BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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| Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Southern California Gas Company with Respect to the Aliso Canyon storage facility and the release of natural gas, and Order to Show Cause Why Southern California Gas Company Should Not Be Sanctioned for Allowing the Uncontrolled Release of Natural Gas from its Aliso Canyon Storage Facility. (U904G) | Investigation 19-06-016 |

# JOINT MOTION OF THE PUBLIC ADVOCATES OFFICE AND THE SAFETY AND ENFORCEMENT DIVISION FOR OFFICIAL NOTICE OF OFFICIALLY NOTICEABLE INFORMATION

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August 20, 2021

## I. INTRODUCTION

Pursuant to Rules 11.1 and 13.10 of the Commission's Rules of Practice and Procedure (Rules), the Public Advocates Office (Cal Advocates) and the Safety and Enforcement Division (SED) move for and request that the Commission take official notice of the officially noticeable information listed below and attached hereto in connection with the *Joint Reply Brief Of The Public Advocates Office And The Safety And Enforcement Division Regarding The Order To Show Cause Related To Southern California Gas Company's Undisclosed And Unauthorized Use Of A Reporting Service During Hearings* filed August 20, 2021 in response to the *Administrative Law Judges' Ruling Ordering Southern California Gas Company to show cause why it should not be sanctioned by the Commission for violations of Rule 1.1 of the Commission's Rules of Practice and Procedure*.

As further described below, each of the enumerated items below are officially noticeable pursuant to Rules 13.9 and 13.10[1] and California Evidence Code section 450 *et seq*.

(1) Attached as Order to Show Cause (OSC) Exhibit 1 is a true and correct copy of the currently applicable California Rules of Professional Conduct, adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077. These rules are officially noticeable pursuant to Evid. Code § 451(c).

(2) Attached as OSC Exhibit 2 is a true and correct copy of the Ruling on Submitted Matter issued on February 20, 2020, in the Superior Court of California, County of Los Angeles, Civil Division, case number JCCP4861. Court rulings are officially noticeable pursuant to Evid. Code § 452(d).

(3) Attached as OSC Exhibit 3 is a true and correct copy of the Court Order: Ruling on Submitted Matter entered August 3, 2020, in the Superior Court of California, County of Los Angeles, Civil Division, case number JCCP4861. Court

[1] Rule 13.10 provides: "Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq."

rulings are officially noticeable pursuant to Evid. Code § 452(d).

(4) Attached as OSC Exhibit 4 is a true and correct copy of the Reporter's Transcript of Proceedings of a Status Conference/Motion Hearing on June 25, 2020, in *Gandsey v. Southern California Gas Company,* Superior Court of California, County of Los Angeles, case number BC601844. Official transcripts from a proceeding involving one of the parties to the current proceeding are officially noticeable pursuant to Evid. Code § 452(d) and (h).

## II. CONCLUSION

For the reasons set forth above, Cal Advocates and SED respectfully request that the Commission take official notice of MTC Exhibits 1 through 4.

Respectfully submitted,


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August 20, 2021

## LIST OF EXHIBITS

| Exhibit Number | Description |
|---|---|
| OSC-1 | California Rules of Professional Conduct |
| OSC-2 | Ruling on Submitted Matter issued on February 20, 2020, in the Superior Court of California, County of Los Angeles, Civil Division, case number JCCP4861. |
| OSC-3 | Ruling on Submitted Matter entered August 3, 2020, in the Superior Court of California, County of Los Angeles, Civil Division, case number JCCP4861 |
| OSC-4 | Reporter's Transcript of Proceedings dated June 25, 2020, in *Gandsey v. Southern California Gas Company* (Superior Court of California, Los Angeles County, No. BC601844). |

# OSC Exhibit 1
# California Rules of Professional Conduct

The State Bar *of California*

# California
# Rules of Professional Conduct

2021

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[1] Rule 1.1, Comment [1] was added by order of the Supreme Court, effective March 22, 2021.

[2] Rule 3-110(B) provides:

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) *diligence*, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service. (Emphasis added.)

[3] But see Cal. Bus. & Prof. Code § 6068(e)(1).

## RULES OF PROFESSIONAL CONDUCT
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| **Current Rules of Professional Conduct**<br>*Effective on November 1, 2018*<br>(Rule Number and Title) | **"1992" Rules of Professional Conduct**<br>*Effective until October 31, 2018*<br>(Rule Number and Title) |
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| **3.3** Candor Toward the Tribunal | **5-200(A)-(D)** Trial Conduct |
| **3.4** Fairness to Opposing Party and Counsel | **5-200(E)** [Trial Conduct]<br>**5-220** Suppression of Evidence<br>(Note: Rule 5-220 was revised effective May 1, 2017.)<br>**5-310** Prohibited Contact With Witnesses<br>(Note: See also Rule 5-110 was revised effective November 2, 2017.) |
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[4] ABA Model Rule 1.14 ("Client With Diminished Capacity") has not been adopted in California.

[5] Rule 1.16, Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.

[6] ABA Model Rule 2.2 was deleted and has not been adopted in California.

[7] ABA Model Rule 2.3 ("Evaluation For Use By Third Persons") has not been adopted in California.

## RULES OF PROFESSIONAL CONDUCT
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[8] Rule 3.8, Comment [7] was amended by order of the Supreme Court, effective June 1, 2020.

[9] But see rule 3-110, Discussion ¶. 1.

[10] But see rule 3-110, Discussion ¶. 1.

[11] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

## RULES OF PROFESSIONAL CONDUCT
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| **Current Rules of Professional Conduct**<br>*Effective on November 1, 2018*<br>(Rule Number and Title) | **"1992" Rules of Professional Conduct**<br>*Effective until October 31, 2018*<br>(Rule Number and Title) |
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[12] ABA Model Rule 7.6 ("Political Contributions To Obtain Legal Engagements Or Appointments By Judges") has not been adopted in California.

[13] ABA Model Rule 8.3 ("Reporting Professional Misconduct") has not been adopted in California.

## RULES OF PROFESSIONAL CONDUCT
## CROSS-REFERENCE CHART

| **"1992" Rules of Professional Conduct**<br>*Effective until October 31, 2018*<br>(Rule Number and Title) | **Current Rules of Professional Conduct**<br>*Effective on November 1, 2018*<br>(Rule Number and Title) |
|---|---|
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| **1-110** Disciplinary Authority of the State Bar | **8.1.1** Compliance with Conditions of Discipline and Agreements in Lieu of Discipline |
| **1-120** Assisting, Soliciting, or Inducing Violations | **8.4** Misconduct |
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| **3-100** Confidential Information of a Client | **1.6** Confidential Information of a Client |

[14] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

[15] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

[16] Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.

## RULES OF PROFESSIONAL CONDUCT
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| **"1992" Rules of Professional Conduct**<br>*Effective until October 31, 2018*<br>(Rule Number and Title) | **Current Rules of Professional Conduct**<br>*Effective on November 1, 2018*<br>(Rule Number and Title) |
|---|---|
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| **3-700** Termination of Employment | **1.16** Declining or Terminating Representation[18] |
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| **4-210** Payment of Personal or Business Expenses Incurred by or for a Client | **1.8.5** Payment of Personal or Business Expenses Incurred by or for a Client |
| **4-300** Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review | **1.8.9** Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review |
| **4-400** Gifts From Client | **1.8.3** Gifts from Client |
| **5-100** Threatening Criminal, Administrative, or Disciplinary Charges | **3.10** Threatening Criminal, Administrative, or Disciplinary Charges |

[17] Rule 1.1, Comment [1] was added by order of the Supreme Court, effective March 22, 2021.

[18] Rule 1.16, Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.

## RULES OF PROFESSIONAL CONDUCT
## CROSS-REFERENCE CHART

| **"1992" Rules of Professional Conduct**<br>*Effective until October 31, 2018*<br>(Rule Number and Title) | **Current Rules of Professional Conduct**<br>*Effective on November 1, 2018*<br>(Rule Number and Title) |
|---|---|
| **5-110** Performing the Duty of Member in Government Service<br>(**Note**: Rule 5-110 was revised effective November 2, 2017.) | **3.8** Special Responsibilities of a Prosecutor[19] |
| **5-120** Trial Publicity | **3.6** Trial Publicity |
| **5-200(A)-(D)** Trial Conduct | **3.3** Candor Toward the Tribunal |
| **5-200(E)** Trial Conduct | **3.4** Fairness to Opposing Party and Counsel |
| **5-210** Member as Witness | **3.7** Lawyer as Witness |
| **5-220** Suppression of Evidence<br>(**Note**: Rule 5-220 was revised effective May 1, 2017.) | **3.4** Fairness to Opposing Party and Counsel<br>(**Note**: See also Rule 3.8(d) regarding the duties of a prosecutor.) |
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Rule 1.2 Scope of Representation and Allocation of Authority

Rule 1.8.2 Use of Current Client's Information[20]

Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

Rule 1.10 Imputation of Conflicts of Interest: General Rule

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Rule 1.18 Duties to Prospective Client

Rule 2.1 Advisor

Rule 2.4 Lawyer as Third-Party Neutral

Rule 3.2 Delay of Litigation

Rule 3.9 Advocate in Non-adjudicative Proceedings

Rule 4.1 Truthfulness in Statements to Others

Rule 4.3 Communicating with an Unrepresented Person[21]

Rule 4.4 Duties Concerning Inadvertently Transmitted Writings

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

Rule 6.3 Membership in Legal Services Organizations

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[19] Rule 3.8, Comment [7] was amended by order of the Supreme Court, effective June 1, 2020.

[20] But see Bus. & Prof. Code § 6068(e).

[21] But see current rule 3-600(D) regarding similar duties in an organizational context.

# RULES OF PROFESSIONAL CONDUCT

*(On May 10, 2018, the California Supreme Court issued an order approving new Rules of Professional Conduct, which are effective on November 1, 2018 On September 26, 2018, the Court issued an order approving non-substantive clean-up revisions to the rules. These revisions are effective on the same date.)*

## Rule 1.0 Purpose and Function of the Rules of Professional Conduct

(a) Purpose.

The following rules are intended to regulate professional conduct of lawyers through discipline. They have been adopted by the Board of Trustees of the State Bar of California and approved by the Supreme Court of California pursuant to Business and Professions Code sections 6076 and 6077 to protect the public, the courts, and the legal profession; protect the integrity of the legal system; and promote the administration of justice and confidence in the legal profession. These rules together with any standards adopted by the Board of Trustees pursuant to these rules shall be binding upon all lawyers.

(b) Function.

(1) A willful violation of any of these rules is a basis for discipline.

(2) The prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and opinions of California courts.

(3) A violation of a rule does not itself give rise to a cause of action for damages caused by failure to comply with the rule. Nothing in these rules or the Comments to the rules is intended to enlarge or to restrict the law regarding the liability of lawyers to others.

(c) Purpose of Comments.

The comments are not a basis for imposing discipline but are intended only to provide guidance for interpreting and practicing in compliance with the rules.

(d) These rules may be cited and referred to as the "California Rules of Professional Conduct."

**Comment**

[1] The Rules of Professional Conduct are intended to establish the standards for lawyers for purposes of discipline. (See *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [106 Cal.Rptr. 489].) Therefore, failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. Because the rules are not designed to be a basis for civil liability, a violation of a rule does not itself give rise to a cause of action for enforcement of a rule or for damages caused by failure to comply with the rule. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1097 [41 Cal.Rptr.2d 768].) Nevertheless, a lawyer's violation of a rule may be evidence of breach of a lawyer's fiduciary or other substantive legal duty in a non-disciplinary context. (*Ibid*.; see also *Mirabito v. Liccardo* (1992) 4 Cal.App.4th 41, 44 [5 Cal.Rptr.2d 571].) A violation of a rule may have other non-disciplinary consequences. (See, e.g., *Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72 [14 Cal.Rptr.3d 58] [enforcement of attorney's lien]; *Chambers v. Kay* (2002) 29 Cal.4th 142, 161 [126 Cal.Rptr.2d 536] [enforcement of fee sharing agreement].)

