The Legal Malpractice Section of Bar Association of San Francisco presents

**2019 Legal Malpractice Symposium**

The Legal Malpractice Symposium includes two presentations designed to educate attendees on basic and emerging issues involving claims against attorneys. The Symposium will provide information all lawyers should know, especially lawyers involved in defending claims against attorneys or who serve in a general counsel capacity for his or her firm.

**Schedule**

8:00 - 9:00 a.m.  **MCLE Registration | Coffee Station**
9:00 - 11:30 a.m.  **Program**

**Session I**

**Insurance 101 for Law Firms**

Although most lawyers are covered by their firm’s insurance policy, many are not familiar with it. This program will provide you with a better understanding of your lawyer’s professional liability policy and discuss coverage issues that arise in claims against attorneys.

**Speakers**

Scott Barabash, Aspen Insurance
John Sullivan, Long & Levit
Tyler Gerking, Farella Braun + Martel

**Session II**

**Emerging Issues In Claims Against Attorneys**

Curious as to what types of practices or errors most often give rise to claims against lawyers? Are you aware of the cutting-edge claims that clients are asserting against attorneys? Come learn from an attorney who prosecutes claims against attorneys and an attorney who defends claims against attorneys and learn what you can do to reduce the risk of being sued.

**Speakers**

Jennifer A. Becker, Long & Levit
Mark Abelson, Campagnoli, Abelson & Campagnoli
Joe McMonigle, Long & Levit

**Event Code:** G196103

**Cost**

- $50 Section Member
- $60 BASF Member
- $75 Non Member
- FREE for Law Students

**Location**

BASF Conference Center
301 Battery Street, 3rd Floor
San Francisco

**MCLE: 2.5 Hours of which 1 Hour is in Legal Ethics**

To receive MCLE credit, you must sign in during the designated MCLE registration period. This activity is approved for Minimum Continuing Legal Education credit by the State Bar of California. BASF is a certified provider. Provider #103

**Sponsor Inquiries**

Email: cle@sfbar.org

**Register at www.sfbar.org**
2019 Legal Malpractice Symposium

Session I Insurance 101 for Law Firms

Speakers

Scott Barabash, Aspen Insurance
John Sullivan, Long & Levit
Tyler Gerking, Farella Braun + Martel

Session II: Emerging Issues in Claims Against Attorneys

Speakers

Jennifer A. Becker, Long & Levit
Mark Abelson, Campagnoli, Abelson & Campagnoli
Joe McMonigle, Long & Levit

Thursday, October 3, 2019

Location: BASF Conf. Center • 301 Battery St., 3rd Floor • San Francisco, CA
Event Code: G196103
Scott Barabash

Scott has more than 20 years of industry experience, including 15 years handling and supervising a variety of professional liability claims including: lawyers, real estate professionals, accountants, consultants, title agents, public entities, cyber, and other miscellaneous professionals.

Based in our San Francisco, California, office, Scott joined Aspen Insurance in 2012 as Vice President, in charge of miscellaneous professional liability claims. In 2013, he moved on to overseeing the Lawyers and Accountants Claims programs. Prior to Aspen, he was a Manager of Professional Programs Claims at Zurich American Insurance Company for eight years.

Scott received his Bachelor of Science degree from the University of Stonybrook and his law degree from Brooklyn Law School. He is an attorney and admitted to practice in New York and New Jersey. He has presented at such events as the American Bar Association’s National Legal Malpractice Conference, The LMRM conference, CLM Annual Conference, Professional Liability Underwriting Society Annual Conference and the New York State Bar Association’s panel on Legal Malpractice.

He is on the executive committee of the Legal Malpractice Section of the Bar Association of San Francisco and was recently appointed by the Trustees of the State Bar of California and currently serves on the Malpractice Insurance Work Group.
John Sullivan

John Sullivan is an experienced litigator with jury trial experience, emphasizing the defense of lawyers and design professionals. He received his J.D. from the University of California, Hastings College of the Law in 2005. While at Hastings, he served as an extern for the Hon. Paul Alvarado (Ret.), San Francisco Superior Court.

Since joining Long & Levit in 2005, Mr. Sullivan has focused his practice on the defense of professionals. He has successfully represented attorneys against claims arising out of underlying transactions and trials. These include cases resolved at the pleading stages, mediation and trial. He also handles attorney fee disputes.

Mr. Sullivan has also represented design professionals and contractors in a wide range of projects including single and multi-family residential projects, complex laboratory buildings and municipal works....More

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Mr. Sullivan has also represented design professionals and contractors in a wide range of projects including single and multi-family residential projects, complex laboratory buildings and municipal works. These cases have included complex construction delay and cost claims, alleged errors and omissions by designers and other professional and fee disputes.

Aside from representing professionals, Mr. Sullivan has experience handling personal injury and product liability cases as well as commercial and corporate disputes.
Tyler Gerking helps policyholders maximize their insurance assets. He works with them and their insurance brokers in negotiating favorable terms to address their unique risks. He also pursues insurance claims, shepherding policyholders through the claim process, and if necessary, pursuing breach of contract and bad faith claims against insurers in litigation and arbitration settings. He works frequently with cyber, errors & omissions liability (E&O), directors & officers liability (D&O), general liability (CGL), employment practices liability (EPL), crime and property insurance.

- He won an arbitration before a three-arbitrator panel, preventing an insurer from recovering a settlement payment it made under a CGL policy.
- He obtained a favorable recovery after settling litigation pending in California state and federal courts, the federal courts in Washington D.C. and London under a tower of professional malpractice insurance policies.
- He won a bench trial in California state court against a D&O insurer that breached its duty to defend a securities class action lawsuit, and then successfully defended the result in the California Court of Appeal.
- He won summary judgment in U.S. District Court for a technology company against its insurer for breach of the duty to defend, establishing that the breach prevented the insurer from compelling arbitration of a billing rate dispute under Cal. Civ. Code section 2860.
- He has persuaded courts to stay insurer-initiated declaratory relief actions while the underlying lawsuits proceed, protecting his clients from having to fight “two-front wars.”

He was a judicial extern for Magistrate Judge Maria-Elena James of the U.S. District Court for the Northern District of California in San Francisco.
Jennifer A. Becker

Jennifer Becker is an experienced trial lawyer with 30 years of practice handling professional liability and ethics matters involving attorneys, architects, engineers and accountants. She is Certified as a Legal Malpractice Specialist by the State Bar of California.

She began her career as a plaintiffs’ lawyer focusing on legal malpractice claims. Ms. Becker joined Long & Levit in 1999 where her unique perspective has served to effectively defend attorneys in legal malpractice actions, and provide counsel on their ethical responsibilities. She has also expanded her practice to include the defense of construction defect, personal injury, commercial litigation, and other professional liability claims. Ms. Becker is skilled as both a litigator and negotiator.

Ms. Becker also provides risk management and ethics advice to her attorney and architect clients based...More

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Ms. Becker also provides risk management and ethics advice to her attorney and architect clients based on her many years of handling professional liability disputes.

