asked yourself what you are going to do this year to make achieve your goals? Have you taken the time (I know it's so hard) to sit down and actually figure out what your specific goals are? If not, I highly encourage you to do so. We all want to be successful (whatever that means to you), we all want to make enough to at least pay the bills every month, maybe we want to "do better" than last year or "network more" or "get on a board" or "insert vague aspiration here." Let's get specific. Let's make a vision board or a specific goal list if crafting makes your skin crawl.

Pick three things that you want to achieve this year. And let's get specific.

Instead of "I want to network more" how about "I am going to join my local bar association and California Lawyers Association. I am going to attend at least 1 event per month. I am going to introduce myself to one new person at each event."

Instead of "I'm going to get on a board," how about "I am interested in/passionate about X (practice area group, ethnic group, religious group, etc). I am

going to find a group that does that and get involved with them actively. I am going to get known and get recognized this year. Next year I am going to run for the board."

Instead of "I want to do better running my solo and small firm" how about "I am going to get up-to-date on the latest information about how to best run my solo and small firm. I am going to do that by taking an MCLE with California Lawyers Association online or attending an in-person Solo and Small Firm Section program."

You can work hard, I know you do!, but if you're not working towards concrete goals, it's easy to lose sight of what you're trying to accomplish. We (yes, me too) can too easily get lost in the time consuming practice of law and forget that, unlike other lawyers, we're so awesome that we also run, manage, or make or break our business of law.

Don't worry, the Solo and Small Firm Section is here to support you in every way that we can.

First, we're advocating on behalf of our membership to the State Bar and any other entity that proposes

## the PRACTITIONER FOR SOLO & SMALL FIRMS

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### Disclaimer

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the PRACTITIONER for Solo & Small Firms is designed to provide accurate information to professional advocates. However, we make this subject matter available to our members with the understanding that the publisher is not engaged in rendering legal or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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something that we think may disparately impact our membership. See something that fits that description? Let us know.

Second, we're making sure you get your needed MCLEs. Whether its through out library of online classes or our upcoming programs on how to run, manage, and grow your law firm, we're cognizant that Solo and Small Firm members have special needs. Join our section to stay abreast of the latest new and follow us on social media (Facebook and Twitter) to get updates on what we're doing.

Third, are you getting excited about this year?? If so, maybe you're thinking you'd like to really get involved. Let's do it! Send us an application with your interest in joining our mission and our Executive Committee.

Fourth, want to make a difference in the community and help spread civics learning and engagement? Our new committee is working hand-in-hand with the Chief Justice's project and the newly formed Civics

Learning Initiative to help promote civics education throughout the State. We're waiting for amazing and caring folks like yourself to come join us in making a difference.

Finally, yes, you heard me right- you're amazing. Take a minute and sit with that. It's true. As Dr. Suess says, "Today you are you, that is truer than true. There is no one alive more youer than you." I know you have a special expertise. We'd love to showcase that as an article in this magazine, at one of our live events, or in a webinar (you can do them from your desk and you get exposure across the state!) So reach out to us and let us know what you'd like to do to get involved. We can't wait to hear from you.

Let us help you check those specific goals boxes and works towards the best year yet.

Sincerely,

Renee N.G. Stackhouse



# SAVE *the* DATE

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# Letter From the Editor

By Somita Basu

**M**y name is Somita Basu and I'm the new Editor-In-Chief of The Practitioner for 2019. I'm not just the new Editor-In-Chief, but I'm also a new member of the Solo and Small Firm Section Executive Committee. It's been a whirlwind initiation, but I feel optimistic about our Section's ability to improve the efficiency and effectiveness of how our members practice.

It is my goal to expand the reach of The Practitioner and bring in new authors to help further diversify the range of content and the platform that the Section offers. I hope to be able to organize the articles for each issue around broad themes.

Our first issue of 2019 is focused on issues related to ethics, certainly a hot button topic in recent times. This past year witnessed the convergence of a host of ethics issues both as they relate to the law and in society in. The State Bar of California has been conducting studies on issues that directly affect Solo and Small Firm practitioners in the area of ethics and ethics related topics.

Our first article by Jim Ham discusses the issues surrounding requiring mandatory malpractice for all licensed attorneys. This issue is still under review and Jim articulates some of the concerns that could arise should this requirement be put in place. The Solo and Small Firm Section wrote to the State Bar arguing against mandatory malpractice insurance and we have included our letter to the State Bar, as we continue to advocate for the best interests of our members.

Meanwhile, California implemented an updated Rules of Professional Conduct that went into effect in November 2018. Steve Krongold provides an in-depth discussion on undisclosed conflicts under the new Rules. The new Rules also affect how you can use social media. Renee Stackhouse, our multi-tasking



**Somita Basu, Esq.**, is a founding principal and managing partner of the Santa Clara, Beverly Hills, and Las Vegas offices of Norton Basu LLP. Ms. Basu is currently the incoming Editor-In-Chief of The Practitioner, a quarterly publication distributed by the the California Lawyers' Association's Solo and Small Firm Section, where she is also serves on the Executive Committee. Ms. Basu is based out of the Santa Clara office and lives in the South Bay with her family.

Section Chair, provides some practical tips on what is and is not allowed under the new Rules.

The rise of the #MeToo movement brought the issue of gender discrimination and sexual harassment in the workplace into the spotlight. This has led to new legislation in California on the subject of sexual harassment. Cindy Elkins gives us a wonderful overview of the new bills that address this issue and how they impact employers.

There has been somewhat of a domino effect in the implementation of new laws surrounding cannabis, and this has been a particularly dynamic area of law. But how does this affect how we practice and our personal behavior? Wendy L. Patrick provides some insight on this rapidly evolving issue. This article was published with the co-operation of the Criminal Law Section.

Our MCLE self-study article by Angelica Sciencio deals with elimination of bias. These MCLE credits are hard to come by, so we hope you find this article informative and helpful. Bias is an issue that runs through all professions, including ours. We hope you will be better able to recognize these issues as a result of this MCLE.

Finally, thank you to our outgoing Editor-in-Chief, Omar Anorga, for his excellent work last year and to Jeremy Evans and Renee Stackhouse for their on-going advice and support as I worked through my first issue. A special thanks to the Criminal Law Section for working with us to bring our members content by a diverse group of authors.

# Will California Have Mandatory Malpractice Insurance for Attorneys and What Will It Look Like?

By James I. Ham



**James I. Ham** is a solo practitioner from Glendale, CA who provides legal ethics and malpractice advice, and defends attorneys in State Bar discipline investigations and trial proceedings. He recently completed service as a Commissioner of the State Bar Commission on the Revision of the Rules of Professional Conduct. He can be reached at [JHam@HamLawOffice.com](mailto:JHam@HamLawOffice.com)

The California State Bar Board of Trustees appointed a Malpractice Insurance Working Group to conduct a legislatively mandated review and study of malpractice insurance for licensed California attorneys. California Business & Professions Code section 6069.5 orders the State Bar to conduct the review. Findings must be reported to the supreme court and the Legislature by May 31, 2019.

The Legislature's approach towards the issue can be determined from the language of the statute, which "[recognizes] the importance of protecting the public from attorney errors through errors and omissions insurance . . ." This language can arguably be read as suggesting that the legislature has already decided that the public needs protection through insurance.

Based on available data, any mandatory malpractice insurance requirement would likely have the most direct impact on solo and small firm practitioners – those who traditionally have had the weakest voice at the State Bar and in the legislature – at least in terms of requiring lawyers to carry malpractice insurance. However, a mandatory malpractice insurance scheme can also have significant and far reaching ramifications for other attorneys who are already insured. A mandatory scheme could disrupt long standing relationships between attorneys and

their insurance carrier of choice. Indeed, many larger law firms utilize risk retention groups to insure against malpractice. It is not clear how such groups would be affected by a mandatory insurance scheme. Thus, the choice of whether to require mandatory malpractice insurance, and the manner in which such a choice is implemented, is a complex one that could affect the choice of insurance carrier and the terms under which coverage is offered, potentially in ways disadvantageous to California attorneys.

## THE KEY BODY: WHAT IS THE MALPRACTICE INSURANCE WORKING GROUP

According to the State Bar, the Working Group's membership represents a "broad range of interests to ensure the voices of the Legislature, the bench, legal consumers, lawyers and insurance industry representatives are included in the study."

Solo and small firm lawyers are represented on the working group by one representative nominated by Local Bars. The State Bar Board of Trustees appoints four members to the Working Group. California Lawyers Association appoints two litigators, one defense and one plaintiffs, to the group. The Assembly and Senate Judiciary Committees each get to appoint one member. Other stakeholder members include a California

Lawyers Association Sections Representative, an Ethics Attorney (nominated by the Committee on Professional Responsibility and Conduct), a California admitted insurance broker (who places policies with solo/small firms), an Affinity Bar appointed by the Minority Bar Coalition, and a Judge appointed by the California Judges Association.