[2] While the rules are intended to regulate professional conduct of lawyers, a violation of a rule can occur when a lawyer is not practicing law or acting in a professional capacity.

[3] A willful violation of a rule does not require that the lawyer intend to violate the rule. (*Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [264 Cal.Rptr. 346]; and see Bus. & Prof. Code, § 6077.)

[4] In addition to the authorities identified in paragraph (b)(2), opinions of ethics committees in California, although not binding, should be consulted for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered.

[5] The disciplinary standards created by these rules are not intended to address all aspects of a lawyer's professional obligations. A lawyer, as a member of the legal profession, is a representative and advisor of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice. A lawyer should be aware of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons* who are not poor cannot afford adequate legal assistance. Therefore,

all lawyers are encouraged to devote professional time and resources and use civic influence to ensure equal access to the system of justice for those who because of economic or social barriers cannot afford or secure adequate legal counsel. In meeting this responsibility of the profession, every lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. The lawyer should aim to provide a substantial* majority of such hours to indigent individuals or to nonprofit organizations with a primary purpose of providing services to the poor or on behalf of the poor or disadvantaged. Lawyers may also provide financial support to organizations providing free legal services. (See Bus. & Prof. Code, § 6073.)

### Rule 1.0.1 Terminology

(a) "Belief" or "believes" means that the person* involved actually supposes the fact in question to be true. A person's* belief may be inferred from circumstances.

(b) [Reserved]

(c) "Firm" or "law firm" means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

(d) "Fraud" or "fraudulent" means conduct that is fraudulent under the law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" means a person's* agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably* foreseeable adverse consequences of the proposed course of conduct.

(e-1) "Informed written consent" means that the disclosures and the consent required by paragraph (e) must be in writing.*

(f) "Knowingly," "known," or "knows" means actual knowledge of the fact in question. A person's* knowledge may be inferred from circumstances.

(g) "Partner" means a member of a partnership, a shareholder in a law firm* organized as a professional corporation, or a member of an association authorized to practice law.

(g-1) "Person" has the meaning stated in Evidence Code section 175.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer means the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer means that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" means the isolation of a lawyer from any participation in a matter, including the timely imposition of procedures within a law firm* that are adequate under the circumstances (i) to protect information that the isolated lawyer is obligated to protect under these rules or other law; and (ii) to protect against other law firm* lawyers and nonlawyer personnel communicating with the lawyer with respect to the matter.

(l) "Substantial" when used in reference to degree or extent means a material matter of clear and weighty importance.

(m) "Tribunal" means: (i) a court, an arbitrator, an administrative law judge, or an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(n) "Writing" or "written" has the meaning stated in Evidence Code section 250. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed, inserted, or adopted by or at the direction of a person* with the intent to sign the writing.

**Comment**

*Firm* or Law Firm**

[1] Practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a law firm.* However, if they present themselves to the public in a way that suggests that they are a law firm* or conduct themselves as a law firm,* they may be regarded as a law firm* for purposes of these rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm,* as is the fact that they have mutual access to information concerning the clients they serve.

[2] The term "of counsel" implies that the lawyer so designated has a relationship with the law firm,* other than as a partner* or associate, or officer or shareholder, that is close, personal, continuous, and regular. Whether a lawyer who is denominated as "of counsel" or by a similar term should be deemed a member of a law firm* for purposes of these rules will also depend on the specific facts. (Compare *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 [86 Cal.Rptr.2d 816] with *Chambers v. Kay* (2002) 29 Cal.4th 142 [126 Cal.Rptr.2d 536].)

*Fraud**

[3] When the terms "fraud"* or "fraudulent"* are used in these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform because requiring the proof of those elements of fraud* would impede the purpose of certain rules to prevent fraud* or avoid a lawyer assisting in the perpetration of a fraud,* or otherwise frustrate the imposition of discipline on lawyers who engage in fraudulent* conduct. The term "fraud"* or "fraudulent"* when used in these rules does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information.

*Informed Consent* and Informed Written Consent**

[4] The communication necessary to obtain informed consent* or informed written consent* will vary according to the rule involved and the circumstances giving rise to the need to obtain consent.

*Screened**

[5] The purpose of screening* is to assure the affected client, former client, or prospective client that confidential information known* by the personally prohibited lawyer is neither disclosed to other law firm* lawyers or nonlawyer personnel nor used to the detriment of the person* to whom the duty of confidentiality is owed. The personally prohibited lawyer shall acknowledge the obligation not to communicate with any of the other lawyers and nonlawyer personnel in the law firm* with respect to the matter. Similarly, other lawyers and nonlawyer personnel in the law firm* who are working on the matter promptly shall be informed that the screening* is in place and that they may not communicate with the personally prohibited lawyer with respect to the matter. Additional screening* measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected law firm* personnel of the presence of the screening,* it may be appropriate for the law firm* to undertake such procedures as a written* undertaking by the personally prohibited lawyer to avoid any communication with other law firm* personnel and any contact with any law firm* files or other materials relating to the matter, written* notice and instructions to all other law firm* personnel forbidding any communication with the personally prohibited lawyer relating to the matter, denial of access by that lawyer to law firm* files or other materials relating to the matter, and periodic reminders of the screen* to the personally prohibited lawyer and all other law firm* personnel.

[6] In order to be effective, screening* measures must be implemented as soon as practical after a lawyer or law firm* knows* or reasonably should know* that there is a need for screening.*

## CHAPTER 1.
## LAWYER-CLIENT RELATIONSHIP

### Rule 1.1 Competence

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

**Comment**

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[2] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[3] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

[***Publisher's Note:*** *Comment [1] was added by order of the Supreme Court, effective March 22, 2021.*]

## Rule 1.2 Scope of Representation and Allocation of Authority

(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably* consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. Except as otherwise provided by law in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the scope of the representation if the limitation is reasonable* under the circumstances, is not otherwise prohibited by law, and the client gives informed consent.*

**Comment**

*Allocation of Authority between Client and Lawyer*

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. (See, e.g., Cal. Const., art. I, § 16; Pen. Code, § 1018.) A lawyer retained to represent a client is authorized to act on behalf of the client, such as in procedural matters and in making certain tactical decisions. A lawyer is not authorized merely by virtue of the lawyer's retention to impair the client's substantive rights or the client's claim itself. (*Blanton v. Womancare, Inc*. (1985) 38 Cal.3d 396, 404 [212 Cal.Rptr. 151, 156].)

[2] At the outset of, or during a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 1.4, a lawyer may rely on such an advance authorization. The client may revoke such authority at any time.

*Independence from Client's Views or Activities*

[3] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

*Agreements Limiting Scope of Representation*

[4] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. (See, e.g., rules 1.1, 1.8.1, 5.6; see also Cal. Rules of Court, rules 3.35-3.37 [limited scope rules applicable in civil

matters generally], 5.425 [limited scope rule applicable in family law matters].)

### Rule 1.2.1 Advising or Assisting the Violation of Law

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

**Comment**

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

[5] If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).

### Rule 1.3 Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, "reasonable diligence" shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

**Comment**

[1] This rule addresses only a lawyer's responsibility for his or her own professional diligence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary

responsibility for supervising subordinate lawyers and nonlawyers.

[2] See rule 1.1 with respect to a lawyer's duty to perform legal services with competence.

### Rule 1.4 Communication with Clients

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent* is required by these rules or the State Bar Act;

(2) reasonably* consult with the client about the means by which to accomplish the client's objectives in the representation;

(3) keep the client reasonably* informed about significant developments relating to the representation, including promptly complying with reasonable* requests for information and copies of significant documents when necessary to keep the client so informed; and

(4) advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows* that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer may delay transmission of information to a client if the lawyer reasonably believes* that the client would be likely to react in a way that may cause imminent harm to the client or others.

(d) A lawyer's obligation under this rule to provide information and documents is subject to any applicable protective order, non-disclosure agreement, or limitation under statutory or decisional law.

**Comment**

[1] A lawyer will not be subject to discipline under paragraph (a)(3) of this rule for failing to communicate insignificant or irrelevant information. (See Bus. & Prof. Code, § 6068, subd. (m).) Whether a particular development is significant will generally depend on the surrounding facts and circumstances.

[2] A lawyer may comply with paragraph (a)(3) by providing to the client copies of significant documents by electronic or other means. This rule does not prohibit a lawyer from seeking recovery of the lawyer's expense in any subsequent legal proceeding.

[3] Paragraph (c) applies during a representation and does not alter the obligations applicable at termination of a representation. (See rule 1.16(e)(1).)

[4] This rule is not intended to create, augment, diminish, or eliminate any application of the work product rule. The obligation of the lawyer to provide work product to the client shall be governed by relevant statutory and decisional law.

### Rule 1.4.1 Communication of Settlement Offers

(a) A lawyer shall promptly communicate to the lawyer's client:

(1) all terms and conditions of a proposed plea bargain or other dispositive offer made to the client in a criminal matter; and

(2) all amounts, terms, and conditions of any written* offer of settlement made to the client in all other matters.

(b) As used in this rule, "client" includes a person* who possesses the authority to accept an offer of settlement or plea, or, in a class action, all the named representatives of the class.

**Comment**

An oral offer of settlement made to the client in a civil matter must also be communicated if it is a "significant development" under rule 1.4.

### Rule 1.4.2 Disclosure of Professional Liability Insurance

(a) A lawyer who knows* or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.

(c) This rule does not apply to:

(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);

(2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;

(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;

(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

**Comment**

[1] The disclosure obligation imposed by paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

"*Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I do not have professional liability insurance.*"

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"*Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I no longer have professional liability insurance.*"

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know* whether the lawyer is or is not covered by professional liability insurance.

## Rule 1.5 Fees for Legal Services

(a) A lawyer shall not make an agreement for, charge, or collect an unconscionable or illegal fee.

(b) Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events. The factors to be considered in determining the unconscionability of a fee include without limitation the following:

(1) whether the lawyer engaged in fraud* or overreaching in negotiating or setting the fee;

(2) whether the lawyer has failed to disclose material facts;

(3) the amount of the fee in proportion to the value of the services performed;

(4) the relative sophistication of the lawyer and the client;

(5) the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(6) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(7) the amount involved and the results obtained;

(8) the time limitations imposed by the client or by the circumstances;

(9) the nature and length of the professional relationship with the client;

(10) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(11) whether the fee is fixed or contingent;

(12) the time and labor required; and

(13) whether the client gave informed consent* to the fee.

(c) A lawyer shall not make an agreement for, charge, or collect:

(1) any fee in a family law matter, the payment or amount of which is contingent upon the securing of a dissolution or declaration of nullity of a marriage or upon the amount of spousal or child support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(d) A lawyer may make an agreement for, charge, or collect a fee that is denominated as "earned on receipt" or "non-refundable," or in similar terms, only if the fee is a true retainer and the client agrees in writing* after disclosure that the client will not be entitled to a refund of all or part of the fee charged. A true retainer is a fee that a client pays to a lawyer to ensure the lawyer's availability to the client during a specified period or on a specified matter, but not to any extent as compensation for legal services performed or to be performed.

(e) A lawyer may make an agreement for, charge, or collect a flat fee for specified legal services. A flat fee is a fixed amount that constitutes complete payment for the performance of described services regardless of the amount of work ultimately involved, and which may be paid in whole or in part in advance of the lawyer providing those services.