Ms. Becker enjoys speaking and writing about Professional Liability issues. She presents on the topic of risk management and ethics at local bar associations, and has been Editor-In-Chief of the firm’s Professional Liability Update publications since 2001. Ms. Becker was appointed to the California State Bar’s Committee on Professional Rules and Conduct for a three year term commencing October 2012. Ms. Becker has been the chair Legal Malpractice Committee of the Bar Association of San Francisco since 2014.
Mark Abelson

Mark has been a partner in Campagnoli, Abelson & Campagnoli since 1981, with an emphasis on professional malpractice and, in particular, plaintiffs’ legal malpractice. He has successfully tried, arbitrated, and settled numerous legal malpractice cases. Mark has lectured to various attorney groups on legal ethics, significant case law developments, and other topics pertaining to legal malpractice. He is a past chairperson of the Bar Association of San Francisco Legal Malpractice Committee and has served as an expert witness in legal malpractice cases. Mark serves as a mediator and arbitrator for the San Francisco Superior Court. He has been previously named to the Norther California Super Lawyers list and is an Outstanding Lawyer of America.
Joe McMonigle is honored by membership in the four leading invitation-only trial lawyer organizations. He is a Fellow in the International Academy of Trial Lawyers (2012); a Fellow in the International Society of Barristers (2011); an Associate Member of the American Board of Trial Advocates (2000); and a Fellow in the American College of Trial Lawyers (2008). These organizations recognize superior skills, professionalism, and excellence in trial. Joe represents lawyers in professional liability cases, attorney fee disputes, partnership disputes, and state bar disciplinary matters and has done so since joining Long & Levit in 1977. Joe is certified as a Legal Malpractice Specialist by the State Bar of California. He also counsels lawyers and law firms on risk management issues.

Joe’s commitment to the legal community is demonstrated by his service in lawyers’ professional liability organizations at the local, state and national levels. He served as chair of the Legal Malpractice Committee of the San Francisco Bar Association; has been a member of the State Bar Committee on Professional Responsibility and Conduct; and has been a member and chair of the ABA Standing Committee on Lawyers’ Professional Liability. He is a former member of the California State Bar Judicial Nominees Commission (JNE); and currently is a member of the California Judicial Council Advisory Committee on Civil Jury Instructions.

Joe has tried dozens of legal malpractice actions to conclusion in counties throughout California. Legal malpractice actions require an understanding of a variety of legal disciplines giving Joe experience and insight into a wide spectrum of tort, commercial, and business disputes. Because of his ability to master diverse practices areas clients frequently call upon Joe to try numerous civil cases including contract, personal injury, and complex business disputes.

California judges frequently ask Joe to represent them in proceedings before the Commission on Judicial Performance. Joe also represents retired judges who provide alternative dispute resolution services in civil actions.

Settlement skills are a critical component of contemporary legal practice. Joe has negotiated hundreds of cases to resolution short of trial, a prospect greatly enhanced by his experience trying cases to conclusion.
LAWYERS PROFESSIONAL LIABILITY INSURANCE DECLARATIONS

THIS IS A CLAIMS-MADE AND REPORTED POLICY. SUBJECT TO ITS TERMS AND CONDITIONS, THIS POLICY ONLY COVERS CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE INSURER DURING THE POLICY PERIOD, OR DURING THE EXTENDED REPORTING PERIOD, IF APPLICABLE. CLAIMS EXPENSES ARE INCLUDED IN, AND WILL REDUCE, THE LIMITS OF LIABILITY. PLEASE READ THE ENTIRE POLICY CAREFULLY.

WORDS THAT APPEAR IN BOLD PRINT, OTHER THAN THE CAPTION TITLES, HAVE SPECIAL MEANINGS AND ARE DEFINED SEPARATELY. WHENEVER A SINGULAR FORM OF A WORD IS USED, THE SAME WILL INCLUDE THE PLURAL WHEN REQUIRED BY CONTEXT.

Insurer: Insurance Company ABC
1 First Avenue
New York City, NY

Item 1. Named Insured and Address:
Law Firm, LLP
101 Main St.
San Francisco, Ca,

Item 2. Policy Period:
From: October 1, 2019
To: October 1, 2020
(12:01 AM Standard Time at the address of the Named Insured stated above.)

Item 3. Limits Of Liability:
$10,000,000 Each Claim (including Damages and Claims Expenses)
$15,000,000 Aggregate (for all Claims including Damages and Claims Expenses)

Item 4. Deductible:
$1,000,000 Each Claim (subject to Damages and Claims Expenses)
$2,000,000 Aggregate (for all Claims subject to Damages and Claims Expenses)

Item 5. Premium $250,000

Item 6. Retroactive Date

Item 7. Knowledge Date

Item 8 Prior/Pending Litigation Date

Item 9. Producer Name and Address

Item 10. Forms and Endorsements Attached at Inception
See Schedule of Forms and Endorsements

Item 11. Notice of Claim

In the event of a Claim, notice to the insurer shall be sent via express mail or electronic mail to:
Express Mail Address:

Insurer
1 First Avenue
New York City, NY

This Declarations page, together with the Application for this Policy, the attached Policy form and all Endorsements thereto, shall constitute the contract between the Insurer and the Insured. The Policy is valid only if signed below by a duly authorized representative of the Insurer.

In witness whereof, the Insurer has caused this Policy to be signed below by a duly authorized representative of the Insurer:

Issued on: «issuedDate»

«img:electronicRepresentativeSignature»

Authorized Representative
LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY

THIS IS A CLAIMS-MADE AND REPORTED POLICY. SUBJECT TO ITS TERMS AND CONDITIONS, THIS POLICY ONLY COVERS CLAIMS FIRST MADE AGAINST THE INSURED AND REPORTED TO THE INSURER DURING THE POLICY PERIOD, OR DURING THE EXTENDED REPORTING PERIOD, IF APPLICABLE. CLAIMS EXPENSES ARE INCLUDED IN, AND WILL REDUCE, THE LIMITS OF LIABILITY. PLEASE READ THE ENTIRE POLICY CAREFULLY.

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In consideration of the payment of the premium and in reliance upon the statements made in the Application, which is made a part hereof and deemed attached hereto, and subject to the Declarations and all terms of this insurance policy, the Insurer and the Insureds agree as follows:

I. INSURING AGREEMENTS

The Insurer shall pay on behalf of the Insured all sums in excess of the Deductible amount and up to the Limits of Liability stated in the Declarations which the Insured shall become legally obligated to pay as Damages and shall pay Claims Expenses resulting from a Claim first made against an Insured during the Policy Period or Extended Reporting Period, if applicable, as a result of a Wrongful Act by an Insured or an entity for whom an Insured is legally liable, provided that:

A. Each Wrongful Act was committed on or after the Retroactive Date and before the end of the Policy Period;

B. No Insured gave notice to any prior Insurer of such Wrongful Act; and

C. Prior to the Knowledge Date no Insured knew or should have known of such Wrongful Act or could have reasonably expected that such Wrongful Act might give rise to a Claim; and

D. The Insured reported the Claim in writing to the Insurer as soon as practicable, but in no event later than sixty (60) days after expiration or termination of this Policy, or during the Extended Reporting Period, if applicable.

II. EXTENSIONS OF COVERAGE

A. Crisis Management – Public Relations Extension

If there is any publication in a daily newspaper of general circulation or a radio, internet or television news report, during the Policy Period, containing statements regarding any Insured that is reasonably likely to harm the professional reputation of the Insured, the first said publication shall be deemed to be a “Crisis” for purposes of this provision. In the event of a Crisis, the Insurer may reimburse the Named Insured the reasonable costs incurred to prevent or repair such harm during the time period commencing ninety (90) days prior to, and in anticipation of the first publication, to 90 days after the first publication, regardless of whether a Claim is ever made against an Insured arising from such Crisis. Reimbursable costs under this provision are those reasonable and necessary fees and expenses incurred by the Named Insured, with the prior written consent of the Insurer, for a Public Relations Firm to provide Public Relations Services for the benefit of the Named Insured in connection with a Crisis. Such services include reasonable and necessary publishing, printing, advertising, mailing of materials, or travel by an Insured or the Public Relations Firm in connection with a Crisis. The maximum amount payable by the Insurer pursuant to this provision is $25,000 for each Policy Period regardless of the number of publications, Crises, or Insureds subject to the unfavorable publication as
stated above. Any payment made by the Insurer under this Extension shall not be subject to the Deductible obligation or the Limits of Liability.