## **WHAT WE KNOW FROM A CALIFORNIA ATTORNEY SURVEY**

In support of the Working Group's efforts, the State Bar's Office of Research and Institutional Accountability conducted a survey of attorneys regarding legal malpractice insurance. While 25,000 California attorneys were surveyed, only 1,450 responses were received. 84% of those responding were private practitioners. 62% of the responders were solo practitioners and an additional 25% worked at law firms with five or less lawyers.

The survey revealed that 39% of solo practitioners were uninsured and 12% of attorneys in firms of two to five lawyers were uninsured. 4% of firms having six to ten lawyers were uninsured. In response to questions about the reasons why lawyers chose to be uninsured, 71% of solo practitioners identified cost as a factor. 35% said that it was not worth the money. 29% said they did not believe they would be sued. 24% said that working part time was a factor in their decision not to be insured. (Respondents could apparently list more than one reason; hence the percentages do not total 100%). The survey also revealed that 67% of the clients served by uninsured attorneys were individuals or families, with small businesses (less than 10 employees) making up another 14% of the client base.

It may come as no surprise that 70% of law firms with six to ten lawyers believe that insurance should be mandatory, compared to only 35% of solo practitioners who believe that insurance should be mandatory. There are many reasons for this difference, including the logical need for larger legal enterprises to provide insurance to their members to protect them against the mistakes of their colleagues in an environment where liability for legal malpractice can extend to other members

of the same law firm to varying degrees depending upon the law firm's structure.

## **WHAT IS "MANDATORY INSURANCE"?**

What would mandatory insurance look like, and who would it cover? Mandatory Insurance is the concept that carrying legal malpractice insurance must be a requirement for all practicing lawyers in the state. The Working Group is considering mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house and government attorneys. There are also viable options short of mandatory insurance. Other options include keeping or strengthening California's existing rule<sup>1</sup> requiring attorneys to make written disclosures to clients if they are not covered by malpractice insurance. Other not so readily apparent options include allowing attorneys to set reasonable limits on liability in conjunction with a mandatory insurance requirement and allowing attorneys to opt-out of mandatory insurance schemes by carrying private insurance or by self-insuring.

## **THE TRADITIONAL ARGUMENTS FOR AND AGAINST MANDATORY MALPRACTICE INSURANCE**

Proponents argue that mandatory insurance protects the public at a reasonable price and in reasonable amounts. Some proponents claim that lawyers who do not carry malpractice insurance are the ones who need it most and the ones most likely to lack the financial wherewithal to respond to a malpractice complaint.

Opponents argue that mandatory insurance can be illusory, give the public a false sense of security, or create unrealistic expectations because mandatory malpractice policies provide relatively limited coverage and have "burning limits" which make the policies subject to exhaustion by defense costs.

Where the amount of required insurance will necessarily be arbitrary, there is also no assurance that such policies would, in fact, protect a particular client. The insurance policy could be substantially consumed by defense costs before settlement or trial, or be insufficient from the outset to address a particular client's claim. Given these obvious

limitations on mandatory insurance, opponents argue that clear and mandatory disclosure is a better option because it allows clients to make better decisions.

Others argue that mandatory malpractice insurance is unfair in the marketplace because different legal practices present different risks, and low risk practitioners should not be forced to subsidize high risk practitioners. Experience suggests that a single source malpractice insurance marketplace is not economically feasible to rate and charge premiums to attorneys based on individual attorney risk profiles, and hence all attorneys end up paying the same annual amount for insurance coverage.

Still others argue that high premium costs associated with mandatory malpractice insurance schemes will increase the cost of providing legal services, and that higher legal costs will further exacerbate the ability of consumers to access justice and force some consumers to obtain legal assistance from unregulated sources. Thus, access to justice could be compromised by making legal services at the already razor thin margin more expensive.

Proponents of mandatory insurance argue it is appropriate because the nature of law practice is changing and non-lawyers are beginning to provide more law-related services. Proponents argue that if unlicensed paralegals and on-line document providers are or will be required to maintain insurance, then lawyers should also be subject to a mandatory insurance requirement.

### **LIMITS ON AVAILABLE COVERAGE UNDER A MANDATORY PLAN?**

In the few cases where states have adopted mandatory malpractice insurance coverage, those programs do not appear to include coverage for defense of State Bar disciplinary investigations. Many private attorney malpractice insurance policies, by contrast, do provide limited coverage for State Bar regulatory investigations and disciplinary proceedings. Some experienced legal malpractice attorneys will tell you that it is short sighted to exclude coverage for such investigations, since the consequences of an adverse disciplinary investigation can often seal the malpractice fate of

an attorney. Most good, privately acquired malpractice insurance policies contain at least some limited coverage for State Bar investigation and defense costs.

Attorneys in mandatory malpractice insurance coverage states have also commented that mandatory policies can have other unfavorable policy language limiting coverage. As a consequence, when lawyers subject to such schemes go into the insurance marketplace to acquire excess insurance above that provided by the mandatory plan, the unfavorable policy limitations provisions follow on to the excess coverage, thereby providing those attorneys with less favorable coverage than is otherwise available in the marketplace.

### **IF INSURANCE IS REQUIRED, WHY NOT ALLOW REASONABLE LIMITATIONS ON LIABILITY?**

Given the much talked about anticipated changes in the models for delivery of legal services and the entry of new non-lawyer participants in the legal services industry, perhaps it is also time to address the archaic and arguably unreasonable “ethical” prohibitions against a lawyer reasonably limiting liability to a client. After all, if lawyers are going to be required to carry malpractice insurance, why should they not also have the right to limit their liability to a client? The notion that a lawyer’s liability to a client should be unlimited seems antiquated and certainly stands as an economic impediment to lawyers participating on a level playing field with others providing law-related services who can freely contract to limit their liability. The fact lawyers are fiduciaries, moreover, is not a sound justification for imposing unlimited liability on lawyers. Other fiduciary relationships do not carry unlimited liability exposure by rule.

Allowing limitations on liability to clients in exchange for mandatory malpractice insurance is hardly novel. For example, lawyers in the United Kingdom are permitted, under certain circumstances, to limit their liability to clients.<sup>2</sup> Limitations on liability make sense and have long been part of commercial and business transactions. The rationale for insisting that lawyers bear unlimited liability to clients should certainly be

revisited at the same time regulators review issues relating to mandatory malpractice insurance.

Allowing limitations on liability to clients is not necessarily a bad thing for consumers of legal services. Liability limitations help manage a client's expectations. Clients should not assume that lawyers are "good for the money" in unlimited amounts if things go wrong. Strong disclosures which advise clients of the limits on liability and insurance coverage would seem to go a long way towards educating and protecting the public. The public, of course, is used to limitations on liability, since they are ubiquitous in commercial dealings. It's hard today to justify a different rule for lawyers.

### **COULD ATTORNEYS SELF-INSURE UNDER A MANDATORY INSURANCE SCHEME?**

Any mandatory malpractice insurance scheme should permit attorneys to self-insure and to opt out of any mandatory plan. California attorneys operating as Professional Corporations are already required to either carry malpractice insurance or to self-insure and provide a personal guarantee up to \$100,000 per attorney.<sup>3</sup> The guarantee amounts can be covered by insurance or by the shareholder's personal assets. There seems to be little justification for not allowing a similar exception to any mandatory insurance scheme where the attorney can demonstrate that he or she has the financial strength to cover claims in an amount equal to the mandatory insurance limits.

### **A LACK OF QUANTIFIABLE DATA LEAVES MANY QUESTIONS UNANSWERED**

Assessing the need for mandatory malpractice insurance is hampered by a lack of current and reliable statistics. There are few, if any, sources reporting statistical information about the number and severity of claims on a nationwide or state-wide basis. Likewise, there is little, if any, publicly available and vetted information relating to the number of clients who have been unable to recover reasonable compensation for an error or mistake by an attorney. Without such data, it is difficult to undertake a serious evaluation of the need for mandatory malpractice insurance or to know where, and how extensive, the "problem" really is.

There are many unanswered questions. How many attorney really need malpractice insurance? How are coverage limits established so that they are not arbitrary and unfair – providing clearly excessive coverage in some instances and clearly inadequate coverage in others? How will such policies impact existing relationships between lawyers and their malpractice insurance carriers? How to you design a mandatory insurance scheme so that it does not discriminate against solo and small firm practitioners while providing advantages to larger law firms as well as institutional and corporate interests seeking to enter the legal services markets?

### **THE EXPERIENCE IN OTHER STATES**

There is experience in other states and in other countries with mandatory attorney malpractice insurance. Oregon has such a scheme.<sup>4</sup> Under the Oregon scheme, attorneys are required to purchase malpractice insurance having a policy limit of \$350,000. The scheme is a monopoly, and some attorneys have commented that this monopoly has resulted in less than ideal policy language and that such policies are not competitive with what is available in the private insurance market. The Oregon policy, for example, does not provide coverage for State Bar investigations or defense. Consequently, as a practical matter, Oregon attorneys are foreclosed from buying insurance that provides coverage for such investigations or the defense of State Bar proceedings.