**Comment**

*Prohibited Contingent Fees*

[1] Paragraph (c)(1) does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under child or spousal support or other financial orders.

*Payment of Fees in Advance of Services*

[2] Rule 1.15(a) and (b) govern whether a lawyer must deposit in a trust account a fee paid in advance.

[3] When a lawyer-client relationship terminates, the lawyer must refund the unearned portion of a fee. (See rule 1.16(e)(2).)

*Division of Fee*

[4] A division of fees among lawyers is governed by rule 1.5.1.

*Written* Fee Agreements*

[5] Some fee agreements must be in writing* to be enforceable. (See, e.g., Bus. & Prof. Code, §§ 6147 and 6148.)

## Rule 1.5.1 Fee Divisions Among Lawyers

(a) Lawyers who are not in the same law firm* shall not divide a fee for legal services unless:

(1) the lawyers enter into a written* agreement to divide the fee;

(2) the client has consented in writing,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms* that are parties to the division; and (iii) the terms of the division; and

(3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

(b) This rule does not apply to a division of fees pursuant to court order.

**Comment**

The writing* requirements of paragraphs (a)(1) and (a)(2) may be satisfied by one or more writings.*

## Rule 1.6 Confidential Information of a Client

(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code

section 6068, subdivision (e)(1) unless the client gives informed consent,* or the disclosure is permitted by paragraph (b) of this rule.

(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) to the extent that the lawyer reasonably believes* the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes* is likely to result in death of, or substantial* bodily harm to, an individual, as provided in paragraph (c).

(c) Before revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) to prevent a criminal act as provided in paragraph (b), a lawyer shall, if reasonable* under the circumstances:

(1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act; or (ii) to pursue a course of conduct that will prevent the threatened death or substantial* bodily harm; or do both (i) and (ii); and

(2) inform the client, at an appropriate time, of the lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b).

(d) In revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as provided in paragraph (b), the lawyer's disclosure must be no more than is necessary to prevent the criminal act, given the information known* to the lawyer at the time of the disclosure.

(e) A lawyer who does not reveal information permitted by paragraph (b) does not violate this rule.

**Comment**

*Duty of confidentiality*

[1] Paragraph (a) relates to a lawyer's obligations under Business and Professions Code section 6068, subdivision (e)(1), which provides it is a duty of a lawyer: "To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." A lawyer's duty to preserve the confidentiality of client information involves public policies of paramount importance. (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].) Preserving the confidentiality of client information contributes to the trust that is the hallmark of the lawyer-client relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or detrimental subjects. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know* that almost all clients follow the advice given, and the law is upheld. Paragraph (a) thus recognizes a fundamental principle in the lawyer-client relationship, that, in the absence of the client's informed consent,* a lawyer must not reveal information protected by Business and Professions Code section 6068, subdivision (e)(1). (See, e.g., *Commercial Standard Title Co. v. Superior Court* (1979) 92 Cal.App.3d 934, 945 [155 Cal.Rptr.393].)

*Lawyer-client confidentiality encompasses the lawyer-client privilege, the work-product doctrine and ethical standards of confidentiality*

[2] The principle of lawyer-client confidentiality applies to information a lawyer acquires by virtue of the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the lawyer-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy. (See *In the Matter of Johnson* (Rev. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179; *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 621 [120 Cal.Rptr. 253].) The lawyer-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or be otherwise compelled to produce evidence concerning a client. A lawyer's ethical duty of confidentiality is not so limited in its scope of protection for the lawyer-client relationship of trust and prevents a lawyer from revealing the client's information even when not subjected to such compulsion. Thus, a lawyer may not reveal such information except with the informed consent* of the client or as authorized or required by the State Bar Act, these rules, or other law.

*Narrow exception to duty of confidentiality under this rule*

[3] Notwithstanding the important public policies promoted by lawyers adhering to the core duty of confidentiality, the overriding value of life permits disclosures otherwise prohibited by Business and Professions Code section 6068, subdivision (e)(1). Paragraph (b) is based on Business and Professions Code section 6068, subdivision (e)(2), which narrowly permits a lawyer to disclose information protected by Business and Professions Code section 6068, subdivision (e)(1) even without client consent. Evidence Code section 956.5, which relates to the evidentiary lawyer-client privilege, sets forth a similar express exception. Although a lawyer is not permitted to reveal information protected by section 6068, subdivision (e)(1) concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality and the evidentiary privilege permits disclosure to prevent a future or ongoing criminal act.

*Lawyer not subject to discipline for revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule*

[4] Paragraph (b) reflects a balancing between the interests of preserving client confidentiality and of preventing a criminal act that a lawyer reasonably believes* is likely to result in death or substantial* bodily harm to an individual. A lawyer who reveals information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted under this rule is not subject to discipline.

*No duty to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)*

[5] Neither Business and Professions Code section 6068, subdivision (e)(2) nor paragraph (b) imposes an affirmative obligation on a lawyer to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) in order to prevent harm. A lawyer may decide not to reveal such information. Whether a lawyer chooses to reveal information protected by section 6068, subdivision (e)(1) as permitted under this rule is a matter for the individual lawyer to decide, based on all the facts and circumstances, such as those discussed in Comment [6] of this rule.

*Whether to reveal information protected by Business and Professions Code section 6068, subdivision (e) as permitted under paragraph (b)*

[6] Disclosure permitted under paragraph (b) is ordinarily a last resort, when no other available action is reasonably* likely to prevent the criminal act. Prior to revealing information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by paragraph (b), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client to take steps to avoid the criminal act or threatened harm. Among the factors to be considered in determining whether to disclose information protected by section 6068, subdivision (e)(1) are the following:

(1) the amount of time that the lawyer has to make a decision about disclosure;

(2) whether the client or a third-party has made similar threats before and whether they have ever acted or attempted to act upon them;

(3) whether the lawyer believes* the lawyer's efforts to persuade the client or a third person* not to engage in the criminal conduct have or have not been successful;

(4) the extent of adverse effect to the client's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article I of the Constitution of the State of California that may result from disclosure contemplated by the lawyer;

(5) the extent of other adverse effects to the client that may result from disclosure contemplated by the lawyer; and

(6) the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

A lawyer may also consider whether the prospective harm to the victim or victims is imminent in deciding whether to disclose the information protected by section 6068, subdivision (e)(1). However, the imminence of the harm is not a prerequisite to disclosure and a lawyer may disclose the information protected by section 6068, subdivision (e)(1) without waiting until immediately before the harm is likely to occur.

*Whether to counsel client or third person* not to commit a criminal act reasonably* likely to result in death or substantial* bodily harm*

[7] Paragraph (c)(1) provides that before a lawyer may reveal information protected by Business and Professions Code section 6068, subdivision (e)(1), the lawyer must, if reasonable* under the circumstances, make a good faith effort to persuade the client not to commit or to continue the criminal act, or to persuade the client to otherwise pursue a course of conduct that will prevent the threatened death or substantial* bodily harm, including persuading the client to take action to prevent a third person* from committing or continuing a criminal act. If necessary, the client may be persuaded to do both. The interests protected by such counseling are the client's interests in limiting disclosure of information protected by section 6068, subdivision (e) and in taking responsible action to deal with situations attributable to the client. If a client, whether in response to the lawyer's counseling or otherwise, takes corrective action — such as by ceasing the client's own criminal act or by dissuading a third person* from committing or continuing a criminal act before harm is caused — the option for permissive disclosure by the lawyer would cease because the threat posed by the criminal act would no longer be present. When the actor is a nonclient or when the act is deliberate or malicious, the lawyer who contemplates making adverse disclosure of protected information may reasonably* conclude that the compelling interests of the lawyer or others in their own personal safety preclude personal contact with the actor. Before counseling an actor who is a nonclient, the lawyer should, if reasonable* under the circumstances, first advise the client of the lawyer's intended course of action. If a client or another person* has already acted but the intended harm has not yet occurred, the lawyer should consider, if reasonable* under the circumstances, efforts to persuade the client or third person* to warn the victim or consider other appropriate action to prevent the harm. Even when the lawyer has concluded that paragraph (b) does not permit the lawyer to reveal information protected by section 6068, subdivision (e)(1), the lawyer nevertheless is permitted to counsel the client as to why it may be in the client's best interest to consent to the attorney's disclosure of that information.

*Disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) must be no more than is reasonably* necessary to prevent the criminal act*

[8] Paragraph (d) requires that disclosure of information protected by Business and Professions Code section 6068, subdivision (e) as permitted by paragraph (b), when made, must be no more extensive than is necessary to prevent the criminal act. Disclosure should allow access to the information to only those persons* who the lawyer reasonably believes* can act to prevent the harm. Under some circumstances, a lawyer may determine that the best course to pursue is to make an anonymous disclosure to the potential victim or relevant law-enforcement authorities. What particular measures are reasonable* depends on the circumstances known* to the lawyer. Relevant circumstances include the time available, whether the victim might be unaware of the threat, the lawyer's prior course of dealings with the client, and the extent of the adverse effect on the client that may result from the disclosure contemplated by the lawyer.

*Informing client pursuant to paragraph (c)(2) of lawyer's ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1)*

[9] A lawyer is required to keep a client reasonably* informed about significant developments regarding the representation. (See rule 1.4; Bus. & Prof. Code, § 6068, subd. (m).) Paragraph (c)(2), however, recognizes that under certain circumstances, informing a client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) would likely increase the risk of death or substantial* bodily harm, not only to the originally-intended victims of the criminal act, but also to the client or members of the client's family, or to the lawyer or the lawyer's family or associates. Therefore, paragraph (c)(2) requires a lawyer to inform the client of the lawyer's ability or decision to reveal information protected by section 6068, subdivision (e)(1) as permitted in paragraph (b) only if it is reasonable* to do so under the circumstances. Paragraph (c)(2) further recognizes that the appropriate time for the lawyer to inform the client may vary depending upon the circumstances. (See Comment [10] of this rule.) Among the factors to be considered in determining an appropriate time, if any, to inform a client are:

(1) whether the client is an experienced user of legal services;

(2) the frequency of the lawyer's contact with the client;

(3) the nature and length of the professional relationship with the client;

(4) whether the lawyer and client have discussed the lawyer's duty of confidentiality or any exceptions to that duty;

(5) the likelihood that the client's matter will involve information within paragraph (b);

(6) the lawyer's belief,* if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial* bodily harm to, an individual; and

(7) the lawyer's belief,* if applicable, that good faith efforts to persuade a client not to act on a threat have failed.

*Avoiding a chilling effect on the lawyer-client relationship*

[10] The foregoing flexible approach to the lawyer's informing a client of his or her ability or decision to reveal information protected by Business and Professions Code section 6068, subdivision (e)(1) recognizes the concern that informing a client about limits on confidentiality may have a chilling effect on client communication. (See Comment [1].) To avoid that chilling effect, one lawyer may choose to inform the client of the lawyer's ability to reveal information protected by section 6068, subdivision (e)(1) as early as the outset of the representation, while another lawyer may choose to inform a client only at a point when that client has imparted information that comes within paragraph (b), or even choose not to inform a client until such time as the lawyer attempts to counsel the client as contemplated in Comment [7]. In each situation, the lawyer will have satisfied the lawyer's obligation under paragraph (c)(2), and will not be subject to discipline.