Public Relations Firm means a firm providing services directed at creating and maintaining a positive public image of their clients. Public Relations Services includes advice, creation and distribution of news releases, media placements, articles in general publications, advertisements, and/or providing assistance and training to Insureds in dealing with media inquiries and publicity related to the Crisis.

B. Defense Extension To Non-Covered Claims

If the Insurer determines that an Insured is entitled to a defense of any portion of a Claim, the Insurer will defend the entire Claim including both covered and non-covered portions of the Claim subject to the termination of the duty to defend as stated in sub-section C of section V titled Defense, Investigation, Consent to Settle. The costs of defending both the covered and non-covered portion of the Claim shall be deemed Claims Expenses.

C. Disciplinary Proceedings Extension

If a Disciplinary Proceeding is commenced against an Insured during the Policy Period, the Insurer will reimburse the Insured against whom the Disciplinary Proceeding was commenced the reasonable attorney's fees and costs incurred in responding to such Disciplinary Proceeding. The maximum amount payable by the Insurer pursuant to this Extension shall be $25,000 for each Policy Period regardless of the number of Disciplinary Proceedings or the number of Insureds against whom Disciplinary Proceedings are commenced. Any payment made by the Insurer under this Extension shall not be subject to the Deductible or the Limits of Liability. The Insurer shall not pay any judgment, award or settlement pursuant to this Extension.

D. E-Discovery Error and Educational Instruction Coverage Extension

If a Claim is made against an Insured, during the Policy Period, relating to electronic discovery, the Insurer may provide e-discovery educational instruction to the Named Insured directly or through a vendor of the Insurer's choice. The maximum amount payable by the Insurer pursuant to this Extension shall be $25,000 for each Policy Period regardless of the number of e-discovery Claims or the number of Insureds against whom said Claims are commenced. Any payment made by the Insurer under this Extension shall not be subject to the Deductible or the Limits of Liability. The Insurer shall not pay any judgment, award or settlement pursuant to this Extension.

E. Privacy Breach and Remediation Coverage Extension

If a Claim is made against an Insured, during the Policy Period, for violation of a right of privacy or any Privacy Regulation as a result of a breach of the Insured's network security, the mismanagement of computer hardware or software, or the loss, theft or unauthorized disclosure or dissemination of Personal Information, the Insurer will pay for all services authorized in advance writing by the Insurer, up to a maximum of $25,000 for each Policy Period, on behalf of any Insured to investigate, remediate, develop or improve the Insured's network security systems to address any network security issues raised by such Claim or for costs of notification required by law for any inadvertent disclosure or breach of security as described herein. Any payment made by the Insurer under this Extension shall not be subject to the Deductible or the Limits of Liability.

F. Reimbursement of Expenses Coverage Extension

If an Insured is requested by the Insurer to attend hearings, depositions and trials, to which that Insured would not otherwise be obligated to attend, relative to the defense of a Claim, the Insurer shall reimburse that Insured's actual loss of earnings and reasonable expenses due to such attendance up to $500 per day. The maximum amount payable by the Insurer pursuant to this extension shall be $10,000 for each Policy Period. Any payment made by the Insurer under this Extension shall not be subject to the Deductible or the Limits of Liability.

G. Subpoena Compliance Coverage Extension
If an Insured is issued a subpoena, during the Policy Period, to produce any evidence in connection with a transaction or litigation in which no Insured was retained to perform Professional Legal Services, the insurer shall pay attorneys' fees and other reasonable expenses associated with compliance with the subpoena. The maximum amount payable by the insurer pursuant to this extension shall be $10,000 per subpoena and $25,000 in the aggregate for each Policy Period, regardless of the number of subpoenas or the number of Insureds subject to subpoenas. Any payment made by the insurer under this Extension shall not be subject to the Deductible nor reduce the Limits of Liability.

If the subpoena is issued in connection with a transaction or litigation in which an Insured was retained to perform Professional Services, any Insured may report it to the Insurer as a potential Claim pursuant to section V. B. Notice of Potential Claims.

H. Supplementary Payment Coverage Extension

The Insurer will also pay all costs taxed against an Insured in any litigation arising from a covered Claim and all interest on the full amount of any judgment that accrues after entry of the judgment and before the Insurer has paid, offered to pay, or deposited in court the part of the judgment that is within the applicable coverage and Limits of Liability. Any payment made by the Insurer under this Extension shall not apply to the Deductible and shall not reduce the Limits of Liability.

The Insurer shall not be obligated to provide any additional coverage or benefit under section II. EXTENSIONS OF COVERAGE, after the aggregate limit of the Insurer's liability has been exhausted by payment of Damages and/or Claim Expenses.

III. DEFINITIONS

Claim means a demand for money or services received by an Insured alleging a Wrongful Act, including service of suit, a request that an Insured waive a legal right or sign an agreement to toll a statute of limitations, or a demand for arbitration.

Claims Expenses means reasonable and necessary fees, costs and expenses incurred by the Insurer, or by the Insured with the prior written consent of the Insurer consisting of fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a Claim, including the cost of appeal bonds; however, the Insurer shall not be obligated to apply for or furnish appeal bonds. Claims Expenses do not include salary charges, wages or expenses of partners, principals, officers, directors, members or employees of the Insured. Claim Expenses shall be part of, and not in addition to, the Limits of Liability specified in the Declarations.

Damages means any compensatory monetary judgment or settlement negotiated with the prior approval of the Insurer. Damages shall not include: any disgorgement, return, withdrawal, restitution or reduction of any sums which are or were in the possession or control of any Insured, or any amounts credited to any Insured's account, or fees paid to or charged by any Insured; fines, sanctions, taxes or penalties; awards deemed uninsurable pursuant to any applicable law; punitive or exemplary damages; treble damages or any other damages resulting from the multiplication of compensatory damages assessed directly against an Insured or for which any Insured is held liable for any reason; equitable relief, or fees, costs or expenses incurred by an Insured to comply with any such equitable relief. Damages shall not include costs for credit monitoring in the event of any disclosure of Personal Information.

Disciplinary Proceeding means any proceeding by a regulatory or disciplinary official, board or agency to investigate charges of professional misconduct in the performance of Professional Legal Services.

Extended Reporting Period means the optional extension of coverage following the cancellation or non-renewal of the policy to report to the Insurer any Claim which arises from a Wrongful Act committed prior to such cancellation or non-renewal and on or after the Retroactive Date.

Immediate Family means the spouse, children, siblings, or parents of any Insured, and any trust or estate of which any of them or any Insured is a beneficiary.

Insured means:

1. The Named Insured referenced in the Declarations or any Predecessor;
2. any attorney or professional corporation but only as respects Professional Legal Services rendered on behalf of the Named Insured or any Predecessor;

3. All non-lawyer employees or independent contractors but only with respect to liability arising from and in the course of their services on behalf of the Named Insured or any Predecessor;

4. The estate, heirs, executors, administrators, assigns and legal representatives of each Insured in the event of said Insured's death, incapacity, insolvency or bankruptcy, but only to the extent that said Insured would otherwise be provided coverage under this Policy.

5. the lawful spouse or domestic partner of any individual which qualifies as an Insured, above, for a Claim but only to the extent that the Insured would otherwise be provided coverage under this policy because of spousal or domestic partner status, and not out of any alleged independent Wrongful Acts, of such individual;

Interrelated Wrongful Acts means Wrongful Acts that are causally or logically related and include all Wrongful Acts that have as a common nexus any fact, circumstance, situation, or event, or which are the same, related or continuous acts, regard less of whether the Claim or Claims alleging such acts involve the same or different Claimants, Insureds or legal causes of action. Interrelated Wrongful Acts shall be deemed to have occurred only on the date that the earliest of such acts commenced.