Oregon's mandatory insurance program is also relatively expensive. \$350,000 in coverage costs \$3,500 per year.<sup>5</sup> This is expensive insurance. Based on this writer's experience and discussions with other attorneys across the country, private insurance is typically available in the same amounts at a fraction of that cost.

Idaho also requires attorneys to carry malpractice insurance. Idaho's rules became effective in January 2018 and require attorneys to maintain insurance coverage at a minimum limit of \$100,000 per occurrence, with a \$300,000 annual aggregate limit.<sup>6</sup>

Illinois requires attorneys who do not carry malpractice insurance to undergo an on-line

practice assessment inventory as part of Illinois' implementation of a pro-active practice-management approach to regulating the legal profession.<sup>7</sup> Illinois' practice management approach to regulation attempts to identify and address problems before they mature into malpractice claims.

In 2017, a State of Nevada task force recommended that attorneys engaged in the practice of law (other than government and corporate counsel) carry minimum insurance of \$250,000.<sup>8</sup> A survey polled bar members concerning their opinions on the proposal and more than 1,000 responses were received. Once again, more than two-thirds of the responses came from lawyers practicing in solo or small firms. Half of those who responded already carried insurance. The primary concern expressed by those responding to the poll was the cost impact on solo and small firm practitioners. Some respondents expressed concern that mandatory insurance would inhibit the attorney's ability to provide low-cost or free legal services.

After reviewing this information, the Nevada Bar's Board of Governors approved the taskforce's recommendations and was planning on asking the Nevada Supreme Court to implement new rules in the near future. The Nevada Supreme Court rejected the proposal in an order Filed October 11, 2018<sup>9</sup>. The court found that the Board of Governors provided inadequate detail and support demonstrating that the proposed amendment is appropriate. The court did state, however, that disclosure of whether an attorney maintains liability insurance "is beneficial to the profession and the public" and that Nevada's current Rule<sup>10</sup> provides for such disclosure.

A Washington State Bar Association Task Force issued an Interim Report to its Board of Governors<sup>11</sup> in July 2018, recommending that malpractice insurance be mandated for Washington-licensed lawyers. This Task Force recommended that lawyers should obtain the required insurance through the private marketplace, rather than through a "captive" single-carrier system.

Insurance is also compulsory in most of Europe, in Australia and Canada, and in most Commonwealth jurisdictions, such as Singapore, Malaysia and Hong

Kong<sup>12</sup>. Again, however, some of these jurisdictions also allow an attorney to place reasonable limits on their liability.

A number of jurisdictions in the United States require attorneys to disclose to clients whether they carry malpractice insurance. In addition to California, states which have an insurance disclosure rule include Alaska, New Hampshire, New Mexico, Ohio, Pennsylvania and South Dakota. Other states have considered, or are considering, mandatory disclosure. Yet, a great many states today do not even require attorneys to disclose the status of their insurance coverage. This certainly suggests that the "problem" of lack of insurance is not as serious as suggested by some.

#### *Options Under Review In California Based Upon The State Bar's Request for Public Comment*

In October 2018, and as part of its statutorily mandated malpractice insurance study, the State Bar sought public comment on five options regarding malpractice insurance for attorneys licensed in California: (1) amending the existing rules to require attorneys to disclose to clients that they do not carry legal malpractice insurance; (2) mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys; (3) developing a Continuing Legal Education or Practice Management program that provides an interactive self-assessment of law practice operations in an effort to examine legal malpractice liability; (4) mandating such a program for attorneys who choose not to carry insurance; and (5) promoting the voluntary purchase of insurance.

It's hard to imagine that we will not see further regulation of lawyer liability and malpractice insurance coverage along the lines described in The State Bar's request for public comment, given the institutional impetus to "do something" given the legislature's statutory mandate and apparent bias in favor of mandatory insurance. Whether mandatory malpractice insurance is the choice recommended to California's lawyer rule-makers – and whether it really makes sense – remains to be seen. Certainly, any approach to the issue should consider how to implement the goals of public protection with due

regard to options other than mandatory insurance. California already has a strong insurance disclosure rule. If mandatory insurance is viewed as necessary, then policymakers ought also to be considering whether attorneys should be allowed to limit reasonably their liability to clients, and to investigate whether such modifications are appropriate to maintain a fair and level playing field in the area of providing legal services where new market entrants offering legal services may enjoy the ability to contractually limit their liability.

The interests of those who currently carry insurance ought to be considered as well. Currently, many attorneys carry malpractice insurance at a reasonable cost and with policy provisions and benefits which may not be available under a mandatory scheme, as the Oregon experience has confirmed. Therefore, any mandatory insurance scheme should probably avoid requiring attorneys to purchase from a sole provider. Attorneys with insurance, and attorneys who can self-insure up to whatever liability limit is set in regulation, should be allowed to satisfy any insurance requirement by maintaining insurance or self-insurance limits in place, while requiring disclosure that insurance is carried.

Another alternative is to do nothing at all. This would not be an unreasonable choice given California's already strong insurance disclosure rules. The cards seem stacked against the status quo, however.

## ENDNOTES

- 1 CAL. PROF. CONDUCT R., rule 1.4.2.
- 2 *See, e.g.*, Principle 12.11 of The Guide to the Professional Conduct of Solicitors 1999 (8th ed.) ("Although it is not acceptable for solicitors to attempt to exclude by contract all liability to their clients, there is no objection as a matter of conduct to solicitors seeking to limit their liability provided that such limitation is not below the minimum level of cover required by the Solicitors Indemnity Rules."); Civil Law (Miscellaneous Provisions Act) § 44 (Ir. 2008). Section 44 of the 2008 Act, effective July 20, 2008, amended the Solicitors (Amendment) Act 1994 to permit a solicitor to limit liability by contract, and repealed the prohibition on the limitation previously found in the Attorney and Solicitors Act 1870.
- 3 *See* CAL. BUS. & PROF. CODE § 6171(b); CAL. STATE BAR LAW CORP. R. 3.158.
- 4 OR. REV. STAT. § 9.080 (2017).
- 5 Oregon State Bar Professional Liability Fund, <https://www.osbplf.org/coverage/overview.html> (December 11, 2018).
- 6 IDAHO BAR COMM'N. R. 302(a)(5).
- 7 ILL. SUP. CT. R. 756(e).
- 8 *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, 25 NEV. LAW.28 (December 2017)[https://www.nvbar.org/wp-content/uploads/NevadaLawyer\\_Dec2017\\_Malpractice-Insurance-Discussion2.pdf](https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Dec2017_Malpractice-Insurance-Discussion2.pdf). ("").
- 9 Order Denying Petition for Amendment to Supreme Court Rule 79, , Nev.ADKT 534 (Filed October 11, 2018).
- 10 NEV. SUP. CT. R. 79(1)(c)
- 11 WASHINGTON STATE BAR ASSOCIATION MANDATORY MALPRACTICE INSURANCE TASK FORCE, MANDATORY MALPRACTICE INSURANCE TASK FORCE INTERIM REPORT TO BOARD OF GOVERNORS (July 10, 2018).
- 12 *See, e.g.*, LEGAL PRACTITIONERS ACT 1981, § 52 (Austl. 1981); LEGAL PROFESSION ACT § 30(7) (B. C. Can.); CQLR c. B-1, r. 20 (Quebec Can.); LEGAL PROFESSION ACT, Ch. 161 § 75A, Legal Profession (Professional Indemnity Insurance) Rules (Sing. 2018); CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION, Council of the Bars and Law Societies of the European Union, Rule 3.9; D. Chiang, *Foreign Lawyer Provisions in Hong Kong and the Republic of China on Taiwan*, 13 PAC. BASIN L.J. 306, 323 (1995).

# Sheppard Mullin vs. J-M Manuf.: A Lesson in Undisclosed Conflicts

By Steven Krongold



**Steven L. Krongold** specializes in business litigation. For the past 30 years, Mr. Krongold has litigated disputes involving trademarks, copyrights, trade secrets, invasion of privacy, cybersquatting, investment fraud, defamation, and other business-related torts. Mr. Krongold can be reached at the Krongold Law Corp., P.C., located in Orange County, CA.

In *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, 6 Cal. 5th 59 (2018), the supreme court ruled that a panel of arbitrators exceeded its powers and therefore vacated a \$1.3 million award of attorney's fees obtained by a large, national law firm against its former client. The decision addresses an important and recurring issue facing the solo and small firm lawyer: enforceability of advance conflict of interest waivers and the potential forfeiture of fees for violation of ethical rules. *Sheppard* involved former Rule 3-310(C)(3) (concurrent or simultaneous representation of clients with conflicting interests). The issue is now governed by Rule 1.7. Nonetheless, *Sheppard* provides insight and guidance on advance waivers and when fees can be recovered despite the rule violation.