*Informing client that disclosure has been made; termination of the lawyer-client relationship*

[11] When a lawyer has revealed information protected by Business and Professions Code section 6068, subdivision (e) as permitted in paragraph (b), in all but extraordinary cases the relationship between lawyer and client that is based on trust and confidence will have deteriorated so as to make the lawyer's representation of the client impossible. Therefore, when the relationship has deteriorated because of the lawyer's disclosure, the lawyer is required to seek to withdraw from the representation, unless the client has given informed consent* to the lawyer's continued representation. The lawyer normally must inform the client of the fact of the lawyer's disclosure. If the lawyer has a compelling interest in not informing the client, such as to protect the lawyer, the lawyer's family or a third person* from the risk of death or substantial* bodily harm, the lawyer must withdraw from the representation. (See rule 1.16.)

*Other consequences of the lawyer's disclosure*

[12] Depending upon the circumstances of a lawyer's disclosure of information protected by Business and Professions Code section 6068, subdivision (e)(1) as permitted by this rule, there may be other important issues that a lawyer must address. For example, a lawyer who is likely to testify as a witness in a matter involving a client must comply with rule 3.7. Similarly, the lawyer must also consider his or her duties of loyalty and competence. (See rules 1.7 and 1.1.)

*Other exceptions to confidentiality under California law*

[13] This rule is not intended to augment, diminish, or preclude any other exceptions to the duty to preserve information protected by Business and Professions Code section 6068, subdivision (e)(1) recognized under California law.

## 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.*

**Comment**

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. The duty of undivided loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed written consent.* Thus, absent consent, a lawyer may not act as an advocate in one matter against a person* the lawyer represents in some other matter, even when the matters are wholly unrelated. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [36 Cal.Rptr.2d 537].) A directly adverse conflict under paragraph (a) can arise in a number of ways, for example, when: (i) a lawyer accepts representation of more than one client in a matter in which the interests of the clients actually conflict; (ii) a lawyer, while representing a client, accepts in another matter the representation of a person* who, in the first matter, is directly adverse to the lawyer's client; or (iii) a lawyer accepts representation of a person* in a matter in which an opposing party is a client of the lawyer or the lawyer's law firm.* Similarly, direct adversity can arise when a lawyer cross-examines a non-party witness who is the lawyer's client in another matter, if the examination is likely to harm or embarrass the witness. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require informed written consent* of the respective clients.

[2] Paragraphs (a) and (b) apply to all types of legal representations, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners* or a corporation for several shareholders, the preparation of a pre-nuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. If a lawyer initially represents multiple clients with the informed written consent* as required under paragraph (b), and circumstances later develop indicating that direct adversity exists between the clients, the lawyer must obtain further informed written consent* of the clients under paragraph (a).

[3] In *State Farm Mutual Automobile Insurance Company v. Federal Insurance Company* (1999) 72 Cal.App.4th 1422 [86 Cal.Rptr.2d 20], the court held that paragraph (C)(3) of predecessor rule 3-310 was violated when a lawyer, retained by an insurer to defend one suit, and while that suit was still pending, filed a direct action against the same insurer in an unrelated action without securing the insurer's consent. Notwithstanding *State Farm*, paragraph (a) does not apply with respect to the relationship

between an insurer and a lawyer when, in each matter, the insurer's interest is only as an indemnity provider and not as a direct party to the action.

[4] Even where there is no direct adversity, a conflict of interest requiring informed written consent* under paragraph (b) exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal. For example, a lawyer's obligations to two or more clients in the same matter, such as several individuals seeking to form a joint venture, may materially limit the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the other clients. The risk is that the lawyer may not be able to offer alternatives that would otherwise be available to each of the clients. The mere possibility of subsequent harm does not itself require disclosure and informed written consent.* The critical questions are the likelihood that a difference in interests exists or will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably* should be pursued on behalf of each client. The risk that the lawyer's representation may be materially limited may also arise from present or past relationships between the lawyer, or another member of the lawyer's firm*, with a party, a witness, or another person* who may be affected substantially by the resolution of the matter.

[5] Paragraph (c) requires written* disclosure of any of the specified relationships even if there is not a significant risk the relationship will materially limit the lawyer's representation of the client. However, if the particular circumstances present a significant risk the relationship will materially limit the lawyer's representation of the client, informed written consent* is required under paragraph (b).

[6] Ordinarily paragraphs (a) and (b) will not require informed written consent* simply because a lawyer takes inconsistent legal positions in different tribunals* at different times on behalf of different clients. Advocating a legal position on behalf of a client that might create precedent adverse to the interests of another client represented by a lawyer in an unrelated matter is not sufficient, standing alone, to create a conflict of interest requiring informed written consent.* Informed written consent* may be required, however, if there is a significant risk that: (i) the lawyer may temper the lawyer's advocacy on behalf of one client out of concern about creating precedent adverse to the interest of another client; or (ii) the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients' informed written consent* is required include: the courts and jurisdictions where the different cases are pending, whether a ruling in one case would have a precedential effect on the other case, whether the legal question is substantive or procedural, the temporal relationship between the matters, the significance of the legal question to the immediate and long-term interests of the clients involved, and the clients' reasonable* expectations in retaining the lawyer.

[7] Other rules and laws may preclude the disclosures necessary to obtain the informed written consent* or provide the information required to permit representation under this rule. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e)(1) and rule 1.6.) If such disclosure is precluded, representation subject to paragraph (a), (b), or (c) of this rule is likewise precluded.

[8] Paragraph (d) imposes conditions that must be satisfied even if informed written consent* is obtained as required by paragraphs (a) or (b) or the lawyer has informed the client in writing* as required by paragraph (c). There are some matters in which the conflicts are such that even informed written consent* may not suffice to permit representation. (See *Woods v. Superior Court* (1983) 149 Cal.App.3d 931 [197 Cal.Rptr. 185]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893 [142 Cal.Rptr. 509]; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520 [50 Cal.Rptr. 592].)

[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.)

[10] A material change in circumstances relevant to application of this rule may trigger a requirement to make new disclosures and, where applicable, obtain new informed written consents.* In the absence of such consents, depending on the circumstances, the lawyer may have the option to withdraw from one or more of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the clients from whose representation the lawyer has withdrawn. (See rule 1.9(c).)

[11] For special rules governing membership in a legal service organization, see rule 6.3; and for work in conjunction with certain limited legal services programs, see rule 6.5.

## Rule 1.8.1 Business Transactions with a Client and Pecuniary Interests Adverse to a Client

A lawyer shall not enter into a business transaction with a client, or knowingly* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) the transaction or acquisition and its terms are fair and reasonable* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing* to the client in a manner that should reasonably* have been understood by the client;

(b) the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing* to seek the advice of an independent lawyer of the client's choice and is given a reasonable* opportunity to seek that advice; and

(c) the client thereafter provides informed written consent* to the terms of the transaction or acquisition, and to the lawyer's role in it.

**Comment**

[1] A lawyer has an "other pecuniary interest adverse to a client" within the meaning of this rule when the lawyer possesses a legal right to significantly impair or prejudice the client's rights or interests without court action. (See *Fletcher v. Davis* (2004) 33 Cal.4th 61, 68 [14 Cal.Rptr.3d 58]; see also Bus. & Prof. Code, § 6175.3 [Sale of financial products to elder or dependent adult clients; Disclosure]; Fam. Code, §§ 2033-2034 [Attorney lien on community real property].) However, this rule does not apply to a charging lien given to secure payment of a contingency fee. (See *Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38 [108 Cal.Rptr.3d 455].)

[2] For purposes of this rule, factors that can be considered in determining whether a lawyer is independent include whether the lawyer: (i) has a financial interest in the transaction or acquisition; and (ii) has a close legal, business, financial, professional or personal relationship with the lawyer seeking the client's consent.

[3] Fairness and reasonableness under paragraph (a) are measured at the time of the transaction or acquisition based on the facts that then exist.

[4] In some circumstances, this rule may apply to a transaction entered into with a former client. (Compare *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 370-71 ["[W]hen an attorney enters into a transaction with a former client regarding a fund which resulted from the attorney's representation, it is reasonable to examine the relationship between the parties for indications of special trust resulting therefrom. We conclude that if there is evidence that the client placed his trust in the attorney because of the representation, an attorney-client relationship exists for the purposes of [the predecessor rule] even

if the representation has otherwise ended [and] It appears that [the client] became a target of [the lawyer's] solicitation because he knew, through his representation of her, that she had recently received the settlement fund [and the court also found the client to be unsophisticated].”] with *Wallis v. State Bar* (1942) 21 Cal.2d 322 [finding lawyer not subject to discipline for entering into business transaction with a former client where the former client was a sophisticated businesswoman who had actively negotiated for terms she thought desirable, and the transaction was not connected with the matter on which the lawyer previously represented her].)

[5] This rule does not apply to the agreement by which the lawyer is retained by the client, unless the agreement confers on the lawyer an ownership, possessory, security, or other pecuniary interest adverse to the client. Such an agreement is governed, in part, by rule 1.5. This rule also does not apply to an agreement to advance to or deposit with a lawyer a sum to be applied to fees, or costs or other expenses, to be incurred in the future. Such agreements are governed, in part, by rules 1.5 and 1.15.

[6] This rule does not apply: (i) where a lawyer and client each make an investment on terms offered by a third person* to the general public or a significant portion thereof; or (ii) to standard commercial transactions for products or services that a lawyer acquires from a client on the same terms that the client generally markets them to others, where the lawyer has no advantage in dealing with the client.

### Rule 1.8.2 Use of Current Client's Information

A lawyer shall not use a client's information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of the client unless the client gives informed consent,* except as permitted by these rules or the State Bar Act.

**Comment**

A lawyer violates the duty of loyalty by using information protected by Business and Professions Code section 6068, subdivision (e)(1) to the disadvantage of a current client.

### Rule 1.8.3 Gifts from Client

(a) A lawyer shall not:

(1) solicit a client to make a substantial* gift, including a testamentary gift, to the lawyer or a person* related to the lawyer, unless the lawyer or other recipient of the gift is related to the client, or

(2) prepare on behalf of a client an instrument giving the lawyer or a person* related to the lawyer any substantial* gift, unless (i) the lawyer or other recipient of the gift is related to the client, or (ii) the client has been advised by an independent lawyer who has provided a certificate of independent review that complies with the requirements of Probate Code section 21384.

(b) For purposes of this rule, related persons* include a person* who is “related by blood or affinity” as that term is defined in California Probate Code section 21374, subdivision (a).

**Comment**

[1] A lawyer or a person* related to a lawyer may accept a gift from the lawyer's client, subject to general standards of fairness and absence of undue influence. A lawyer also does not violate this rule merely by engaging in conduct that might result in a client making a gift, such as by sending the client a wedding announcement. Discipline is appropriate where impermissible influence occurs. (See *Magee v. State Bar* (1962) 58 Cal.2d 423 [24 Cal.Rptr. 839].)

[2] This rule does not prohibit a lawyer from seeking to have the lawyer or a partner* or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Such appointments, however, will be subject to rule 1.7(b) and (c).

### Rule 1.8.4 [Reserved]

### Rule 1.8.5 Payment of Personal or Business Expenses Incurred by or for a Client

(a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer

or lawyer's law firm* will pay the personal or business expenses of a prospective or existing client.

(b) Notwithstanding paragraph (a), a lawyer may:

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

(2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written* promise to repay the loan, provided the lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so;

(3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and

(4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client.

(c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client.

(d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

## Rule 1.8.6 Compensation from One Other than Client

A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless:

(a) there is no interference with the lawyer's independent professional judgment or with the lawyer-client relationship;

(b) information is protected as required by Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6; and

(c) the lawyer obtains the client's informed written consent* at or before the time the lawyer has entered into the agreement for, charged, or accepted the compensation, or as soon thereafter as reasonably* practicable, provided that no disclosure or consent is required if:

(1) nondisclosure or the compensation is otherwise authorized by law or a court order; or

(2) the lawyer is rendering legal services on behalf of any public agency or nonprofit organization that provides legal services to other public agencies or the public.