Knowledge Date means the effective date of the first Lawyers Professional Liability Policy issued by this Insurer to the Named Insured and continuously renewed and maintained in effect to the inception of this Policy Period.

Mediation means a non-binding process in which a neutral panel or individual assists the parties in reaching settlement. To be considered Mediation under this Policy, the process must be of a kind set forth in the Commercial Mediation Rules of the American Arbitration Association. The Insurer, however, at its sole option, may recognize any Mediation process or forum presented for approval.

Other Organization means any corporation, partnership, association, trust, individual, or fund, (including a pension, welfare, profit sharing, mutual or investment fund or trust) or any other business enterprise or charitable organization of any kind or nature, other than an Insured.

Personal Information means an individual's identity with any one or more of the following: social security number; medical or healthcare data, or other protected health information; drivers license number or state identification number; account number, credit card number or debit card number in combination with any required security code, access code or password that would permit access to that individual’s financial account; or other nonpublic Personal Information as defined in a Privacy Regulation.

Personal Injury means false arrest, detention or imprisonment; malicious prosecution; the publication or utterance of a libel or slander or other defamatory or disparaging material; invasion, infringement or interference with rights of privacy or publicity; wrongful entry or eviction; invasion of the right of private occupancy; or violation of a right of privacy or publicity or a Privacy Regulation as a result of a breach of the Insured’s network security, the mismanagement of computer hardware or software, or the loss, theft or unauthorized disclosure or dissemination of Personal Information.

Policy Period means the period referenced in the Declarations or any shorter period that may occur as a result of a cancellation of this Policy.

Predecessor means any individual or entity identified in the Application that, prior to the inception of this Policy Period, the Named Insured became the successor in interest to greater than 50% of the identified predecessor's financial assets and liabilities.

Privacy Regulation means any statute or regulation associated with the control and use of personally identifiable financial, medical or other sensitive information; including identity theft and privacy protection legislation that requires commercial entities that collect Personal Information to post privacy policies, adopt specific privacy controls, or notify individuals in the event that Personal Information has actually or potentially been compromised.

Professional Legal Services means:

1. services and activities performed by an Insured for others for a fee; or
2. activities as a member of a bar association, ethics, peer review, formal accreditation board or similar professional boards or committees; or

3. the publication or presentation of research papers or similar materials by an Insured but only if the fees, royalties, or other income generated from such work are not greater than ten thousand dollars ($10,000) during the Policy Period; or

4. Legal services performed on a pro bono basis approved in writing in advance by the Named Insured or any Predecessor.

Retroactive Date means the date referenced in the Declarations. This Policy shall not apply to any Claims resulting from any Wrongful Acts or Interrelated Wrongful Acts committed prior to this date.

Totally and Permanently Disabled means that the Insured has become so disabled as to be wholly unable to provide any Professional Legal Services in the Insured's capacity as a lawyer provided that such disability has existed continuously for not less than six (6) months; and is expected to be continuous and permanent. Totally and Permanently Disabled shall not include any condition which:

1. is a result of war or acts of war, whether or not declared;

2. occurred during active service in the armed forces of any country; or

3. results from:
   a. intentionally self-inflicted injuries;
   b. attempted suicide, whether or not sane, or the abuse or misuse of addictive chemical compounds, drugs or alcohol.

Wrongful Act means any actual or alleged negligent act, error or omission or Personal Injury, arising out of the rendering of or the failure to render Professional Legal Services.

IV. EXCLUSIONS

This Policy does not apply to any Claim:

1. Alleging intentional wrongdoing, fraud, dishonesty, or malicious Wrongful Acts by an Insured, if such conduct is established as a matter of fact in a civil, arbitration, criminal or other proceeding, or is admitted to by the Insured. The Insurer shall continue to defend the Insured against whom the allegations are made if these allegations arise out of Wrongful Acts otherwise covered under this Policy, but that Insured shall reimburse the Insurer for all Claims Expenses if such conduct is established as a matter of fact in a civil, arbitration, criminal or other proceeding, or is admitted to by the Insured.

This exclusion does not apply to an Insured who did not personally commit or personally participate in any of the conduct described in this exclusion.

2. Based upon, arising out of, directly or indirectly, or in any way involving any Claim by any Insured against any Insured unless said Claim is based solely and entirely upon an attorney-client relationship between said Insureds.

3. Based upon, arising out of, directly or indirectly, or in any way involving, any Insured's activities as an officer, director, manager or employee of any Other Organization.

4. Based upon, arising out of, directly or indirectly, or in any way involving Professional Legal Services provided by an Insured to any Other Organization if any Insured collectively and/or members of the Insured's Immediate Family own 30% or more of the Other Organization.
5. Based upon, arising out of, directly or indirectly, or in any way involving bodily injury, sickness, disease, emotional distress, mental anguish, outrage, humiliation or death; injury to or destruction of any tangible property including loss of use thereof, unless:

a. the liability for such Claim is caused by the performance of Professional Legal Services by the Insured; and

b. such Claim would not have otherwise occurred directly or indirectly but for the performance of Professional Legal Services by the Insured;

6. Based upon, arising out of, directly or indirectly, or in any way involving alleged discrimination, humiliation, harassment, or misconduct by an Insured because of race, creed, color, age, gender, sex, sexual preference or orientation, national origin, religion, disability, handicap, marital status, or any other class protected under federal, state, local or other law, or by an employee, former employee, or job applicant, of an Insured in their capacity as such.

V. CLAIMS

A. Notice of Claims

In the event of a Claim, an Insured shall as a condition precedent to the coverage afforded by this Policy, as soon as practicable:

1. Forward to the Insurer every demand, notice, summons or pleading received by an Insured; and

2. Give written notice containing particulars sufficient to identify the Insured and claimant, Policy Number identifying the policy under which the Claim is reported, and complete and comprehensive information regarding the facts and circumstances surrounding the Wrongful Act.

This notice shall be mailed to the Insurer at the address referenced in Item 11 of the Declarations or e-mailed to:

professional liability claims@aspen-insurance.com.

If notices are mailed or e-mailed, the date of mailing or e-mailing of such notice shall constitute the date such notice was given and proof of mailing or e-mailing to the stated address shall be sufficient proof of notice;

B. Notice of Potential Claims

If an Insured becomes aware of a Wrongful Act, fact or circumstance that may reasonably be expected to give rise to a Claim, and if the Insured reports such Wrongful Act, fact or circumstance to the Insurer during the Policy Period in writing, then any Claim subsequently arising from such Wrongful Act, fact or circumstance duly reported in accordance with this paragraph shall be deemed under this Policy to be a Claim made during the Policy Period in which such written notice of a Wrongful Act, fact or circumstance is received by the Insurer. Such written notice to the Insurer shall include a complete and comprehensive statement of the facts and circumstances surrounding the Wrongful Act, fact or circumstance and the reasons that a Claim is anticipated.

C. Defense, Investigation, Consent to Settle

The Insurer has the right and duty to defend any Claim, made against an Insured, to which this insurance applies. The Insurer has the sole right to appoint defense counsel and to make such investigation of a Claim or potential Claim as it deems necessary. The Insurer has no right or duty to defend any Disciplinary Proceeding. If a Claim is subject to arbitration or mediation, the insurer shall be entitled to exercise all of the Insured's rights in the choice of arbitrators or mediators and in the conduct of an arbitration or mediation proceeding.