## THE FACTS

Sheppard Mullin is a large, national law firm that agreed to defend J-M Manufacturing Co. in a *qui tam* case. The plaintiffs alleged that J-M had misled customers, over 200 public entities around the country, on the strength of PVC pipes used in water and sewer systems. After performing a conflicts check, the firm learned that it represented one of the public entity interveners, the South Tahoe Public Utility District (South Tahoe), in employment-related disputes. Since South Tahoe had signed an advance waiver of conflicts in cases unrelated to employment matters, the firm concluded it could represent J-M in the *qui tam* action. The firm

therefore entered into a retainer agreement with J-M which contained the following conflict waiver: "[Firm] has many attorneys and multiple offices. We may currently or in the future represent one or more other clients (including current, former, and future clients) in matters involving [J-M]. We undertake this engagement on the condition that we may represent another client in a matter in which we do not represent [J-M], even if the interests of the other client are adverse to [J-M] (including appearance on behalf of another client adverse to [J-M] in litigation or arbitration) and can also, if necessary, examine or cross-examine [J-M] personnel on behalf of that other client in such proceedings or in other proceedings to which [J-M] is not a party provided the other matter is not substantially related to our representation of [J-M] and in the course of representing [J-M] we have not obtained confidential information of [J-M] material to representation of the other client. By consenting to this arrangement, [J-M] is waiving our obligation of loyalty to it so long as we maintain confidentiality and adhere to the foregoing limitations."<sup>1</sup>

Sheppard Mullin did not tell J-M about its representation of South Tahoe before or at the time the engagement agreement was signed.

The engagement agreement contained an arbitration clause, providing that any dispute over fees that was not resolved through arbitration under the auspices of the California State Bar, would be resolved in "mandatory binding arbitration" conducted in

accordance with the California Arbitration Act (CAA), California Code of Civil Procedure section 1282 *et seq.*<sup>2</sup>

A few weeks after Sheppard Mullin began representing J-M, and over the course of the following year, the firm billed South Tahoe for about 12 hours of work.

A year after the engagement, South Tahoe's attorneys in the *qui tam* action (plaintiff's counsel) wrote to Sheppard Mullin asking why the firm had failed to inform South Tahoe of the adverse representation of J-M. Sheppard Mullin reminded South Tahoe of its earlier conflicts waiver. Dissatisfied, South Tahoe filed a motion to disqualify Sheppard Mullin in the *qui tam* proceeding. In July 2011, the district court granted the disqualification motion, ruling that Sheppard Mullin's simultaneous representation of South Tahoe and J-M had been undertaken without adequately informed waivers in violation of Rule 3-310(C)(3).<sup>3</sup>

Prior to its disqualification, Sheppard Mullin had performed 10,000 hours of work in the *qui tam* action and a related state court action. The firm's billings totaled more than \$3 million, of which more than \$1 million remained unpaid.

Despite being disqualified for violating Rule 3-301(C), Sheppard Mullin sued J-M for the unpaid fees. J-M cross-complained for breach of contract, accounting, and breach of fiduciary duty; it also sought disgorgement of fees previously paid.

The dispute was sent to a panel of three arbitrators who ruled in Sheppard Mullin's favor. They observed that "the better practice" would have been for the firm to disclose its representation of South Tahoe and seek J-M's specific waiver of the conflict.<sup>4</sup> However, the arbitrators concluded that, even assuming Sheppard Mullin's failure to disclose the conflict constituted an ethical violation, the violation was not sufficiently serious or egregious to warrant forfeiture or disgorgement.<sup>5</sup> The South Tahoe engagement involved matters unrelated to the *qui tam* action and the conflict of interest had not caused J-M damage, prejudiced its defense of the *qui tam* action, resulted in communication of its confidential information to South Tahoe, or rendered Sheppard Mullin's representation less effective or less valuable.<sup>6</sup>

The arbitrators thus awarded Sheppard Mullin more than \$1.3 million in fees and interest.

The superior court confirmed the award and denied J-M's petition to vacate. The court cited *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992) which held that a violation of the Rules of Professional Conduct does not render a retainer agreement unenforceable. The arbitrators therefore did not exceed their powers in awarding the contractual fees.<sup>7</sup>

The court of appeal reversed, holding that Sheppard Mullin violated Rule 3-310(C)(3), which both rendered the engagement agreement with J-M unenforceable and disentitled Sheppard Mullin from any fees for representing J-M while it was simultaneously representing South Tahoe in other matters.<sup>8</sup>

The supreme court granted Sheppard Mullin's petition for review. The petition presented three questions: (1) whether a court may invalidate an arbitration award on the ground that the agreement containing the arbitration agreement violates the public policy of the state as expressed in the Rules of Professional Conduct, as opposed to statutory law; (2) whether Sheppard Mullin violated the Rules of Professional Conduct in view of the broad conflicts waiver signed by J-M; and (3) whether any such violation automatically disentitles Sheppard Mullin from any compensation for the work it performed on behalf of J-M.<sup>9</sup>

## ILLEGALITY EXCEPTION TO FINALITY OF ARBITRATION AWARDS

The threshold issue involved the standard of review of arbitral awards. CAA provides that a court may vacate an arbitration award when "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted."<sup>10</sup> *Loving & Evans v. Blick*, 33 Cal. 2d 603 (1949) held that the excess-of-authority exception applies, and an arbitral award must be vacated, when a court determines that the arbitration has been undertaken to enforce a contract that is "illegal and against the public policy of the state."

Sheppard Mullin argued the contract must violate a public policy declared by the Legislature. Because

the Rules of Professional Conduct are not promulgated by the Legislature, a violation of the rules cannot support vacating an arbitration award under section 1286.2(a)(4). The supreme court disagreed.

In *Chambers v. Kay*, 29 Cal. 4th 142 (2002), the court refused enforcement of a fee division agreement undertaken without written client consent in violation of the Rules of Professional Conduct. The California State Bar is authorized by statute to formulate those rules, and they are adopted with the approval of the court. Later appellate decisions note the rules “are not only ethical standards to guide the conduct of members of the bar; but they also serve as an expression of public policy to protect the public.” *Sheppard* therefore held that “an attorney contract that has as its object conduct constituting a violation of the Rules of Professional Conduct is contrary to the public policy of this state and is therefore unenforceable.”<sup>11</sup>

The court cautioned, however, that “the case law does not establish, nor do we today hold, that an attorney-services contract may be declared illegal in its entirety simply because it contains a provision that conflicts with an attorney’s obligations under the Rules of Professional Conduct.”<sup>12</sup> Rather, it is only when “the illegality taints the entire contract” that courts may declare “the entire transaction is illegal and unenforceable.”<sup>13</sup>

## ADVANCE WAIVER WAS NOT EFFECTIVE

Rule 3-310(C)(3) provided that an attorney “shall not, without the informed written consent of each client . . . [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.” The prohibition against simultaneous representation is now reflected in Rule 1.7(a), which states as follows: “A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter.”

The court held that because Sheppard Mullin knew of, but concealed the conflicting interest, J-M’s

consent to the advance waiver of conflict was not “informed” within the meaning of the Rules of Professional Conduct.<sup>14</sup> As for South Tahoe, their advance waiver was not a simple framework agreement. “It was, rather, an agreement governing a continuing engagement involving occasional work on employment matters as needed. And under that agreement, over the course of a decade Sheppard Mullin regularly advised and assisted South Tahoe with employment matters.<sup>15</sup> Absent any express agreement severing the relationship during periods of inactivity, South Tahoe could reasonably have believed that it continued to enjoy an attorney-client relationship with its longtime law firm even when no project was ongoing.”<sup>16</sup>

As stated by the supreme court, “a client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.”<sup>17</sup>

“Because Rule 3-310(C)(3) embodies a core aspect of the duty of loyalty, the disclosure required for informed consent to dual representation must also be measured by a standard of loyalty. To be informed, the client’s consent to dual representation must be based on disclosure of all material facts the attorney knows and can reveal.<sup>18</sup> An attorney or law firm that knowingly withholds material information about a conflict has not earned the confidence and trust the rule is designed to protect. [¶] Assessed by this standard, the conflicts waiver here was inadequate.”<sup>19</sup>

The same result would be obtained under new Rule 1.7. Comment 9 provides some guidance to advance waivers, stating: “This rule does not preclude an informed written consent to a future conflict in compliance with applicable case law. The effectiveness of an advance consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences to the client of those representations, the greater the likelihood that the client will have the requisite

understanding. The experience and sophistication of the client giving consent, as well as whether the client is independently represented in connection with giving consent, are also relevant in determining whether the client reasonably understands the risks involved in giving consent. An advance consent cannot be effective if the circumstances that materialize in the future make the conflict nonconsentable under paragraph (d).”<sup>20</sup>

Rule 1.7, much like Rule 3-310, would not permit an attorney concealing a known conflict of interest, regardless of whether the client is sophisticated or not. *Sheppard* notes that: “Whether the client is an individual or a multinational corporation with a large law department, the duty of loyalty demands an attorney or law firm provide the client all material information in the attorney or firm’s possession. No matter how large and sophisticated, a prospective client does not have access to a law firm’s list of other clients, and cannot check for itself whether the firm represents adverse parties. Nor can it evaluate for itself the risk that it may be deprived, via motion for disqualification, of its counsel of choice, as happened here. In any event, clients should not have to investigate their attorneys. Simply put, withholding available information about a known, existing conflict is not consistent with informed consent.”<sup>21</sup>

## RECOVERY IN QUANTUM MERUIT

Sheppard Mullin’s ethical breach rendered the engagement agreement with J-M unenforceable in its entirety. “The transaction was entered under terms that undermined an ethical rule designed for the protection of the client as well as for the preservation of public confidence in the legal profession. The contract is for that reason unenforceable.”<sup>22</sup>

As an alternative to contractual recovery, Sheppard sought recovery under the equitable doctrine of quantum meruit—a doctrine that has been applied to allow attorneys “to recover the reasonable value of their legal services from their clients when their fee agreements are found to be invalid or unenforceable.”