**Comment**

[1] A lawyer's responsibilities in a matter are owed only to the client except where the lawyer also represents the payor in the same matter. With respect to the lawyer's additional duties when representing both the client and the payor in the same matter, see rule 1.7.

[2] A lawyer who is exempt from disclosure and consent requirements under paragraph (c) nevertheless must comply with paragraphs (a) and (b).

[3] This rule is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has the contractual right to unilaterally select counsel for the insured, where there is no conflict of interest. (See *San Diego Navy Federal Credit Union v. Cumis Insurance Society* (1984) 162 Cal.App.3d 358 [208 Cal.Rptr. 494].).

[4] In some limited circumstances, a lawyer might not be able to obtain client consent before the lawyer has entered into an agreement for, charged, or accepted compensation, as required by this rule. This might happen, for example, when a lawyer is retained or paid by a family member on behalf of an incarcerated client or in certain commercial settings, such as when a lawyer is retained by a creditors' committee involved in a corporate debt restructuring and agrees to be compensated for any services to be provided to other similarly situated creditors who have not yet been identified. In such limited situations, paragraph (c) permits the lawyer to comply with this rule as soon thereafter as is reasonably* practicable.

[5] This rule is not intended to alter or diminish a lawyer's obligations under rule 5.4(c).

### Rule 1.8.7 Aggregate Settlements

(a) A lawyer who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregate agreement as to guilty or nolo contendere pleas, unless each client gives informed written consent.* The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person* in the settlement.

(b) This rule does not apply to class action settlements subject to court approval.

### Rule 1.8.8 Limiting Liability to Client

A lawyer shall not:

(a) Contract with a client prospectively limiting the lawyer's liability to the client for the lawyer's professional malpractice; or

(b) Settle a claim or potential claim for the lawyer's liability to a client or former client for the lawyer's professional malpractice, unless the client or former client is either:

(1) represented by an independent lawyer concerning the settlement; or

(2) advised in writing* by the lawyer to seek the advice of an independent lawyer of the client's choice regarding the settlement and given a reasonable* opportunity to seek that advice.

**Comment**

[1] Paragraph (b) does not absolve the lawyer of the obligation to comply with other law. (See, e.g., Bus. & Prof. Code, § 6090.5.)

[2] This rule does not apply to customary qualifications and limitations in legal opinions and memoranda, nor does it prevent a lawyer from reasonably* limiting the scope of the lawyer's representation. (See rule 1.2(b).)

### Rule 1.8.9 Purchasing Property at a Foreclosure or a Sale Subject to Judicial Review

(a) A lawyer shall not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which such lawyer or any lawyer affiliated by reason of personal, business, or professional relationship with that lawyer or with that lawyer's law firm* is acting as a lawyer for a party or as executor, receiver, trustee, administrator, guardian, or conservator.

(b) A lawyer shall not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is a spouse or relative of the lawyer or of another lawyer in the lawyer's law firm* or is an employee of the lawyer or the lawyer's law firm.*

(c) This rule does not prohibit a lawyer's participation in transactions that are specifically authorized by and comply with Probate Code sections 9880 through 9885, but such transactions remain subject to the provisions of rules 1.8.1 and 1.7.

**Comment**

A lawyer may lawfully participate in a transaction involving a probate proceeding which concerns a client by following the process described in Probate Code sections 9880-9885. These provisions, which permit what would otherwise be impermissible self-dealing by specific submissions to and approval by the courts, must be strictly followed in order to avoid violation of this rule.

### Rule 1.8.10 Sexual Relations with Current Client

(a) A lawyer shall not engage in sexual relations with a current client who is not the lawyer's spouse or registered domestic partner, unless a consensual sexual relationship existed between them when the lawyer-client relationship commenced.

(b) For purposes of this rule, "sexual relations" means sexual intercourse or the touching of an intimate part of another person* for the purpose of sexual arousal, gratification, or abuse.

(c) If a person* other than the client alleges a violation of this rule, no Notice of Disciplinary Charges may be filed by the State Bar against a lawyer under this rule until the State Bar has attempted to obtain the client's statement regarding, and has considered, whether the client would be unduly burdened by further investigation or a charge.

**Comment**

[1] Although this rule does not apply to a consensual sexual relationship that exists when a lawyer-client relationship commences, the lawyer nevertheless must comply with all other applicable rules. (See, e.g., rules 1.1, 1.7, and 2.1.)

[2] When the client is an organization, this rule applies to a lawyer for the organization (whether inside counsel or outside counsel) who has sexual relations with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters. (See rule 1.13.)

[3] Business and Professions Code section 6106.9, including the requirement that the complaint be verified, applies to charges under subdivision (a) of that section. This rule and the statute impose different obligations.

## Rule 1.8.11 Imputation of Prohibitions Under Rules 1.8.1 to 1.8.9

While lawyers are associated in a law firm,* a prohibition in rules 1.8.1 through 1.8.9 that applies to any one of them shall apply to all of them.

**Comment**

A prohibition on conduct by an individual lawyer in rules 1.8.1 through 1.8.9 also applies to all lawyers associated in a law firm* with the personally prohibited lawyer. For example, one lawyer in a law firm* may not enter into a business transaction with a client of another lawyer associated in the law firm* without complying with rule 1.8.1, even if the first lawyer is not personally involved in the representation of the client. This rule does not apply to rule 1.8.10 since the prohibition in that rule is personal and is not applied to associated lawyers.

## Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person* in the same or a substantially related matter in which that person's* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.*

(b) A lawyer shall not knowingly* represent a person* in the same or a substantially related matter in which a firm* with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person;* and

(2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed written consent.*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm* has formerly represented a client in a matter shall not thereafter:

(1) use information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client to the disadvantage of the former client except as these rules or the State Bar Act would permit with respect to a current client, or when the information has become generally known;* or

(2) reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 acquired by virtue of the representation of the former client except as these rules or the State Bar Act permit with respect to a current client.

**Comment**

[1] After termination of a lawyer-client relationship, the lawyer owes two duties to a former client. The lawyer may not (i) do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client, or (ii) at any

time use against the former client knowledge or information acquired by virtue of the previous relationship. (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256]; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564 [15 P.2d 505].) For example, (i) a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client and (ii) a lawyer who has prosecuted an accused person* could not represent the accused in a subsequent civil action against the government concerning the same matter. (See also Bus. & Prof. Code, § 6131; 18 U.S.C. § 207(a).) These duties exist to preserve a client's trust in the lawyer and to encourage the client's candor in communications with the lawyer.

[2] For what constitutes a "matter" for purposes of this rule, see rule 1.7(e).

[3] Two matters are "the same or substantially related" for purposes of this rule if they involve a substantial* risk of a violation of one of the two duties to a former client described above in Comment [1]. For example, this will occur: (i) if the matters involve the same transaction or legal dispute or other work performed by the lawyer for the former client; or (ii) if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

[4] Paragraph (b) addresses a lawyer's duties to a client who has become a former client because the lawyer no longer is associated with the law firm* that represents or represented the client. In that situation, the lawyer has a conflict of interest only when the lawyer involved has actual knowledge of information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm* acquired no knowledge or information relating to a particular client of the firm,* and that lawyer later joined another firm,* neither the lawyer individually nor lawyers in the second firm* would violate this rule by representing another client in the same or a related matter even though the interests of the two clients conflict. See rule 1.10(b) for the restrictions on lawyers in a firm* once a lawyer has terminated association with the firm.*

[5] The fact that information can be discovered in a public record does not, by itself, render that information generally known* under paragraph (c). (See, e.g., *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179.)

[6] With regard to the effectiveness of an advance consent, see rule 1.7, Comment [9]. With regard to imputation of conflicts to lawyers in a firm* with which a lawyer is or was formerly associated, see rule 1.10. Current and former government lawyers must comply with this rule to the extent required by rule 1.11.

### Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm,* none of them shall knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm;* or

(2) the prohibition is based upon rule 1.9(a) or (b) and arises out of the prohibited lawyer's association with a prior firm,* and

(i) the prohibited lawyer did not substantially participate in the same or a substantially related matter;

(ii) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(iii) written* notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening* procedures employed; and an agreement by the firm* to respond promptly to any written* inquiries or objections by the former client about the screening* procedures.

(b) When a lawyer has terminated an association with a firm,* the firm* is not prohibited from thereafter representing a person* with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm,* unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm* has information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter.

(c) A prohibition under this rule may be waived by each affected client under the conditions stated in rule 1.7.

(d) The imputation of a conflict of interest to lawyers associated in a firm* with former or current government lawyers is governed by rule 1.11.

**Comment**

[1] In determining whether a prohibited lawyer's previously participation was substantial,* a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

[2] Paragraph (a) does not prohibit representation by others in the law firm* where the person* prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person* became a lawyer, for example, work that the person* did as a law student. Such persons,* however, ordinarily must be screened* from any personal participation in the matter. (See rules 1.0.1(k) and 5.3.)

[3] Paragraph (a)(2)(ii) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[4] Where a lawyer is prohibited from engaging in certain transactions under rules 1.8.1 through 1.8.9, rule 1.8.11, and not this rule, determines whether that prohibition also applies to other lawyers associated in a firm* with the personally prohibited lawyer.

[5] The responsibilities of managerial and supervisory lawyers prescribed by rules 5.1 and 5.3 apply to screening* arrangements implemented under this rule.

[6] Standards for disqualification, and whether in a particular matter (1) a lawyer's conflict will be imputed to other lawyers in the same firm,* or (2) the use of a timely screen* is effective to avoid that imputation, are also the subject of statutes and case law. (See, e.g., Code Civ. Proc., § 128, subd. (a)(5); Pen. Code, § 1424; *In re Charlisse* C. (2008) 45 Cal.4th 145 [84 Cal.Rptr.3d 597]; *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 [45 Cal.Rptr.3d 464]; *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776 [108 Cal.Rptr.3d 620].)

## Rule 1.11 Special Conflicts of Interest for Former and Current Government Officials and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public official or employee of the government:

(1) is subject to rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public official or employee, unless the appropriate government agency gives its informed written consent* to the representation. This paragraph shall not apply to matters governed by rule 1.12(a).

(b) When a lawyer is prohibited from representation under paragraph (a), no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter unless:

(1) the personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written* notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule

(c) Except as law may otherwise expressly permit, a lawyer who was a public official or employee and, during that employment, acquired information that the lawyer knows* is confidential government information about a person,* may not represent a private client whose interests are adverse to that person* in a matter in which the information could be used to the material disadvantage of that person.* As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority, that, at the time this rule is applied, the government is prohibited by law from disclosing to the public, or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm* with which that lawyer is associated may undertake or continue representation in the matter only if the personally prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee:

(1) is subject to rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent;* or

(ii) negotiate for private employment with any person* who is involved as a party, or as a lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by rule 1.12(b) and subject to the conditions stated in rule 1.12(b).

**Comment**

[1] Rule 1.10 is not applicable to the conflicts of interest addressed by this rule.

[2] For what constitutes a "matter" for purposes of this rule, see rule 1.7(e).

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client. Both provisions apply when the former public official or employee of the government has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation. Substantial* participation requires that the lawyer's involvement be of significance to the matter. Participation may be substantial* even though it is not determinative of the outcome of a particular matter. However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial* participation may occur when, for example, a lawyer participates through decision, approval, disapproval, recommendation, investigation or the rendering of advice in a particular matter.