As a condition precedent to coverage under this Policy, the Insured shall not admit liability for or settle any Claim or incur any Claims Expenses, without the prior written consent of the Insurer. The Insured must
take all reasonable actions within its ability to prevent or mitigate any Claim which would be covered under this Policy. The Insurer has the right to make such investigation and conduct negotiations and, with the written consent of the Named Insured, effect settlement of any Claim as the Insurer deems reasonable.

If the Insured refuses to consent to a settlement or compromise recommended by the Insurer and elects to contest or continue to contest the Claim, the Insurer's liability for Damages shall not exceed the amount for which the Insurer would have been liable if the Claim had been so settled when and as so recommended.

The Insurer shall not be obligated to pay any Damages or Claims Expenses, or to undertake or continue the defense of any Claim, after the applicable limit of the Insurer's liability has been exhausted by payment of Damages and Claims Expenses or after deposit of the applicable limit of the Insurer's liability with or subject to control of a court of competent jurisdiction. The duty to defend under the Defense Extension terminates when all potentially covered Claims are dismissed or withdrawn.

D. Cooperation

The Insured shall provide the Insurer with such cooperation, assistance and information as the Insurer may request, all without charge to the Insurer.

E. Territory

This Policy applies to Wrongful Acts committed by an Insured anywhere in the world.

VI. GENERAL CONDITIONS

A. Limits of Liability

1. Limits of Liability - each Claim

Subject to paragraph B. below, the Limits of Liability of the Insurer for Damages and Claim Expenses for each Claim first made against the Insured and reported to the Insurer during the Policy Period shall not exceed the amount stated in the Declarations for each Claim.

2. Limits of Liability - in the Aggregate

The Limits of Liability of the Insurer for Damages and Claim Expenses for all Claims first made against the Insured and reported to the Insurer during the Policy Period shall not exceed the amount stated in the Declarations as the Aggregate.

B. Deductible

The Deductible amount stated in the Declarations is the amount of the Insured's liability for each and every Claim and applies to the payment of Damages and Claim Expenses for each and every Claim first made and reported to the Insurer in writing during the Policy Period. The Deductible shall be paid by the Named Insured, or upon the Named Insured's failure to pay, jointly and severally by all Insureds. The Limits of Liability set forth in the Declarations are in addition to and in excess of the deductible. Each said Deductible shall be paid within thirty (30) days of written demand therefore by the Insurer.

The Insured shall be entitled to a reduced Deductible of fifty percent (50%) of the amount stated in the Declarations, up to a maximum reduction of $25,000, if the Claim is resolved within one year of the Claim being reported to the Insurer.

C. Multiple Insureds, Claims and Claimants

The Limits of Liability shown in the Declarations and subject to the provisions of this Policy is the amount the Insurer will pay as Damages and Claims Expenses regardless of the number of Insureds, Claims made or persons or entities making Claims. If Claims based on Interrelated Wrongful Acts are made against any Insured and reported to an Insurer, all such Claims, whenever made, shall be considered a single Claim first
made and reported to an Insurer within the policy period in which the earliest of the related Claims was first made and reported to an Insurer.

If this Policy and any other Policy issued by Aspen applies to the same Claim, including any Extended Reporting Periods of such Policy or Policies, then only the Policy with the highest remaining Limit of Liability shall apply.

D. Extended Reporting Periods

1. Extended Reporting Period

In the event of cancellation or non-renewal of this Policy by either the Named Insured or the Insurer, the Named Insured shall have the right to elect an Extend Reporting Period following the date of such cancellation or non-renewal as follows:

- one (1) year for an additional premium of 100% of the total annual premium;
- two (2) years for an additional premium of 135% of the total annual premium;
- three (3) years for an additional premium of 150% of the total annual premium;
- five (5) years for an additional premium of 200% of the total annual premium; or
- an unlimited period for an additional premium of 250% of the total annual premium.

2. Non-Practicing Reporting Period

If an Insured as specified in section III. Definitions, shall retire or otherwise cease the private practice of law during the Policy Period, then such Insured, or, if deceased, such Insured's estate, shall have the right to elect an extension of coverage following the date of such Insured's retirement or termination of private practice, to report to the Insurer any Claim which arises from a Wrongful Act committed prior to such Insured's date of retirement or termination of private practice as follows:

- one (1) year for an additional premium of 100% of the Per Lawyer Annual Premium;
- two (2) years for an additional premium of 135% of the Per Lawyer Annual Premium;
- three (3) years for an additional premium of 150% of the Per Lawyer Annual Premium;
- five (5) years for an additional premium of 200% of the Per Lawyer Annual Premium; or
- an unlimited period for an additional premium of 250% of the Per Lawyer Annual Premium.

In the event an Insured as specified in section III. Definitions shall: (a) die, except by suicide; (b) become Totally and Permanently Disabled; or (c) with three (3) consecutive full years of coverage by the Insurer, retire or otherwise cease the private practice of law during the Policy Period, such Insured shall be entitled to a five (5) year Non-Practicing Extended Reporting Period at no additional premium.

3. Other Extended Reporting Period Provisions Applicable to sections 1 and 2 above

As a condition precedent to the right to purchase the Extended Reporting Period, any and all premiums and deductibles that are due must have been paid and there must be compliance with all other terms and conditions of this Policy. No Extended Reporting Period shall be available when any Insured's license or
right to practice his or her profession is revoked or suspended by, or surrendered at the request of, any regulatory or judicial authority.

The right to purchase the Extended Reporting Period must be exercised by notice in writing not later than sixty (60) days following the non-renewal or cancellation date of this Policy, and must include payment of premium for the applicable Extended Reporting Period. If such notice is not given to the Insurer, the Named Insured shall not, at a later date, be able to exercise such right.

At the commencement of any Extended Reporting Period, the entire premium thereafter shall be deemed earned and in the event the Named Insured terminates the Extended Reporting Period before its expiration date, the Insurer shall not be liable to return any portion of the premium for the Extended Reporting Period.

There is no additional policy limit applicable to the Extended Reporting Period, and it shall not in any way increase, renew or replenish the Limits of Liability as set forth in the Declarations.

E. Firm Changes

The Named Insured shall report changes during the Policy Period which affect 50% or greater of the Named Insured's total lawyer population within sixty (60) days of such change, however, this provision shall not apply if the Named Insured had less than six (6) lawyers who met the definition of Insured at the inception of this Policy. In the event of a merger, dissolution or acquisition, the Named Insured shall notify the Insurer at least thirty (30) days prior to the projected date of such change. In each case, the Insurer will have the right to accept, alter or decline coverage and to charge an additional premium.

F. Other Insurance

This insurance shall be in excess of the amount of the applicable Deductible of this Policy and any other valid insurance available to the Insured, whether such other insurance is stated to be primary, pro rata, contributory, excess, contingent or otherwise, unless such other insurance is written only as a specific excess insurance over the Limits of Liability provided in this Policy. The Insurer shall not have any duty to defend an Insured when that Insured is defended under another policy of insurance.

G. Subrogation

In the event of any payment under this Policy, the Insurer shall be subrogated to all of the Insured's rights of recovery against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to preserve and secure such rights. The Insured shall do nothing to prejudice such rights.

H. Reimbursement of the Insurer

If the Insurer has paid any Damages or Claims Expenses in excess of the applicable Limits of Liability or within the amount of the applicable Deductible, each Insured shall be liable to the Insurer for any and all such amounts and, upon demand, shall pay such amounts to the Insurer promptly. If it is negotiated or determined that any Claims Expenses are not covered under this Policy, each Insured agrees to repay the Insurer the amount of such Claims Expenses not covered.