The court of appeal denied Sheppard Mullin any recovery, even on quantum meruit basis, due to its conflict of interest. The supreme court reversed. The firm could recover reasonable compensation for the

thousands of hours it worked on the qui tam matter. The court rejected a categorical bar or forfeiture of fees. Instead, the trial court must consider, as the Restatement Third of Law Governing Lawyers instructs, the egregiousness of the attorney’s conduct, its potential and actual effect on the client and the attorney-client relationship, and the existence of alternative remedies in order to determine whether and to what extent forfeiture of compensation is warranted.<sup>23</sup> “The degree to which forfeiture is warranted as an equitable remedy will necessarily vary with the equities of the case.”

The court surveyed a number of appellate court decisions, noting they demonstrate that “forfeiture of compensation is often an appropriate response to conflicted representation. But they do not stand for the proposition that quantum meruit recovery for legal services performed while the attorney suffers from an unwaived conflict of interest is categorically barred, and we do not so hold. We instead hold that the issue is generally one for the discretion of the trial court, to be exercised in light of all the circumstances that gave rise to the conflict.”<sup>24</sup>

“By leaving open the possibility of quantum meruit compensation for the 10,000 hours that Sheppard Mullin worked on J-M’s behalf, we in no way condone the practice of failing to inform a client of a known, existing conflict of interest before asking the client to sign a blanket conflicts waiver. Trust and confidence are central to the attorney-client relationship, and maintaining them requires an ethical attorney to display all possible candor in his or her disclosure of circumstances that may affect the client’s interests. Sheppard Mullin’s failure to exhibit the necessary candor in this case has rendered its contract with J-M unenforceable and has thus disentitled it to the benefit of the unpaid contract fees awarded by the arbitrators in this case. Whether Sheppard Mullin is nevertheless entitled to a measure of compensation for its work is, along with the other unresolved noncontract issues raised by the pleadings, a matter for the trial court to consider in the first instance.”<sup>25</sup>

## CLOSING THOUGHTS

Advance conflicts waivers may be necessary, especially for larger law firms, but they are fraught

with risk. Once a known conflict of interest arises, the firm must notify the clients and obtained their informed written consent. Careful consideration of new Rule 1.7 is absolutely essential.

## ENDNOTES

- 1 *Sheppard*, 6 Cal. 5th at 69.
- 2 *Id.* at 70.
- 3 *Id.* at 70.
- 4 *Id.* at 71.
- 5 *Id.*
- 6 *Id.*
- 7 CAL. CIV. PROC. CODE § 1286.2 (a)(4).
- 8 *Sheppard*, 6 Cal. 5th at 72.
- 9 *Id.*
- 10 CAL. CIV. PROC. CODE § 1286.2, subd. (a)(4).
- 11 *Sheppard*, 6 Cal. 5th at 74.
- 12 *Id.* at 79.
- 13 *Id.*
- 14 *Id.* at 80.
- 15 *Id.* at 84.
- 16 *Id.* at 83.
- 17 *Flatt v. Super. Ct.*, 9 Cal. 4th 275, 285 (1994); accord, *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*, 20 Cal. 4th 1135, 1147 (1999).
- 18 *Sheppard*, 6 Cal. 5th at 83.
- 19 *Sheppard*, 6 Cal. 5th at 84.
- 20 CAL. R. PROF. CONDUCT, rule 1.7, com. 9 (eff. Nov. 1, 2018).
- 21 *Sheppard*, 6 Cal. 5th at 86.
- 22 *See Chambers*, 29 Cal. 4th at 159.; *Sheppard*, 6 Cal. 5th at 87.
- 23 *Sheppard*, 6 Cal. 5th at 89.
- 24 *Id.* at 94.
- 25 *Id.* at 96.



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# How the New Rules of Conduct Affect Your Social Media Use

By Renee Stackhouse



**Renee Stackhouse** is a San Diego trial attorney and founder of Stackhouse, APC who focuses on plaintiff's personal injury, military, and criminal defense. She is Chair of the CLA Solo & Small Firm Section, Immediate Past President of California Women Lawyers, President of the CWL Foundation, and sits on the San Diego County Bar Association. She is faculty at the prestigious Gerry Spence Trial Lawyers College and the founder of MSheLE.com. She can be reached at [Renee@StackhouseAPC.com](mailto:Renee@StackhouseAPC.com).

Potential clients and referrals are out there on social media platforms and you can't afford to ignore them. The new California Rules of Professional Conduct, effective November 1, 2018, take social media realities into account and require changes to the way lawyers use social media.

**When communicating about your services, you're only responsible for what you say.** Under new Rule 7.1, lawyers still can't make false or misleading statements about themselves or their services. But there's a change from the old rule on communication: Lawyers are not responsible for what others say about them.

**You can say "specializes in" even if you're not a certified specialist.** Under new Rule 7.4, a lawyer may now say that his or her practice "specializes in" a particular area even if the lawyer is not a certified specialist by the Board of Law Specialization. The key is to steer clear of stating that you're a "certified specialist" if you're not. To be on the safe side, it may be best to say that you "focus" your practice in a particular area of law instead.

**The lawyer advertising rules apply to social media advertising.** New Rules 7.2 and 7.3 state the rules of lawyer advertising. When directing the advertising to a particular person, you need to state that it's advertising. One easy way to do that is to add the hashtag "#ad" to your social media post or other advertising. If the advertising is going to the general public, *e.g.*, a social media banner ad, you don't need

to add the hashtag or other indication that it's advertising.

When is a statement advertising? If it includes a call to action. For example:

"Case finally over. Unanimous verdict! Celebrating tonight."

*NOT Advertising. "It is not a message or offer concerning the availability for professional employment." NOT a call to action.*

"Another great victory in court today! My client is delighted. Who wants to be next?"

*This is advertising. First two sentences would be ok. Third sentence "suggests availability for professional employment."*

"Won another personal injury case. Call me for a free consultation."

*This is advertising. First sentence is fine. Second sentence concerns professional employment. It doesn't matter that it's a "free" consultation, communications aren't limited to messages seeking money for services.*

"Just published an article on wage and hour breaks. Let me know if you would like a copy."

*NOT advertising. The attorney is merely relaying information regarding a published article and is offering to provide copies.*

**Old standards for advertising are gone.** Under the new Rules, the standards in former Rule 1-400 have been removed as “not necessary to regulate inherently false and deceptive advertising.” And the record-keeping requirement was eliminated as “increasingly burdensome” and “seldom used for disciplinary purposes.”

**You can look at public social media information of parties and witnesses, but don’t get sneaky with “friend” requests.** New Rule 4.1 prohibits lying by omission to communicate with someone,

which would include using a false name to “friend” someone involved in a case.

Although lawyers are generally not caught for social media violations until the State Bar is investigating something else, it’s always best to be careful and follow the rules.

*This article was previously published as a blog post on the CEB website.*

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# 2019 Bills Pertaining to Sexual Harassment in the Workplace

By Cindy Elkins



**Cynthia Elkins** is the principal of Elkins Employment Law, founded in 1998, a firm devoted to the representation and defense of employers in all aspects of their employment-law and human resource legal concerns. Prior to starting her own practice, Cynthia held several positions with employment law firms.

This time of year sees not only the changing of the seasons (as much as we have seasons in California), but this time of year is when we see the many new pieces of legislation that have been signed into law. Many of the new laws were the result of the much publicized #MeToo movement.

Below is a brief overview of some of the bills pertaining to these issues. These laws became effective **January 1, 2019**, unless otherwise noted.

## SEXUAL HARASSMENT PREVENTION TRAINING FOR ALL EMPLOYEES

### S.B. 1343: Senator Holly Mitchell (D-Los Angeles)<sup>1</sup>

As of January 1, 2019, California employers with five or more employees (which includes seasonal and temporary employees - see below) must provide harassment prevention training to all employees - supervisory and non-supervisory - by 2020 and thereafter. This new law is in stark contrast to the previous law that required employers with 50 or more employees to conduct prevention training to supervisory employees once every two years. (A.B. 1825)

Under the new law, sexual harassment prevention training must be provided as follows:

- By January 1, 2020, an employer with five or more employees must provide *at least two hours* of training to all *supervisory* employees in California within six months of their assumption of a position.