[4] By requiring a former government lawyer to comply with rule 1.9(c), paragraph (a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client. This provision applies regardless of whether the lawyer was working in a "legal" capacity. Thus, information learned by the lawyer while in public service in an administrative, policy, or advisory position also is covered by paragraph (a)(1).

[5] Paragraph (c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

[6] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of

this rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. Because conflicts of interest are governed by paragraphs (a) and (b), the latter agency is required to screen* the lawyer. Whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. (See rule 1.13, Comment [6]; see also *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70, 76-78 [209 Cal.Rptr. 159].)

[7] Paragraphs (b) and (c) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is personally prohibited from participating.

[8] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 1.7 and is not otherwise prohibited by law.

[9] A lawyer serving as a public official or employee of the government may participate in a matter in which the lawyer participated substantially while in private practice or non-governmental employment only if: (i) the government agency gives its informed written consent* as required by paragraph (d)(2)(i); and (ii) the former client gives its informed written consent* as required by rule 1.9, to which the lawyer is subject by paragraph (d)(1).

[10] This rule is not intended to address whether in a particular matter: (i) a lawyer's conflict under paragraph (d) will be imputed to other lawyers serving in the same governmental agency; or (ii) the use of a timely screen* will avoid that imputation. The imputation and screening* rules for lawyers moving from private practice into government service under paragraph (d) are left to be addressed by case law and its development. (See *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 847, 851-54 [43 Cal.Rptr.3d 776]; *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 26-27 [18 Cal.Rptr.3d 403].) Regarding the standards for recusals of prosecutors in criminal matters, see Penal Code section 1424; *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 706, 711-20 [76 Cal.Rptr.3d 250]; and *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727-35 [76 Cal.Rptr.3d 264]. Concerning prohibitions against former prosecutors participating in matters in which they served or participated in as prosecutor, see, e.g., Business and Professions Code section 6131 and 18 United States Code section 207(a).

## Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, judicial staff attorney or law clerk to such a person* or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give informed written consent.*

(b) A lawyer shall not seek employment from any person* who is involved as a party or as lawyer for a party, or with a law firm* for a party, in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third party neutral. A lawyer serving as a judicial staff attorney or law clerk to a judge or other adjudicative officer may seek employment from a party, or with a lawyer or a law firm* for a party, in a matter in which the staff attorney or clerk is participating personally and substantially, but only with the approval of the court.

(c) If a lawyer is prohibited from representation by paragraph (a), other lawyers in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in the matter only if:

(1) the prohibition does not arise from the lawyer's service as a mediator or settlement judge;

(2) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written* notice is promptly given to the parties and any appropriate tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

**Comment**

[1] Paragraphs (a) and (b) apply when a former judge or other adjudicative officer, or a judicial staff attorney or law clerk to such a person,* or an arbitrator, mediator, or other third-party neutral, has personally and substantially participated in the matter. Personal participation includes both direct participation and the supervision of a subordinate's participation, as may occur in a chambers with several staff attorneys or law clerks. Substantial* participation requires that the lawyer's involvement was of significance to the matter. Participation may be substantial* even though it was not determinative of the outcome of a particular case or matter. A finding of substantiality should be based not only on the effort devoted to the matter, but also on the importance of the effort. Personal and substantial* participation may occur when, for example, the lawyer participated through decision, recommendation, or the rendering of advice on a particular case or matter. However, a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate, or acquire material confidential information. The fact that a former judge exercised administrative responsibility in a court also does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits, such as uncontested procedural duties typically performed by a presiding or supervising judge or justice. The term "adjudicative officer" includes such officials as judges pro tempore, referees, and special masters.

[2] Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. (See rule 2.4.)

[3] Paragraph (c)(2) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is personally prohibited from participating.

## Rule 1.13 Organization as Client

(a) A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.

(b) If a lawyer representing an organization knows* that a constituent is acting, intends to act or refuses to act in a matter related to the representation in a manner that the lawyer knows* or reasonably should know* is (i) a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization, the lawyer shall proceed as is reasonably* necessary in the best lawful interest of the organization. Unless the lawyer reasonably believes* that it is not necessary in the best lawful interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) In taking any action pursuant to paragraph (b), the lawyer shall not reveal information protected by Business and Professions Code section 6068, subdivision (e).

(d) If, despite the lawyer's actions in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or fails to act, in a manner that is a violation of a legal obligation to the organization or a violation of law reasonably* imputable to the organization, and is likely to result in substantial* injury to the organization, the lawyer shall continue to proceed as is reasonably* necessary in the best lawful interests of the organization. The lawyer's response may include the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rule 1.16.

(e) A lawyer who reasonably believes* that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b), or who resigns or withdraws under circumstances described in paragraph (d), shall proceed as the lawyer reasonably believes* necessary to assure that the organization's highest authority is informed of the lawyer's discharge, resignation, or withdrawal.

(f) In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer

knows* or reasonably should know* that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its constituents, subject to the provisions of rules 1.7, 1.8.2, 1.8.6, and 1.8.7. If the organization's consent to the dual representation is required by any of these rules, the consent shall be given by an appropriate official, constituent, or body of the organization other than the individual who is to be represented, or by the shareholders.

**Comment**

*The Entity as the Client*

[1] This rule applies to all forms of private, public and governmental organizations. (See Comment [6].) An organizational client can only act through individuals who are authorized to conduct its affairs. The identity of an organization's constituents will depend on its form, structure, and chosen terminology. For example, in the case of a corporation, constituents include officers, directors, employees and shareholders. In the case of other organizational forms, constituents include the equivalents of officers, directors, employees, and shareholders. For purposes of this rule, any agent or fiduciary authorized to act on behalf of an organization is a constituent of the organization.

[2] A lawyer ordinarily must accept decisions an organization's constituents make on behalf of the organization, even if the lawyer questions their utility or prudence. It is not within the lawyer's province to make decisions on behalf of the organization concerning policy and operations, including ones entailing serious risk. A lawyer, however, has a duty to inform the client of significant developments related to the representation under Business and Professions Code section 6068, subdivision (m) and rule 1.4. Even when a lawyer is not obligated to proceed in accordance with paragraph (b), the lawyer may refer to higher authority, including the organization's highest authority, matters that the lawyer reasonably believes* are sufficiently important to refer in the best interest of the organization subject to Business and Professions Code section 6068, subdivision (e) and rule 1.6.

[3] Paragraph (b) distinguishes between knowledge of the conduct and knowledge of the consequences of that conduct. When a lawyer knows* of the conduct, the lawyer's obligations under paragraph (b) are triggered when the lawyer knows* or reasonably should know* that the conduct is (i) a violation of a legal obligation to the organization, or a violation of law reasonably* imputable to the organization, and (ii) likely to result in substantial* injury to the organization.

[4] In determining how to proceed under paragraph (b), the lawyer should consider the seriousness of the violation and its potential consequences, the responsibility in the organization and the apparent motivation of the person* involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, the lawyer may ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably* conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. For the responsibility of a subordinate lawyer in representing an organization, see rule 5.2.

[5] In determining how to proceed in the best lawful interests of the organization, a lawyer should consider the extent to which the organization should be informed of the circumstances, the actions taken by the organization with respect to the matter and the direction the lawyer has received from the organizational client.

*Governmental Organizations*

[6] It is beyond the scope of this rule to define precisely the identity of the client and the lawyer's obligations when representing a governmental agency. Although in some circumstances the client may be a specific agency, it may also be a branch of government or the government as a whole. In a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more

extensively than that of a lawyer for a private organization in similar circumstances. Duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. In addition, a governmental organization may establish internal organizational rules and procedures that identify an official, agency, organization, or other person* to serve as the designated recipient of whistle-blower reports from the organization's lawyers, consistent with Business and Professions Code section 6068, subdivision (e) and rule 1.6. This rule is not intended to limit that authority.

### Rule 1.14 [Reserved]

### Rule 1.15 Safekeeping Funds and Property of Clients and Other Persons*

(a) All funds received or held by a lawyer or law firm* for the benefit of a client, or other person* to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account" or words of similar import, maintained in the State of California, or, with written* consent of the client, in any other jurisdiction where there is a substantial* relationship between the client or the client's business and the other jurisdiction.

(b) Notwithstanding paragraph (a), a flat fee paid in advance for legal services may be deposited in a lawyer's or law firm's operating account, provided:

(1) the lawyer or law firm* discloses to the client in writing* (i) that the client has a right under paragraph (a) to require that the flat fee be deposited in an identified trust account until the fee is earned, and (ii) that the client is entitled to a refund of any amount of the fee that has not been earned in the event the representation is terminated or the services for which the fee has been paid are not completed; and

(2) if the flat fee exceeds $1,000.00, the client's agreement to deposit the flat fee in the lawyer's operating account and the disclosures required by paragraph (b)(1) are set forth in a writing* signed by the client.

(c) Funds belonging to the lawyer or the law firm* shall not be deposited or otherwise commingled with funds held in a trust account except:

(1) funds reasonably* sufficient to pay bank charges; and

(2) funds belonging in part to a client or other person* and in part presently or potentially to the lawyer or the law firm,* in which case the portion belonging to the lawyer or law firm* must be withdrawn at the earliest reasonable* time after the lawyer or law firm's interest in that portion becomes fixed. However, if a client or other person* disputes the lawyer or law firm's right to receive a portion of trust funds, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(d) A lawyer shall:

(1) promptly notify a client or other person* of the receipt of funds, securities, or other property in which the lawyer knows* or reasonably should know* the client or other person* has an interest;

(2) identify and label securities and properties of a client or other person* promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other property of a client or other person* coming into the possession of the lawyer or law firm;*

(4) promptly account in writing* to the client or other person* for whom the lawyer holds funds or property;

(5) preserve records of all funds and property held by a lawyer or law firm* under this rule for a period of no less than five years after final appropriate distribution of such funds or property;

(6) comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar; and

(7) promptly distribute, as requested by the client or other person,* any undisputed funds or

property in the possession of the lawyer or law firm* that the client or other person* is entitled to receive.

(e) The Board of Trustees of the State Bar shall have the authority to formulate and adopt standards as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(3). The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

*Standards:*

Pursuant to this rule, the Board of Trustees of the State Bar adopted the following standards, effective November 1, 2018, as to what "records" shall be maintained by lawyers and law firms* in accordance with paragraph (d)(3).

(1) A lawyer shall, from the date of receipt of funds of the client or other person* through the period ending five years from the date of appropriate disbursement of such funds, maintain:

(a) a written* ledger for each client or other person* on whose behalf funds are held that sets forth:

(i) the name of such client or other person;*

(ii) the date, amount and source of all funds received on behalf of such client or other person;*

(iii) the date, amount, payee and purpose of each disbursement made on behalf of such client or other person;* and

(iv) the current balance for such client or other person;*

(b) a written* journal for each bank account that sets forth:

(i) the name of such account;

(ii) the date, amount and client or other person* affected by each debit and credit; and

(iii) the current balance in such account;

(c) all bank statements and cancelled checks for each bank account; and

(d) each monthly reconciliation (balancing) of (a), (b), and (c).

(2) A lawyer shall, from the date of receipt of all securities and other properties held for the benefit of client or other person* through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintain a written* journal that specifies:

(a) each item of security and property held;

(b) the person* on whose behalf the security or property is held;

(c) the date of receipt of the security or property;

(d) the date of distribution of the security or property; and

(e) person* to whom the security or property was distributed.