I. Entire Contract

By acceptance of this Policy, each Insured agrees that the statements in the Declarations and Application are its agreements and representations, that this Policy is issued in reliance upon the truth of such representations and that this Policy embodies all agreements existing between each Insured and the Insurer.

J. Notice of Cancellation

This Policy may be cancelled by the Named Insured by surrender of this Policy to the Insurer or by giving written notice to the Insurer stating when thereafter such cancellation shall be effective. The Insurer may only cancel this Policy in the event of non-payment of premium by mailing to the Named Insured, at the address referenced in the
Declarations, written notice stating when, not less than ten (10) days thereafter, the cancellation shall be effective. The mailing of such notice shall be sufficient proof of notice and this Policy shall terminate at the date and hour specified in such notice. If this Policy shall be cancelled by the Named Insured, the Insurer shall retain the customary short rate proportion of the premium hereon. If this Policy shall be cancelled by the Insurer, the Insurer shall retain the pro-rata proportion of the premium hereon. Premium adjustments and returns shall be made at the time cancellation is effective or as soon as possible after that time. Payment or tender of unearned premium shall not be a condition of cancellation.

K. Named Insured - Sole Agent

The Named Insured shall be the sole agent of all Insureds hereunder for the purpose of effecting or accepting any amendments to or cancellation of this Policy, for the purpose of receiving such notices as may be required by law and/or any provision(s) of this Policy, for the completing of any Application and the making of any representations, for the payment of any premium and the receipt of any return premium that may become due under this Policy, for the payment of any Deductible obligations that may become due under this Policy, and the exercising or declining to exercise any right under this Policy, including declining or exercising any Extended Reporting Period.

L. Assignment

No change in, modification of, or assignment of, interest under this Policy shall be effective except when made by written endorsement signed by an authorized representative of the Insurer.

M. Action Against the Insurer

No action shall be taken against the Insurer unless: (1) as a condition precedent thereto, the Insured has fully complied with all the terms and provisions of this Policy, and (2) until the amount of any Insured's obligation or liability to a third party has been finally determined either by an award or judgment against any Insured after an actual contested trial or adjudicatory proceeding or by written agreement of the Insured and the claimant with the prior written consent of the Insurer.

No entity shall have the right under this Policy to join any Insured in any action or proceeding against an Insurer to determine the Insurer's liability nor shall the Insurer be joined in an action or proceeding by any Insured or its legal representative.

N. Titles

The titles of paragraph sections or endorsements in, or of, this Policy are intended solely for convenience and reference, and are not deemed in any way to modify the provisions to which they relate.
ARBITRATION / MEDIATION ENDORSEMENT

It is hereby noted and agreed that with effect from inception Underwriters agree:

1) Arbitration proceedings and Mediation services are covered hereon subject to the following definitions:

a) Arbitration Proceedings:

"Arbitration Proceedings" means the submission by two or more parties of a dispute to the Assured as a neutral adjudicator who, after a hearing at which all interested parties have an opportunity to be heard, or following the submission of evidence or written argument, renders an award which the parties have agreed in advance to accept, or are required to accept as a final settlement of this dispute;

b) Mediation Services:

"Mediation Services" means the rendering of professional services by the Assured as a neutral administrator involving the submission, negotiation and settlement of disputes.

2) Mediation Services are covered hereon subject to the following conditions:

Prior to providing mediation services, the Assured, if he or she is an attorney, shall provide a written statement to all the parties, explaining his or her role as a neutral intermediary and stating that he or she may not act as advocate for either party.

In cases where the Assured assists in preparing a written settlement agreement in connection with the provision of mediation services, the Assured shall recommend each participant in writing to have the settlement agreement independently reviewed by their own counsel before executing the agreement.

All other terms and conditions remain unchanged.
IX. EXTENDED REPORTING ENDORSEMENT AMENDMENT

Item 'A.' of 'IX. EXTENDED REPORTING ENDORSEMENT' of the Wording is amended to read as follows:

A. In the event of cancellation or non-renewal of this Insurance by the Named Assured or Underwriters, the Named Assured designated in Item I of the Declarations shall have the right, upon payment in full and not proportionally or otherwise in part of option i) 100%, option ii) 175% or option iii) 225% of the Premium set forth in Item 5 of the Declarations to have issued an endorsement providing a 12 month (in respect option i)) Extended Reporting Period, 24 month (in respect option ii)) Extended Reporting Period or 36 month (in respect of option iii)) Extended Reporting Period for Claims first made against any Assured and reported to the Underwriters during the Extended Reporting Period, subject to the conditions set forth in the definition of Extended Reporting Period herein.

In order for the Named Assured to invoke the Extended Reporting option, the payment of the premium for the Extended Reporting Period must be paid to Underwriters within 30 days of the non-renewal or cancellation.

All other terms, conditions and exclusions of the Policy remain the same.
INSURANCE 101
FOR LAW FIRMS

Scott Barabash
ASPEN INSURANCE COMPANY

John Sullivan
LONG & LEVIT, LLP

Tyler Gerking
FARELLA, BRAUN + MARTEL
Nuts and Bolts of a Policy
Reading Your Policy

- Declarations Page
- Policy Form
- Endorsements
Policy Form

INJURY AGREEMENT

DUTY TO DEFEND/COOPERATE

DAMAGES

EXCLUSIONS

ERODING POLICY LIMITS
Common Issues Addressed in Endorsements:

- Choice of Counsel
- Defense Outside the Limits
- Arbitration/Mediation Endorsement
- Extended Reporting Endorsement
Issues that Arise During Litigation
Coverage Disputes

- Failure to Report
- Scope of Professional Services
- Social Engineering Scams
- Excluded Damages
- Malicious Prosecution
- Fraud
Policy Limits Demands
Consent to Settle Clauses
Applicable Rules of Professional Conduct

- Rule 1.4.2  
  Disclosure of Professional Liability Insurance

- Rule 1.7  
  Conflicts of Interest

- Rule 1.8.6  
  Compensation from One Client to Another Client

- Rule 5.4  
  Financial and Similar Arrangements with Nonlawyers
Thank you.

Questions?
The Legal Malpractice Section of the Bar Association of San Francisco

2019 Legal Malpractice Symposium

Emerging Issues In Claims Against Attorneys

Jennifer A. Becker, Long & Levit, LLP
Mark Abelson, Campagnoli, Abelson & Campagnoli, LLP
Joe McMonigle, Long & Levit, LLP
Retention Agreements

- Written Agreements Mandated by Business & Professions Code §§ 6147 (contingency) and 6148 (> $1,000)
- Identify Client
- Identify Scope
- Describe shared responsibilities with co-counsel or referral fees
- Advanced Waivers
- Identify Termination Events
Rule 1.7 Conflict of Interest: Current Clients

(a) 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.

(b) A lawyer shall not, without informed written consent* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person,* or by the lawyer’s own interests.

(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written* disclosure of the relationship to the client and compliance with paragraph (d) where:

(1) the lawyer has, or knows* that another lawyer in the lawyer’s firm* has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or

(2) the lawyer knows* or reasonably should know* that another party’s lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer’s firm,* or has an intimate personal relationship with the lawyer.