- By January 1, 2020, an employer with five or more employees must provide *at least one hour* of training to all *non-supervisory* employees in California within six months of their assumption of a position.
- After January 1, 2020, covered employers must provide the required training to each employee in California once every two years.

The new law specifies that an employer who has provided the training to an employee after January 1, 2019 is **not** required to provide training again by the January 1, 2020 deadline. The new law also provides that the training may be completed by employees individually or as part of a group presentation and may even be completed in shorter segments as long as the total hourly requirement is met.

## Special Rules For Seasonal, Temporary And Agricultural Employees

S.B. 1343 has some special provisions that apply to seasonal and temporary employers and employees. Beginning January 1, 2020 seasonal and temporary employees, or any employee that is hired to work for less than six months, shall be provided the required training within 30 calendar days after the date of hire, or within 100 hours worked, whichever occurs first.

In the case of a temporary employee employed by a temporary services provider to perform services for clients, S.B. 1343 specifies that the training shall be

provided by the temporary services employer, not the client.

## **Department of Fair Employment & Housing Obligations**

The Department of Fair Employment and Housing (DFEH) is required to implement a method for employees who have completed the training to electronically save and print a certificate of completion.

The new law also requires the DFEH to develop or obtain online training courses — a two-hour course for supervisory employees and a one-hour course for non-supervisory employees. These on-line programs are to be made available on the DFEH website and shall contain an interactive feature that requires the viewer to respond periodically to questions in order to continue. In addition, DFEH is required to make the online training videos available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean and any other language spoken by a “substantial number of non-English speaking people.”

Employers are not required to use the online DFEH training videos - an employer may develop its own training program or may direct employees to view the online DFEH training videos. While the on-line program is intended to be interactive, the bill provides that any questions resulting from the online training course shall be directed to the employer’s human resources department or equally qualified professional, **not** to the DFEH.

This legislation will likely result in a significant increase in the amount of time and expense an employer must expend to comply with the expanded prevention training requirements.

## **CALIFORNIA TAKES A “STAND” AGAINST SEXUAL HARASSMENT & DISCRIMINATION IN THE WORKPLACE**

**S.B. 820<sup>2</sup>: Senator Connie Leyva (D-Chino)**

This bill expands the category of settlement agreements in which non-disclosure provisions are prohibited in civil action and/or administrative actions. Specifically, prohibited non-disclosure clauses now include those in settlement agreements involving an act of workplace

harassment or discrimination based on sex, failure to prevent an act of such harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination based on sex.

The legislation is known as the STAND (Stand Together Against Non-Disclosure) Act. This bill becomes effective January 1, 2019 so that any provision in any settlement agreement entered into on or after that date that violates the new prohibitions will be deemed to be null and void as against public policy. (The law will not impact settlement agreements entered into prior to January 1, 2019).

Interestingly, the prohibition contained in the new law only applies to “claims filed in a civil action or a complaint filed in an administrative action.” The new law appears to not prohibit such non-disclosure clauses being used in settlements that occur in the “pre-litigation” phase (such as where a demand letter has been sent but no claim has been filed with an administrative agency or in court). With this exclusion, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.

## **Settlement Agreements Can Still Prohibit Disclosure of the Settlement Amount**

The STAND Act provides an exclusion as to the protection of the amount paid in settlement of a claim. It is commonplace in most settlement agreements to provide that the amount of the settlement is subject to a non-disclosure agreement. The STAND Act specifically provides that it does **not** prohibit the enforcement of a provision in a settlement agreement that “precludes the disclosure of the amount paid in settlement of a claim.”

## **RESTRICTIONS ON NON-DISPARAGEMENT, EXPANDED OBLIGATIONS ON NON-EMPLOYEE CONDUCT**

**S.B. 1300<sup>3</sup>: Senator Hannah-Beth Jackson (D-Santa Barbara)**

This bill, entitled **Unlawful Employment Practices: Discrimination And Harassment**, includes restrictions and imposes obligations on employers relating to sexual harassment issues in the workplace.

## Restrictions on Employer Releases and Non-Disparagement Agreements

The bill makes it an unlawful employment practice under the California Government Code for an employer, in exchange for a raise or bonus or as a condition of employment or continued employment, to do the following:

- Require an employee to sign a release stating the employee does not possess any claim or injury against the employer or other covered entity, and include the release of a right to file and pursue a civil action or complaint with, or otherwise notify, a state agency, law enforcement agency, court, or other governmental entity; or
- Require an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.

However, these provisions do not apply to negotiated settlement agreements to resolve an underlying claim in court, before an administrative agency or alternative dispute resolution forum, or through an employer's internal complaint process.

## Employer Responsibility for Nonemployees

Currently under the Fair Employment and Housing Act (FEHA), an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. This bill now provides that an employer may be responsible for the acts of non-employees with respect to harassment activity other than sexual harassment.

In addition, the bill also changes the current standard under FEHA which provides that an employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, if

the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. This bill would instead make the above provision apply with respect to any type of harassment prohibited under FEHA of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace.

## Changes to Sexual Harassment Litigation - Plaintiff Need Not Prove Decline in Productivity Resulting from Harassment

One of the key components in this bill is the formal adoption of the long established standard in *Harris v. Forklift Systems*<sup>4</sup>) that a sexual harassment plaintiff “need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.”

## Single Incident Now Sufficient for Hostile Work Environment Claim

S.B. 1300 expressly provides that a “single incident of harassment is sufficient to create a triable issue of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment.”

The statute further affirms the California Supreme Court's *Reid v. Google, Inc.*<sup>5</sup>, which found isolated remarks, if viewed in light of other circumstances, can be evidence of severe and pervasive harassing conduct.

## Attorney Fees & Costs Not Awarded to A Prevailing Defendant

The bill also provides that a prevailing defendant is prohibited from being awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought or that the plaintiff continued to litigate after it clearly became so.

## Bystander Training

Employers may, but are not obligated to, provide employees with “bystander intervention training” that includes information and practical guidance on how to enable bystanders to recognize potentially problematic behaviors and to motivate bystanders to take action when they observe such behaviors. The training and education may include exercises to provide bystanders with the skills and confidence to intervene as appropriate. Such exercises also may provide bystanders with resources they can call upon that support their intervention.

In anticipation of these new laws, employers should:

- Review and update harassment prevention training programs
- Modify any settlement agreements to release any claims post January 1, 2018 alleging sexual harassment or discrimination in the workplace to ensure they do not:
  - include provision preventing employees from disclosing factual information

about claims of sexual assault, sexual harassment, sex discrimination, or related retaliation claims

- require an employee to waive his right to testify at an administrative, legislative, or judicial proceeding about criminal conduct or sexual harassment.
- require, as a condition for a raise or bonus or for employment or continued employment, that employees release claims or agree not to disclose information about sexual harassment or other unlawful acts.

## ENDNOTES

- 1 S.B. 1343 2017-2018 Reg. Sess. (Cal. 2018).
- 2 S.B. 820 2017-2018 Reg. Sess. (Cal. 2018).
- 3 S.B. 1300 2017-2018 Reg. Sess. (Cal. 2018).
- 4 510 U.S. 17 (1993).
- 5 50 Cal. 4th 512 (2010).

# Can California Lawyers Ethically Light Up?\*

By Wendy L. Patrick

**E**lection Day 2016 added yet another tourist attraction to the already overpopulated Golden State: marijuana. Despite strong voices in opposition, California voters rolled back the prohibitions to rolling a joint. Yet for California lawyers, who have a duty to “support the Constitution and laws of the United States and of this state” pursuant to California Business and Professions Code section 6068(a) and related provisions, there is more to the story. Although the solution to how to solve the state-federal law discrepancy with respect to marijuana use remains hazy, there are ethical opinions we can review for guidance to clear the air regarding the legal and ethical provisions at issue. California Rules of Professional Conduct, Rule 1-100 states that, although not binding, lawyers should look at California ethics opinions, as well as ethics opinions, rules, and standards from other jurisdictions and bar associations for guidance on professional conduct. Let us review a few opinions that address two questions: Can lawyers represent clients in the marijuana business? And can they personally indulge?

## REPRESENTING GREEN-COLLAR CAPITALISTS

Now that marijuana is legal in California, entrepreneurially minded business people are poised to capitalize on the new law—with the help of their lawyers. California Rule 3-210<sup>1</sup>, Advising the Violation of Law, states that lawyers “shall not advise the violation of any law ... unless the member believes in good faith that such law, rule, or ruling is invalid.” The rule goes on to state that a lawyer may “take appropriate steps in good faith to test the validity” of any law. Lawyers approached by potential clients seeking representation in California’s newly



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defined marijuana business naturally worry about advising law violations, and even aiding and abetting activity that remains a federal offense. Marijuana is still illegal as a Schedule 1 substance under the Controlled Substances Act<sup>2</sup>; meaning that the Food and Drug Administration has determined it possesses no medical use.