**Comment**

[1] Whether a lawyer owes a contractual, statutory or other legal duty under paragraph (a) to hold funds on behalf of a person* other than a client in situations where client funds are subject to a third-party lien will depend on the relationship between the lawyer and the third-party, whether the lawyer has assumed a contractual obligation to the third person* and whether the lawyer has an independent obligation to honor the lien under a statute or other law. In certain circumstances, a lawyer may be civilly liable when the lawyer has notice of a lien and disburses funds in contravention of the lien. (See *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302 [54 Cal.Rptr.2d 665].) However, civil liability by itself does not establish a violation of this rule. (Compare *Johnstone v. State Bar of California* (1966) 64 Cal.2d 153, 155-156 [49 Cal.Rptr. 97] ["'When an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the

relationship had been that of attorney and client, he may properly be disciplined for his misconduct.'"] with *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358 [90 Cal.Rptr. 600] [lawyer who agrees to act as escrow or stakeholder for a client and a third-party owes a duty to the nonclient with regard to held funds].)

[2] As used in this rule, "advances for fees" means a payment intended by the client as an advance payment for some or all of the services that the lawyer is expected to perform on the client's behalf. With respect to the difference between a true retainer and a flat fee, which is one type of advance fee, see rule 1.5(d) and (e). Subject to rule 1.5, a lawyer or law firm* may enter into an agreement that defines when or how an advance fee is earned and may be withdrawn from the client trust account.

[3] Absent written* disclosure and the client's agreement in a writing* signed by the client as provided in paragraph (b), a lawyer must deposit a flat fee paid in advance of legal services in the lawyer's trust account. Paragraph (b) does not apply to advance payment for costs and expenses. Paragraph (b) does not alter the lawyer's obligations under paragraph (d) or the lawyer's burden to establish that the fee has been earned.

### Rule 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the lawyer knows* or reasonably should know* that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;*

(2) the lawyer knows* or reasonably should know* that the representation will result in violation of these rules or of the State Bar Act;

(3) the lawyer's mental or physical condition renders it unreasonably difficult to carry out the representation effectively; or

(4) the client discharges the lawyer.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) the client insists upon presenting a claim or defense in litigation, or asserting a position or making a demand in a non-litigation matter, that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the client either seeks to pursue a criminal or fraudulent* course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes* was a crime or fraud;*

(3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent;*

(4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;

(5) the client breaches a material term of an agreement with, or obligation, to the lawyer relating to the representation, and the lawyer has given the client a reasonable* warning after the breach that the lawyer will withdraw unless the client fulfills the agreement or performs the obligation;

(6) the client knowingly* and freely assents to termination of the representation;

(7) the inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(8) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively;

(9) a continuation of the representation is likely to result in a violation of these rules or the State Bar Act; or

(10) the lawyer believes* in good faith, in a proceeding pending before a tribunal,* that the tribunal* will find the existence of other good cause for withdrawal.

(c) If permission for termination of a representation is required by the rules of a tribunal,* a lawyer shall

not terminate a representation before that tribunal* without its permission.

(d) A lawyer shall not terminate a representation until the lawyer has taken reasonable* steps to avoid reasonably* foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

(e) Upon the termination of a representation for any reason:

(1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not; and

(2) the lawyer promptly shall refund any part of a fee or expense paid in advance that the lawyer has not earned or incurred. This provision is not applicable to a true retainer fee paid solely for the purpose of ensuring the availability of the lawyer for the matter.

**Comment**

[1] This rule applies, without limitation, to a sale of a law practice under rule 1.17. A lawyer can be subject to discipline for improperly threatening to terminate a representation. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837.)

[2] When a lawyer withdraws from the representation of a client in a particular matter under paragraph (a) or (b), the lawyer might not be obligated to withdraw from the representation of the same client in other matters. For example, a lawyer might be obligated under paragraph (a)(1) to withdraw from representing a client because the lawyer has a conflict of interest under rule 1.7, but that conflict might not arise in other representations of the client.

[3] Withdrawal under paragraph (a)(1) is not mandated where a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, defends the proceeding by requiring that every element of the case be established. (See rule 3.1(b).)

[4] Lawyers must comply with their obligations to their clients under Business and Professions Code section 6068, subdivision (e) and rule 1.6, and to the courts under rule 3.3 when seeking permission to withdraw under paragraph (c). If a tribunal* denies a lawyer permission to withdraw, the lawyer is obligated to comply with the tribunal's* order. (See Bus. & Prof. Code, §§ 6068, subd. (b) and 6103.) This duty applies even if the lawyer sought permission to withdraw because of a conflict of interest. Regarding withdrawal from limited scope representations that involve court appearances, compliance with applicable California Rules of Court concerning limited scope representation satisfies paragraph (c).

[5] Statutes may prohibit a lawyer from releasing information in the client materials and property under certain circumstances. (See, e.g., Pen. Code, §§ 1054.2 and 1054.10.) A lawyer in certain criminal matters may be required to retain a copy of a former client's file for the term of his or her imprisonment. (See, Pen. Code, § 1054.9.)

[6] Paragraph (e)(1) does not prohibit a lawyer from making, at the lawyer's own expense, and retaining copies of papers released to the client, or to prohibit a claim for the recovery of the lawyer's expense in any subsequent legal proceeding.

[***Publisher's Note:*** *Comment [5] was amended by order of the Supreme Court, effective June 1, 2020.*]

## Rule 1.17 Sale of a Law Practice

All or substantially* all of the law practice of a lawyer, living or deceased, including goodwill, may be sold to another lawyer or law firm* subject to all the following conditions:

(a) Fees charged to clients shall not be increased solely by reason of the sale.

(b) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e)(1), then;

(1) if the seller is deceased, or has a conservator or other person* acting in a representative capacity, and no lawyer has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer;

(i) the purchaser shall cause a written* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the purchaser shall obtain the written* consent of the client. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(1)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.

(2) in all other circumstances, not less than 90 days prior to the transfer;

(i) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written* notice to be given to each client whose matter is included in the sale, stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client materials and property, as required by rule 1.16(e)(1); and that if no response is received to the notice within 90 days after it is sent, or if the client's rights would be prejudiced by a failure of the purchaser to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client, and

(ii) the seller, or the lawyer appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written* consent of the client prior to the transfer. If reasonable* efforts have been made to locate the client and no response to the paragraph (b)(2)(i) notice is received within 90 days, consent shall be presumed until otherwise notified by the client.

(c) If substitution is required by the rules of a tribunal* in which a matter is pending, all steps necessary to substitute a lawyer shall be taken.

(d) The purchaser shall comply with the applicable requirements of rules 1.7 and 1.9.

(e) Confidential information shall not be disclosed to a nonlawyer in connection with a sale under this rule.

(f) This rule does not apply to the admission to or retirement from a law firm,* retirement plans and similar arrangements, or sale of tangible assets of a law practice.

**Comment**

[1] The requirement that the sale be of "all or substantially* all of the law practice of a lawyer" prohibits the sale of only a field or area of practice or the seller's practice in a geographical area or in a particular jurisdiction. The prohibition against the sale of less than all or substantially* all of a practice protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial* fee-generating matters. The purchasers are required to undertake all client matters sold in the transaction, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[2] Under paragraph (a), the purchaser must honor existing arrangements between the seller and the client as to fees and scope of work and the sale may not be financed by increasing fees charged for client matters transferred through the sale. However, fee increases or other changes to the fee arrangements might be justified by other factors, such as modifications of the purchaser's responsibilities, the passage of time, or reasonable* costs that were not

addressed in the original agreement. Any such modifications must comply with rules 1.4 and 1.5 and other relevant provisions of these rules and the State Bar Act.

[3] Transfer of individual client matters, where permitted, is governed by rule 1.5.1. Payment of a fee to a nonlawyer broker for arranging the sale or purchase of a law practice is governed by rule 5.4(a).

### Rule 1.18 Duties to Prospective Client

(a) A person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from the lawyer in the lawyer's professional capacity, is a prospective client.

(b) Even when no lawyer-client relationship ensues, a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received from the prospective client information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that is material to the matter, except as provided in paragraph (d). If a lawyer is prohibited from representation under this paragraph, no lawyer in a firm* with which that lawyer is associated may knowingly* undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received information that prohibits representation as provided in paragraph (c), representation of the affected client is permissible if:

(1) both the affected client and the prospective client have given informed written consent,* or

(2) the lawyer who received the information took reasonable* measures to avoid exposure to more information than was reasonably* necessary to determine whether to represent the prospective client; and

(i) the prohibited lawyer is timely screened* from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written* notice is promptly given to the prospective client to enable the prospective client to ascertain compliance with the provisions of this rule.

**Comment**

[1] As used in this rule, a prospective client includes a person's* authorized representative. A lawyer's discussions with a prospective client can be limited in time and depth and leave both the prospective client and the lawyer free, and sometimes required, to proceed no further. Although a prospective client's information is protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 the same as that of a client, in limited circumstances provided under paragraph (d), a law firm* is permitted to accept or continue representation of a client with interests adverse to the prospective client. This rule is not intended to limit the application of Evidence Code section 951 (defining "client" within the meaning of the Evidence Code).

[2] Not all persons* who communicate information to a lawyer are entitled to protection under this rule. A person* who by any means communicates information unilaterally to a lawyer, without reasonable* expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship or provide legal advice is not a "prospective client" within the meaning of paragraph (a). In addition, a person* who discloses information to a lawyer after the lawyer has stated his or her unwillingness or inability to consult with the person* (*People v. Gionis* (1995) 9 Cal.4th 1196 [40 Cal.Rptr.2d 456]), or who communicates information to a lawyer without a good faith intention to seek legal advice or representation, is not a prospective client within the meaning of paragraph (a).

[3] In order to avoid acquiring information from a prospective client that would prohibit representation as provided in paragraph (c), a lawyer considering whether or not to undertake a new matter must limit the initial interview to only such information as reasonably* appears necessary for that purpose.

[4] Under paragraph (c), the prohibition in this rule is imputed to other lawyers in a law firm* as provided

in rule 1.10. However, under paragraph (d)(1), the consequences of imputation may be avoided if the informed written consent* of both the prospective and affected clients is obtained. (See rule 1.0.1(e-1) [informed written consent].) In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all prohibited lawyers are timely screened* and written* notice is promptly given to the prospective client. Paragraph (d)(2)(i) does not prohibit the screened* lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is prohibited.

[5] Notice under paragraph (d)(2)(ii) must include a general description of the subject matter about which the lawyer was consulted, and the screening* procedures employed.

## CHAPTER 2. COUNSELOR

### Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

**Comment**

[1] A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

[2] This rule does not preclude a lawyer who renders advice from referring to considerations other than the law, such as moral, economic, social and political factors that may be relevant to the client's situation.

### Rule 2.2 [Reserved]

### Rule 2.3 [Reserved]

### Rule 2.4 Lawyer as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons* who are not clients of the lawyer to reach a resolution of a dispute, or other matter, that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows* or reasonably should know* that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

**Comment**

[1] In serving as a third-party neutral, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer neutrals may also be subject to various codes of ethics, such as the Judicial Council Standards for Mediators in Court Connected Mediation Programs or the Judicial Council Ethics Standards for Neutral Arbitrators in Contractual Arbitration.

[2] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm* are addressed in rule 1.12.

[3] This rule is not intended to apply to temporary judges, referees or court-appointed arbitrators. (See rule 2.4.1.)

### Rule 2.4.1 Lawyer as Temporary Judge, Referee, or Court-Appointed Arbitrator

A lawyer who is serving as a temporary judge, referee, or court-appointed arbitrator, and is subject to canon 6D of the California Code of Judicial Ethics, shall comply with the terms of that canon.

**Comment**

[1] This rule is intended to permit the State Bar to discipline lawyers who violate applicable portions of the California Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court.