(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and:

(1) the lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; and

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

(e) For purposes of this rule, “matter” includes any judicial or other proceeding, application, request for a ruling or other determination, contract, transaction, claim, controversy, investigation, charge, accusation, arrest, or other deliberation, decision, or action that is focused on the interests of specific persons,* or a discrete and identifiable class of persons.*
“Flatt Conflict” Flatt v. Superior Court (Daniel) (1994) 9 Cal. 4th 275

- New Client asked for advice about suing Existing Client
- Any advice to New Client would breach Duty of Loyalty to Existing Client
- Attorney not liable to New Client for not advising NC of the applicable statute of limitations on claim against Existing Client
Conflicts of Interest- Current Client

- Single Rule 3-310 now four rules
- Current clients (Rule 3-310(B) and (C)) - Rule 1.7

  - *Flatt v Superior Court* conflict
  - Focus *material limitation*, not actual or potential conflict (Rule 1.7(a.))
  - Written disclosure provisions (3-310(B)) basically unchanged
  - Express prohibition on representing a client, without informed consent, if the representation is directly adverse to another client in a separate matter. (Rule 1.7(b))
“Material Limitation”

• Room for Creativity

M’Guinness brought suit against fellow shareholder Johnson, for breach of fiduciary duty and other claims arising out of the operation of a small construction firm, TLC.

M’Guinness also named TLC asking for involuntary dissolution of the corporation and the appointment of a receiver.

Johnson cross-complained against M’Guinness, TLC, and the third TLC shareholder, Scott Stuart.

Johnson was represented by the law firm of Casas, Riley & Simonian, LLP, who had represented TLC sporadically since 2006.

Disqualification Motion
  - Concurrent Representation
  - Successive Representation in substantially related actions

Not just for Big Law, applies to the rest of us too…
The 2006 Retention Agreement:
- Contracts are strictly construed against the attorney
- Uncertainties are resolved in favor of a fair and reasonable interpretation and in favor of the client and against the attorney
- Firm’s engagement was broad and open-ended
  - parties’ intent to establish an ongoing attorney-client relationship, terminable only by specific methods described in the agreement including return of all property and funds to the client
- The last invoice showed funds held by firm in trust
- There were 69 invoices in six discrete matters, 7 months of billings after the Firm’s representation of TLC had, “concluded”
- 25.3 hours of services for TLC – too bad
- Other actions:
  - A CRS attorney showed up when M’Guiness and Stuart went to collect their personal property -- exertion of control over TLC property
  - A CRS partner hummah hummaed when asked about status of TLC representation
  - A CRS partner controlled and limited access by M’Guinness to TLC records -- should have refrained from taking part in any controversies among shareholders as to its control
- Both M’Guinness and Stuart pled allegations that could support a derivative lawsuit against Johnson
  - Derivative lawsuit conflict rule
  - CRS could not sue TLC for damages obo Johnson
Court of Appeal – this is concurrent representation

If a party moving to disqualify an attorney establishes concurrent representation, the court is required, “in all but a few instances,” to automatically disqualify the attorney without regard to whether the subject matter of the representation of one client relates to the representation of a second client in the lawsuit.

Although disqualification is a drastic measure and motions to disqualify are sometimes brought by litigants for improper tactical reasons, disqualification is not “generally disfavored.”
Richie served as President and COO of O’Gara Coach

Richie left, was admitted to the bar, and then represented another officer of the corporation against O’Gara Coach, who moved to disqualify Ritchie

Richie did not have attorney-client relationship with O’Gara Coach during his employment, and was not disqualified based on successive representation;

Disqualification is fundamentally about protecting client confidences, regardless of how the confidential information is acquired.

In Ra Richie was point of contact with outside counsel about Ra’s dispute -→ DQ

In Wu Richie was not exposed to confidential information and was not DQ’d
ANTELOPE VALLEY GROUNDWATER CASES
(2018) 30 Cal.App.5th 602

- Agencies involved in decades long groundwater cases.
- Law Firm represented “District 40” in the groundwater cases.
- Law Firm represented “AVEK” as its general counsel. After AVEK was brought into the groundwater cases, it hired separate counsel, who filed a cross complaint against District 40. Thus Law Firm simultaneously represents clients with conflicting interests.
- No conflict waiver is signed, but AVEK does not object during a decade of litigation. Law Firm did not use AVEK’s confidential information in representing District 40.
- AVEK terminates Law Firm, and demands it withdraw from District 40’s representation, and files a disqualification motion.
- Even a Flatt conflict, simultaneous representation of parties with adverse interests, can be waived.
- A writing is required by the Rules of Professional Conduct, but for purposes of disqualification motions, there is no rule that a client can only manifest informed consent by proof of a written consent. “California State Bar’s Rules of Professional Conduct govern attorney discipline; they do not create standards for disqualification in the courts.”
- AVEK’s delay in bringing the motion was a separate basis for denying it, as a form of estoppel. Delay in seeking disqualification causes prejudice to an opponent.
Advanced Waivers

- Now permitted by the RPC

Rule 1.7, Comment 9:

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). A lawyer who obtains from a client an advance consent that complies with this rule will have all the duties of a lawyer to that client except as expressly limited by the consent. A lawyer cannot obtain an advance consent to incompetent representation. (See rule 1.8.8.)

- Sheppard, Mullin defends J-M in an action adverse to South Lake Tahoe, who it represents in unrelated matters.
- SM had obtained Advanced Waivers from both clients allowing representation in unrelated matters.
- SM disqualified from the litigation by South Lake Tahoe
- SM sues J-M for fees. CSC decides the SM – JM engagement agreement is unenforceable because SM had a conflict of interest not cured by the Advanced Waiver.
  - SM failed to disclose it currently represented an adverse party, South Lake Tahoe, when it obtained the waiver from J-M.
  - The Advance Waiver was not informed
    - “But by failing to disclose to J-M the fact that a current conflict actually existed, the law firm failed to disclose to its client all the “relevant circumstances” within its knowledge relating to its representation of J-M.”
    - “…law firm failed to disclose a known, existing conflict before soliciting J-M’s consent…”
    - “…without full disclosure of existing conflicts known to the attorney, the client’s consent is not informed for purposes of our ethics rules.”
- SM lost the War, but won the Battle – case remanded to trial court to determine if it was entitled to fees under quantum meruit
Plaintiffs are sugar industry manufacturers, trade groups, and associations in litigation over false advertising claims by the Defendants, corn syrup companies.

Plaintiffs’ law firm A, merged with law firm B, forming New Firm. Law firm B had previously and currently represented Defendant 1 in a broad range of matters, including some that gave it access to confidential information relevant to the lawsuit. (Current Client Conflict Issue)

Fourteen years prior, Defendant 1 had signed an advance waiver to allow B to represent other clients on matters adverse to Defendant 1 so long as those matters were unrelated to B’s work to Defendant 1. (Advance Waiver Issue)

New Firm withdrew from its representation of Defendant 1

Law firm B also had represented Defendant 2 in the past, but it was not concurrent (Successive Client Representation Issue)
Successive Representation

- Substantial relationship test protects former client right to continued confidentiality of information
- “direct” relationship between the law firm and the client on a matter with similar factual and/or legal issues material to resolution of the current matter
- If so, client need not show law firm actually possesses relevant confidential information

Concurrent Representation

- Implicates duty of undivided loyalty
- Public perception
- Automatic disqualification
New Firm was concurrent counsel to Plaintiffs and Defendant 1

What about the advance waiver?

Full, reasonable disclosure and both clients knowingly agree in writing to waive the conflict

“Because the waiver must be informed, a second waiver may be required if the original waiver insufficiently disclosed the nature of a subsequent conflict.”

Need not specify the exact nature of the future conflict

Does not require that every possible consequence of a conflict be disclosed for consent to be valid

Whether full disclosure was made and the client made an informed waiver is a fact-specific inquiry that considers the following factors:

1. the breadth of the waiver;
2. the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future);
3. the quality of the conflicts discussion between the attorney and the client;
4. the specificity of the waiver;
5. the nature of the actual conflict (whether the attorney sought to represent both sides in the same dispute or in unrelated disputes);
6. the sophistication of the client; and
7. the interests of justice
The 1998 Advance Waiver

“It is possible that some of our current or future clients will have disputes with you during the time we are representing you. We therefore also ask each of our clients to agree that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not substantially related to our work for you, even if the interest of such clients in those unrelated matters are directly adverse to yours....”