## L.A. AND S.F. ATTEMPT TO CLEAR THE AIR

Noting the state-federal conflict, two ethics opinions in California address how lawyers may ethically represent clients who are in the marijuana business. The Los Angeles County Bar Association Professional Responsibility and Ethics Committee in Opinion No. 527 endeavored to provide guidance to lawyers regarding giving legal advice and assistance to clients involved in marijuana cultivation, distribution or consumption.

Opinion 527 concluded that lawyers may advise and assist clients with respect to complying with California’s marijuana laws as long as they do not advise or assist client to violate federal law. The opinion also stated that lawyers must advise such clients about federal law and potential penalties associated with a violation.

Teresa Schmid, Chair of the Los Angeles County Bar Professional Responsibility and Ethics Committee, explains, “even more than when it was first released in 2015, LACBA’s Opinion No. 527 is about access to justice.

The passage of Proposition 64 this November means that thousands more Californians will be able to legitimately

use and cultivate marijuana under California law, even as federal law continues to prohibit it. When lawyers

withhold their services because of uncertainties in substantive or ethical law, the public is deprived of the legal guidance necessary to ensure their safety and security.

Opinion No. 527 protects the public by giving California lawyers a means to advise these new clients responsibly.”

The Bar Association of San Francisco in Opinion 2015-1 concluded that a lawyer may ethically represent a client in connection with forming and operating a marijuana dispensary and related matters, because such activity is legal under California law, even though it is in violation of federal law. The opinion noted that California Rule 3-210<sup>3</sup> did not anticipate this unusual scenario, and expressed preference for providing preventative legal advice to clients regarding state laws regulating marijuana use before they become criminal defendants or face forfeiture actions. Opinion 2015-1 acknowledged several other opinions on the topic from other states, some of which reached the opposite conclusion.

While the Bar Association of San Francisco opined that a lawyer can ethically represent a client engaged in the marijuana business under state law, it also suggested that lawyers advise clients about potential federal law liability and related consequences, and remain aware of their own risks.

## **STATES PROHIBIT LAWYERS FROM REPRESENTING CLIENTS IN THE MARIJUANA BUSINESS**

As the San Francisco opinion noted, different states came to different conclusions. In Ohio Ethics Opinion 2016-6 (Aug. 5, 2016), the Ohio State Bar said lawyers cannot advise clients to engage in conduct in violation of federal law, even if permitted under state law. Although the opinion states that lawyers cannot provide legal services to assist clients transacting or doing business in the medical marijuana industry, it notes that lawyers may explain the legality or consequences of clients’ proposed actions.

While acknowledging the often cited U.S. Department of Justice 2013 memorandum announcing its general policy not to interfere with medical marijuana use pursuant to state laws, the Ohio opinion notes that marijuana use continues to be classified as a federal crime.

## **LAWYERS GOING GREEN: READ UP BEFORE YOU LIGHT UP**

What about the lawyer who is not seeking to inform, but to inhale? Existing ethics opinions impact this discussion as well. There are a variety of ethics opinions from around the country that have arrived at different conclusions on this issue. Here are a few examples.

Ohio Opinion 2016-6 states that lawyers who use medical marijuana, even with a state regulated prescription, are subject to federal prosecution and are engaging in conduct that may “adversely reflect on a lawyer’s honesty, trustworthiness, and overall fitness to practice law” in violation of Ohio rules of professional conduct.

The opinion qualifies this statement by noting that such violations would need to be established on a case-by-case basis, requiring a nexus between the act and the lawyer’s lack of honesty or trustworthiness. It also notes that multiple violations of federal law would likely qualify as a “pattern of repeat offenses” and evidence of an “indifference to legal violations,” which would violate the rule. Other jurisdictions have reached different conclusions.

Washington State Bar Association Advisory Opinion 201501 (2015) says lawyers may, with certain qualifications, use marijuana as well as provide legal advice and assistance to clients in complying with the Cannabis Patient Protection Act and Washington state law allowing recreational use of marijuana.

In support of this conclusion, the opinion notes the “extraordinary” and “unprecedented” combination of factors present in Washington, and also notes that if the federal government were to change its policy and decide to enforce the Controlled Substances Act, their conclusion would have to be reconsidered.

The Washington opinion also notes that if a lawyer’s marijuana use leads to behavior prohibited by the rules of professional conduct, the lawyer would be subject to discipline in the same way that he or she would if they violated ethical rules due to excessive alcohol consumption.

## **HIGH NOON AT THE OFFICE: COMPETENCE REQUIRES CLARITY**

Despite the green revolution, lawyers and law firms must still provide competent representation to clients. California Rule of Professional Conduct, rule 3-110,

Failing to Act Competently, states that a lawyer “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” The definition of “competence” includes not only “diligence” as well as “learning and skill,” but also the “mental, emotional, and physical ability reasonably necessary” to perform legal services. The issue here could become what to do with a highly qualified, skilled, knowledgeable attorney who is high. No one would argue that at least while the attorney is under the influence, marijuana use detracts from mental, emotional and physical ability.

The discussion section of the rule notes that a lawyer’s duty of competence includes supervising the work of subordinate attorneys, as well as agents or non-attorney employees. Along these lines, consider whether you would notice if someone who worked for you was under the influence. Because many lawyers spend much of their time behind a computer screen instead of interacting with staff, the answer might be, probably not.

## **DESPITE THE GREEN LIGHT, PROCEED WITH CAUTION**

Although California has legalized marijuana, the message to lawyers is: proceed with caution. Given the range of ethical opinions across the nation, lawyers would be wise to review all of the relevant laws and ethical rules before making a decision regarding representation, and personal use.

Many of the concerns related to legalizing marijuana will no doubt be addressed over time through legislation and litigation. In the short term, however, a working knowledge of the issues involved will prepare us to handle the green flash on the horizon.

\* This article is reprinted with the permission of the Los Angeles and San Francisco Daily Journals, the Criminal Law Journal, and the author Wendy Patrick.

## **ENDNOTES**

- 1 CAL. CT. R. 3-210.
- 2 21 U.S.C. § 841(a)(1).
- 3 CAL. CT. R. 3-210.



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# MCLE Article: Elimination of Bias: You Should Try to Change What You Should Be Able to See

By Angelica Sciencio



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The American Bar Association's most recent study and report on bias in the workplace, released in September 2018, shines a light on the impactful effect implicit bias may have on a lawyer's career, opportunities for advancement, attrition and, inevitably a practitioner's psyche and self-esteem. The report highlights the appalling (yet not surprising) numbers and disproportionate rates that women, and particularly women of color report bias in the profession.

The published executive summary of the study, aptly named "You Can't Change What You Can See: Interrupting Racial & Gender Bias in the Legal Profession,"<sup>1</sup> provides a short overview of the report results. The study was compiled based on the answers of 2827 respondents and compared reported bias encountered by individuals identified as white male, white female, men of color and women of color. The report indicates that women of color reported encountering biased behavior substantially more often than any other group. In certain instances, women of color reported biased behaviors at a rate of 50% points higher than white males.

The "mistaken identity" scenario is a classic situation where substantially higher bias is reported by women.

In the study, 50.85% of white women and 57.52% of women of color reported at least one instance when these lawyers were mistaken by a court reporter, legal assistant and even part of the janitorial staff.<sup>2</sup> Let that sink in: 57.52% of female lawyers of color reported at least one instance when they were addressed by individuals whose first assumption was that they were not attorneys. It is not unreasonable to conclude that suffering under the sometimes subtle, sometimes overt actions based on biases is probably one of the motives that lead women, especially women of color, to leave private law at a rate of more than 80% by their 8th year in practice.<sup>3</sup>

Parenthood apparently generates pervasive and career impacting biases. All groups surveyed for the ABA study reported high bias rates resulting from the belief that taking parental leave may harm one's career. Interestingly, the report indicates that the "Maternal Wall" affects both mothers and non-mothers, with women reporting high levels of bias towards mothers (who are often perceived as less competent) and non-mothers (who are often expected to work more hours on the job). When it comes to parenthood, white women reported bias at higher numbers than any other group.

<b>Bias Reported</b>	<b>White Male</b>	<b>White Female</b>	<b>Men of Color</b>	<b>Women of Color</b>
Parenthood did NOT harm perceived competence	80.00	<b>44.48</b>	79.45	51.09
Parental Leave is Harmful to Career	42.42	<b>57.07</b>	47.20	50.00
Nonparents Maternal Wall – Expected to Spend More Time at Work	26.50	<b>48.40</b>	35.00	46.00

The ABA’s report discusses the negative impact of bias in the workplace and provides tools to help firms and companies to interrupt these biases. The report consistently and strongly recommends the use of metrics – keeping track of numbers of job candidates, promotions, assignments to see whether bias could be playing a role on the results and using tools to interrupt those biases from affecting the decision-making process.