- Open-ended.
  - purports to waive conflicts in any matter not substantially related indefinitely.

- Lacks specificity.
  - Does not identify a potentially adverse client,
  - Does not identify the types of potential conflicts
  - Does not identify the nature of the representative matters.

- Client claimed not to understand or anticipate
New Firm’s Withdrawal

“Hot Potato Rule”

- Conflict is not cured by terminating relationship with one client

1998 Agreement did not allow Law Firm B to cure conflict by withdrawal

- New Firm withdrew while Defendant 1 was under a deadline

- HPR applies regardless of reason for withdrawal
Defendant 2 – Successive Representation

- 2005 Engagement letter had a “terminate upon completion of service” provision
  - Effective to terminate relationship and make Defendant 2 a “past” client
- “Substantial relationship” ≠ exact match
- Issues are whether corn is “natural” -- similar legal and factual issues → likely receipt of material confidential information
It Doesn’t Matter

- The fact that Law Firm B attorneys who represented Defendants are no longer with New Firm does not cure conflict
- The fact attorneys at New Firm representing Plaintiff never received information about Defendants, or worked on Defendants’ matters does not cure conflict
- The fact attorneys who worked on Defendants’ matters did not communicate confidential information to attorneys working on Plaintiffs’ matters, and did not perform any work for Plaintiff does not cure the conflict
  - In fact, the attorney who signed the engagement agreement with Defendants 1 and 2 consulted with Plaintiffs’ expert and lead attorney – possible leak of confidential information
- Because there is a “substantial relationship” New Firm is conclusively presumed to possess confidential information material to the present action; clients are not forced to reveal the confidences the rule is intended to protect
Now, it’s just getting sad....

- New Firm offered to:
  - Reimburse Defendants 1 and 2 for motion fees
  - Impose an ethical wall
    - Ethical Wall was not immediately implemented, and a probable leak of Defendant 2’s confidences occurred
  - Put Law Firm B’s records in escrow, and prevent New Firm from accessing
  - Provide free legal services to transition to new counsel, and to pay reasonable transition fees
  - Make an evidentiary stipulation in Defendant’s favor
    - Evidentiary stipulation does not cure breach of Defendants’ confidences that could be used against Defendants
  - Not cross-examine or argue against Defendants 1 & 2
    - New Firm still dumped Defendants, and still represents their opponents
Too little, too late...

“the important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process”
Ethical Screening/Imputation of Conflicts

- California’s Unique Articulation of Model Rule 1.10
- Imputation formerly a matter of common law in CA
- Current client
  - 1.10 expressly provides that the Rule 1.7 current client conflicts of one attorney in a firm are generally imputed to all attorneys in the firm.
- Former Client, Screening now expressly permitted
  - 1.10 expressly provides that Rule 1.9 former client conflicts are imputed to firm unless
    - the former client was a client of the prohibited attorney’s former firm
    - the prohibited attorney did not “substantially participate” in the matter at the former firm
    - The prohibited attorney is timely screened from participation in the matter and
    - notice is provided to the affected client. “Substantially participate” standard – unique to California
- Potential impact on disqualification law?
  - Side-switching cases
  - No screening in certain circumstances
Wikihow: Ethical Walls

*Kirk v First American Title Ins. Co. (2010) 183 CA4th 776*

- Defendant First American was represented by a three-attorney Bryan Cave, LLP team.
- Plaintiffs’ counsel consulted with a potential expert, attorney Gary Cohen, and conveyed confidential information to him.
- Cohen joined Sonnenschein Nath & Rosenthal LLP’s San Francisco office.
- Team joined Sonnenschein’s Los Angeles office.
  - Ethical Wall immediately established around Cohen
  - Notification to attorneys, paralegals, and secretaries
- On disqualification motion question was whether Cohen’s taint was shared by firm.
- Only absolute prohibition is that “vicarious disqualification should be automatic in cases of a tainted attorney possessing actual confidential information from a representation, who switches sides in the same case.” *Id.* at 800.
- Case-by-case analysis based on the circumstances.
- The court held that “in the proper circumstances, the presumption [of disqualification of the firm] is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case.” *Id.* at 801.
- The burden rests on the firm to prove that it timely and effectively established an ethical wall. 183 CA4th at 810.
Not Just for Big Law, Redux….  


- The National Grange had state subsidiaries. California Grange split off from the National organization and formed the Guild, taking the California Grange’s property with it.

- National organization formed a new California Grange. Two cases were filed over property the Grange claimed was appropriated by the Guild.

- Solo represented the Guild. He hired an associate from a firm representing the National Grange.

- In one case, Associate disqualified as a “side switcher”; No “Ethical Wall” analysis warranted.

- Associate’s conflict was imputed to Solo
Solo Practitioner – Big Firm Problems

- In a second case, substantial relationship test applied
- Solo disqualified because trial court was not persuaded the “Ethical Wall” existed

[T]he evidence to support [the ethical wall] was not created contemporaneous with the imposition of an ethical wall. The memo submitted by [Solo] was prepared to document the continued adherence to the rules verbally imposed by [Solo], as was [Associate’s] and his secretary's signing of an affidavit. Similarly, the declarations were prepared to document what was previously told to [Solo’s] employees. There is no evidence of practices and policies regarding an ethical wall being formally imposed at the time of [Associate’s] hiring and declarations purporting to impose such protective measures are insufficient. *Id. at 719*
Problem Solver: Termination

- Temptation to keep the attorney-client relationship opened ended as a business development tool
- Creates problems in other areas

- **Statute of Limitations**, *See, C.C.P. § 340.6*: ....the period shall be tolled during the time that any of the following exist:

  (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred.

- Terminating the Relationship affects the **Duty of Loyalty**
  - Without the Duty of Loyalty  → greater flexibility in establishing new client relationships
Terminate with Clarity

- Make it clear when the representation is over.
  - Send a letter stating that the representation has concluded, that it has been a pleasure, and that if he/she needs services in the future he/she should feel free to contact you about possible retention.
- Do not keep billing for time
“Framework” agreement

3.3 In the event this Agreement has terminated pursuant to Paragraph 3.1 above, and you wish to retain us to provide further legal services, we will provide such services as requested so long as we are able to take on the matter. Such “as requested” services will constitute a new representation, which will revive and be governed by this Agreement, at the then-prevailing attorney rates.

Banning Ranch Conservancy v. Superior Court (City of Newport Beach) (2011) 193 Cal.App.4th 903

- A “framework” retainer agreements, can provide a structure for future attorney-client relationships on an “as-requested” basis.

- Relationship is subject to confirmation by the firm.

- Agreement expedites future relationships but does not create an attorney-client relationship absent an actual request, and acceptance on a particular matter.

- Firm retains the right to confirm its ability to take on the matter based on workload, conflicts, or other reasons.
Me Too

Greater sensitivity to incivility that includes sexism

8.4.1 of the California Rules of Professional Conduct prohibits an attorney, in his or her representation of a client, from unlawfully harassing or unlawfully discriminating against persons on the basis of protected characteristics including gender.


Plaintiff Fernando Martinez hereby appeals from the lower court’s disgraceful order … The ruling’s succubustic adoption of the defense position, and resulting validation of the defendant’s pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners."

Succubus was a demon assuming female form that had sexual intercourse with men in their sleep