While we should commend the ABA’s efforts to gather, present and interrupt bias in the profession, that study is focused on primarily bias affecting attorneys who are employees of large firms and government agencies. With more than 49% of lawyers in California practicing as solo practitioners or small firm attorneys,<sup>4</sup> the potential impact of bias could be extremely significant on the practice and careers of solo and small firm attorneys. Yet, we do not have numbers that help us understand the magnitude of this impact.

## THE IMPORTANCE OF UNDERSTANDING IMPLICIT BIAS

The California Bar Association requires every active attorney in California to attend at least one hour of elimination of bias training every three years simply because it recognizes that bias exists. Every attorney should recognize that bias exists. As solos or small firm practitioners, we often work alone or with a small group of attorneys. It can become easy to believe that our legal abilities are the only or the most important factor determining the success or failure of our cases.

Even though you may not have to deal with bias factors when vying for a promotion, getting hired or making partner, bias may affect your chances of

reaching an agreement with opposing counsel, persuade a judge or a jury and even close and retain a client. Overlooking the bias factor could be a costly mistake for a solo or small firm practitioner, no matter their race or gender.

## GO AHEAD: ADMIT YOU ARE BIASED

Most people are reluctant to admit that they are biased, sometimes incorrectly equating the word to some other characteristics that will easily put someone on the defensive. Having bias does not mean being prejudiced, stereotyping or discriminating; however not recognizing that bias exists can lead to those behaviors.

We must understand that most biases are, first and foremost, unconscious. They are not intentional and are merely the product of one’s experiences, observations and assumptions. These beliefs can be shaped by history, culture, and the media and are often influenced by race, social class, and upbringing. They are formed by a normal cognitive process that helped us survive as a species allowing us to make quick and unconscious decisions to survive and thrive. Unfortunately, the process through which we unconsciously gather and quickly process information into cluster patterns often leads to errors in judgment caused by the cognitive illusions we call biases.

According to the Cognitive Bias Codex,<sup>5</sup> there are over 180 different types of recognized cognitive biases that either help us process or retain information, make quick decisions and find meaning in patterns. Some are well-known biases, such as Confirmation Bias (causing us to we focus on details that confirm our already existing beliefs) and Murphy’s Law. Others are more obscure but tend to make sense, such as the IKEA effect, which causes us to place a

higher or unreasonable value on things that we help build or create. Now you know why your significant other is attached to that squeaky side table you have been trying to ship off to Goodwill!

We all have biases, but in order to interrupt them and avoid making the resulting errors in, we must be hyper-aware of our bias's existence and test our beliefs before making important decisions, especially when these decisions concern our clients. To find out just how biased you are, you may take a free Implicit Association Test (IAT) online <sup>6</sup>, an interactive test offered by Harvard University's Implicit Project. The test "measures the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy)." I am certain you will be as surprised with the results of your IATs as I was with mine.

### **ASSESS THE SITUATION AND GENTLY CALL SOMEONE OUT ON THEIR BIAS, IF THE TERRAIN IS SAFE.**

Recently, a female colleague took to social media to vent about a particularly frustrating sentencing hearing where the judge, after hearing counsel's argument and answers to some of the questions posed, told her that she was engaging in a diatribe when she was merely doing her job. The incident confirms one of the points addressed by the ABA's report which compares the rate at which participants report being penalized for being assertive with 62% of white males reporting that they feel acceptance when they are assertive and 56% reporting that they are free to express anger, compared to 45% and 39% percent of women of color, respectively reporting on those categories.

Often when confronted with a potential bias-laced comment or decision, attorneys must make a decision on whether to speak up as bringing up the possible bias or even defending oneself can cause more harm than good. My trial attorney female colleague chose to speak up, but soon after prefacing her defense "with all due respect", she was cut off (49 % of women report being interrupted in the workplace, compared to 34% of men). It is hard to shake the feeling that the less-than-desired result she received at the hearing may have been bias-tainted.

Canon 3 of the California Code of Judicial Ethics requires judges to perform the duties of the office impartially, defined as meaning absence of bias or prejudice, in favor or against a party. It also requires the judge to keep "an open mind" in considering issues coming before them. <sup>7</sup>

But as we now know, no human is free from biases as these cognitive defects are part of normal human information processing, and judges are human after all. And while the diatribe incident must have been frustrating to the attorney accused of engaging in it, it may not rise to the level of a violation of the Code of Judicial Ethics. So, what is an attorney to do in such cases?

### **USE BIAS IN YOUR FAVOR**

A recent article in INC. Magazine<sup>8</sup> discussed research that shows that, during pitches, investors put female founders on the defensive more often than their male counterparts. The author suggests that women entrepreneurs should shape-shift and "be less direct" during their pitches to combat investor bias. While I am not fond of the term shape-shifter, I agree that you must present your case (literally and figuratively) framed in a way that will be understood and well-received by your audience. I am not implying that in this day and age when we appreciate and promote the power and benefits of diversity, one should pretend to be something one is not in order to manipulate a person or a result. But understanding 1) how biases work and 2) identifying someone's potential biases (or societal and historical norms based in which biases are formed) and framing your message to fit that person's beliefs can help you and sometimes is the only way for you to get the results you need.

A study about judicial officer biases highlighted the importance of understanding and using certain cognitive biases in an attorney's favor. The "Motion to Dismiss Study"<sup>9</sup> highlights the influence that certain type of information has on one's decision-making process. The "Anchoring Effect" affects how people anchor their estimates based on a piece of information given, no matter how arbitrary or aleatory that information may be. In that study, some judges were provided no anchor, asking what damages they would award to a seriously injured Plaintiff in a personal injury case. Other judges were asked the

same question but were provided an anchor, namely the mention of a frivolous motion claiming that the damages did not reach a \$75,000.00 jurisdictional minimum threshold. Judges who were provided the anchor, awarded on average almost 30% less damages than judges who were not anchored by the \$75,000.00 figure. For a personal injury attorney who is unaware or uninterested on how bias affect decisions, this lack of information could cost his or her client hundreds of thousands of dollars in damage awards.

## DON'T LET BIAS REACH IN TO YOUR BOTTOM LINE.

A few years ago, I was fortunate enough to receive some feedback from a potential client who chose another attorney after coming in for a consultation. The feedback I received was that during the consultation I had thrown a bucket of cold water on that potential client's immigration aspirations. After much thought, I realized that my very honest assessment of a client's options, and my very transparent disclaimer as to the chances of getting the desired results could come across to a certain segment of my clientele as negative. As an immigration attorney, I represent clients from different backgrounds who have different views of what a good lawyer looks like. The very same approach that helps me easily close certain potential clients, immediately turn off others. By merely shifting the focus to different beneficial aspects of my representation I am now able to provide the same message to different people, giving me the opportunity to help more individuals achieve their goals and continue to further my own life's mission.

You do not need to shape-shift, but if you are unable to provide a message in a language that your client will understand, your message is in vain, no matter how much important information it contains.

Several years ago, a criminal defense attorney with whom I used to share an office suite, came in to meet a potential client and as we were chatting in the conference room, I noticed he pulled out his contact lens case, removed his contacts and put on his glasses. I asked him if something was wrong with his contacts and he said: "No, I just wear glasses on my first consultations because potential clients perceive me as

more intelligent when I have them on." I laughed and thought to myself about how silly that sounded. But if we understand how biases are formed, we must agree that that attorney's simple move could be the difference between a signature on retainer or on a non-engagement letter.

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## ENDNOTES

- 1 COMMISSION ON WOMEN IN THE PROFESSION, RESOLUTION 302: REPORT TO THE HOUSE OF DELEGATES (American Bar Association, 2018); JOAN C. WILLIAMS, MARINA MULTHAUP, SU LI, AND RACHEL KORN, YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL AND GENDER BIAS IN THE LEGAL PROFESSION: EXECUTIVE SUMMARY, American Bar Association's Commission on Women in the Profession and MCAA, (2018).
- 2 *Id.* at 18-19.
- 3 ABA Commission on Women in the Profession, Visible Invisibility: Women of Color in Law Firms (2006), [https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility\\_es.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/visibleinvisibility_es.pdf).
- 4 Office of Research and Institutional Accountability, *Summary Results of Five Year Attorney Survey*, CAL. BAR ASSOC. (2017).
- 5 DESIGNED BY JOHN MANUGIAN III, ORGANIZED BY BUSTER BENSON, COGNITIVE BIAS CODEX (2016).
- 6 Visit <https://implicit.harvard.edu/implicit/takeatest.html>.
- 7 CAL. CODE JUD. ETHICS. Terminology. at 4, l. 33.
- 8 Weisul, Kimberly. *How Female Founders Can Combat Bias*, INC. Nov. 2018 at 60-61.
- 9 Guthrie, Chris and Rachlinski, Jeffrey John and Wistrich, Andrew J., *Inside the Judicial Mind* 86 CORNELL L. REV. 4 (2001) <https://ssrn.com/abstract=257634> or <http://dx.doi.org/10.2139/ssrn.257634>.

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