[2] This rule is not intended to apply to a lawyer serving as a third-party neutral in a mediation or a settlement conference, or as a neutral arbitrator pursuant to an arbitration agreement. (See rule 2.4.)

## CHAPTER 3. ADVOCATE

### Rule 3.1 Meritorious Claims and Contentions

(a) A lawyer shall not:

(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;* or

(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

### Rule 3.2 Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial* purpose other than to delay or prolong the proceeding or to cause needless expense.

**Comment**

See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence and rule 3.1(b) with respect to a lawyer's representation of a defendant in a criminal proceeding. See also Business and Professions Code section 6128, subdivision (b).

### Rule 3.3 Candor Toward the Tribunal*

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client.

**Comment**

[1] This rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's* authority. See rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

*Legal Argument*

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16. (See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33].) The obligations of a lawyer under these rules and the State Bar Act are subordinate to applicable constitutional provisions.

*Remedial Measures*

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* (See, e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

*Duration of Obligation*

[6] A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).)

*Ex Parte Communications*

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.*

*Withdrawal*

[8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules. A lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068, subdivision (d) and 6106.

## Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person* to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) expenses reasonably* incurred by a witness in attending or testifying;

(2) reasonable* compensation to a witness for loss of time in attending or testifying; or

(3) a reasonable* fee for the professional services of an expert witness;

(e) advise or directly or indirectly cause a person* to secrete himself or herself or to leave the jurisdiction of a tribunal* for the purpose of making that person* unavailable as a witness therein;

(f) knowingly* disobey an obligation under the rules of a tribunal* except for an open refusal based on an assertion that no valid obligation exists; or

(g) in trial, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the guilt or innocence of an accused.

**Comment**

[1] Paragraph (a) applies to evidentiary material generally, including computerized information. It is a criminal offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. (See, e.g., Pen. Code, § 135; 18 U.S.C. §§ 1501-1520.) Falsifying evidence is also generally a criminal offense. (See, e.g., Pen. Code, § 132; 18 U.S.C. § 1519.) Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. Applicable law may require a lawyer to turn evidence over to the police or other prosecuting authorities, depending on the circumstances. (See *People v. Lee* (1970) 3 Cal.App.3d 514, 526 [83 Cal.Rptr. 715]; *People v. Meredith* (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].)

[2] A violation of a civil or criminal discovery rule or statute does not by itself establish a violation of this rule. See rule 3.8 for special disclosure responsibilities of a prosecutor.

## Rule 3.5 Contact with Judges, Officials, Employees, and Jurors

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

(c) As used in this rule, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(l) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

**Comment**

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

## Rule 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows* or reasonably should know* will (i) be disseminated by means of public communication and (ii) have a substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), but only to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6, lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons* involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person* involved, when there is reason to believe* that there exists the likelihood of substantial* harm to an individual or to the public but only to the extent that dissemination by public communication is reasonably* necessary to protect the individual or the public; and

(7) in a criminal case, in addition to paragraphs (b)(1) through (6):

(i) the identity, general area of residence, and occupation of the accused;

(ii) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;*

(iii) the fact, time, and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable* lawyer would believe* is required to protect a client from the substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a law firm* or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

**Comment**

[1] Whether an extrajudicial statement violates this rule depends on many factors, including: (i) whether the extrajudicial statement presents information clearly inadmissible as evidence in the matter for the purpose of proving or disproving a material fact in issue; (ii) whether the extrajudicial statement presents information the lawyer knows* is false, deceptive, or the use of which would violate Business and Professions Code section 6068, subdivision (d) or rule 3.3; (iii) whether the extrajudicial statement violates a lawful "gag" order, or protective order, statute, rule of court, or special rule of confidentiality, for example, in juvenile, domestic, mental disability, and certain criminal proceedings, (see Bus. & Prof. Code, § 6068, subd. (a) and rule 3.4(f), which require compliance with such obligations); and (iv) the timing of the statement.

[2] This rule applies to prosecutors and criminal defense counsel. See rule 3.8(e) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

## Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate in a trial in which the lawyer is likely to be a witness unless:

(1) the lawyer's testimony relates to an uncontested issue or matter;

(2) the lawyer's testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer has obtained informed written consent* from the client. If the lawyer represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the lawyer is employed.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm* is likely to be called as a witness unless precluded from doing so by rule 1.7 or rule 1.9.

**Comment**

[1] This rule applies to a trial before a jury, judge, administrative law judge or arbitrator. This rule does not apply to other adversarial proceedings. This rule also does not apply in non-adversarial proceedings, as where a lawyer testifies on behalf of a client in a hearing before a legislative body.

[2] A lawyer's obligation to obtain informed written consent* may be satisfied when the lawyer makes the required disclosure, and the client gives informed consent* on the record in court before a licensed court reporter or court recorder who prepares a transcript or recording of the disclosure and consent. See definition of "written" in rule 1.0.1(n).

[3] Notwithstanding a client's informed written consent,* courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from being prejudiced. (See, e.g., *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470 [175 Cal.Rptr. 918].)

## Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows* is not supported by probable cause;

(b) make reasonable* efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable* opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal* has approved the appearance of the accused in propria persona;

(d) make timely disclosure to the defense of all evidence or information known* to the prosecutor that the prosecutor knows* or reasonably should know* tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;* and

(e) exercise reasonable* care to prevent persons* under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons* assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6.

(f) When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(g) When a prosecutor knows* of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

**Comment**

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.* This rule is intended to achieve those results. All lawyers in government service remain bound by rules 3.1 and 3.4.

[2] Paragraph (c) does not forbid the lawful questioning of an uncharged suspect who has knowingly* waived the right to counsel and the right to remain silent. Paragraph (c) also does not forbid prosecutors from seeking from an unrepresented accused a reasonable* waiver of time for initial appearance or preliminary hearing as a means of

facilitating the accused's voluntary cooperation in an ongoing law enforcement investigation.

[3] The disclosure obligations in paragraph (d) are not limited to evidence or information that is material as defined by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] and its progeny. For example, these obligations include, at a minimum, the duty to disclose impeachment evidence or information that a prosecutor knows* or reasonably should know* casts significant doubt on the accuracy or admissibility of witness testimony on which the prosecution intends to rely. Paragraph (d) does not require disclosure of information protected from disclosure by federal or California laws and rules, as interpreted by case law or court orders. Nothing in this rule is intended to be applied in a manner inconsistent with statutory and constitutional provisions governing discovery in California courts. A disclosure's timeliness will vary with the circumstances, and paragraph (d) is not intended to impose timing requirements different from those established by statutes, procedural rules, court orders, and case law interpreting those authorities and the California and federal constitutions.

[4] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal* if disclosure of information to the defense could result in substantial* harm to an individual or to the public interest.

[5] Paragraph (e) supplements rule 3.6, which prohibits extrajudicial statements that have a substantial* likelihood of prejudicing an adjudicatory proceeding. Paragraph (e) is not intended to restrict the statements which a prosecutor may make which comply with rule 3.6(b) or 3.6(c).

[6] Prosecutors have a duty to supervise the work of subordinate lawyers and nonlawyer employees or agents. (See rules 5.1 and 5.3.) Ordinarily, the reasonable* care standard of paragraph (e) will be satisfied if the prosecutor issues the appropriate cautions to law enforcement personnel and other relevant individuals.

[7] When a prosecutor knows* of new, credible and material evidence creating a reasonable* likelihood that a person* outside the prosecutor's jurisdiction was convicted of a crime that the person* did not commit, paragraph (f) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (f) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable* efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. (See rule 4.2.) Statutes may require a prosecutor to preserve certain types of evidence in criminal matters. (See Pen. Code, §§ 1417.1-1417.9.) In addition, prosecutors must obey file preservation orders concerning rights of discovery guaranteed by the Constitution and statutory provisions. (See *People v. Superior Court (Morales)* (2017) 2 Cal.5th 523 [213 Cal.Rptr.3d 581]; *Shorts v. Superior Court* (2018) 24 Cal.App.5th 709 [234 Cal.Rptr.3d 392].)

[8] Under paragraph (g), once the prosecutor knows* of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Depending upon the circumstances, steps to remedy the conviction could include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[9] A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of paragraphs (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

[***Publisher's Note:*** *Comment [7] was amended by order of the Supreme Court, effective June 1, 2020.*]

## Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

**Comment**

This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.

### Rule 3.10 Threatening Criminal, Administrative, or Disciplinary Charges

(a) A lawyer shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.

(b) As used in paragraph (a) of this rule, the term "administrative charges" means the filing or lodging of a complaint with any governmental organization that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature but does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action.

(c) As used in this rule, the term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more persons* under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before a federal, state, or local governmental entity.

**Comment**

[1] Paragraph (a) does not prohibit a statement by a lawyer that the lawyer will present criminal, administrative, or disciplinary charges, unless the statement is made to obtain an advantage in a civil dispute. For example, if a lawyer believes* in good faith that the conduct of the opposing lawyer or party violates criminal or other laws, the lawyer may state that if the conduct continues the lawyer will report it to criminal or administrative authorities. On the other hand, a lawyer could not state or imply that a criminal or administrative action will be pursued unless the opposing party agrees to settle the civil dispute.

[2] This rule does not apply to a threat to bring a civil action. It also does not prohibit actually presenting criminal, administrative or disciplinary charges, even if doing so creates an advantage in a civil dispute. Whether a lawyer's statement violates this rule depends on the specific facts. (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [177 Cal.Rptr. 670].) A statement that the lawyer will pursue "all available legal remedies," or words of similar import, does not by itself violate this rule.

[3] This rule does not apply to: (i) a threat to initiate contempt proceedings for a failure to comply with a court order; or (ii) the offer of a civil compromise in accordance with a statute such as Penal Code sections 1377 and 1378.

[4] This rule does not prohibit a government lawyer from offering a global settlement or release-dismissal agreement in connection with related criminal, civil or administrative matters. The government lawyer must have probable cause for initiating or continuing criminal charges. (See rule 3.8(a).)

[5] As used in paragraph (b), "governmental organizations" includes any federal, state, local, and foreign governmental organizations. Paragraph (b) exempts the threat of filing an administrative charge that is a prerequisite to filing a civil complaint on the same transaction or occurrence.

## CHAPTER 4.
## TRANSACTIONS WITH PERSONS* OTHER THAN CLIENTS

### Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:*

(a) make a false statement of material fact or law to a third person;* or

(b) fail to disclose a material fact to a third person* when disclosure is necessary to avoid assisting a

criminal or fraudulent* act by a client, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e)(1) or rule 1.6.

**Comment**

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms the truth of a statement of another person* that the lawyer knows* is false. However, in drafting an agreement or other document on behalf of a client, a lawyer does not necessarily affirm or vouch for the truthfulness of representations made by the client in the agreement or document. A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission. In addition to this rule, lawyers remain bound by Business and Professions Code section 6106 and rule 8.4.

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.*

[3] Under rule 1.2.1, a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows* is criminal or fraudulent.* See rule 1.4(a)(4) regarding a lawyer's obligation to consult with the client about limitations on the lawyer's conduct. In some circumstances, a lawyer can avoid assisting a client's crime or fraud* by withdrawing from the representation in compliance with rule 1.16.

[4] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

## Rule 4.2 Communication with a Represented Person*

(a) In representing a client, a lawyer shall not communicate directly or indirectly about the subject of the representation with a person* the lawyer knows* to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

(b) In the case of a represented corporation, partnership, association, or other private or governmental organization, this rule prohibits communications with:

(1) A current officer, director, partner,*or managing agent of the organization; or

(2) A current employee, member, agent, or other constituent of the organization, if the subject of the communication is any act or omission of such person* in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability.

(c) This rule shall not prohibit:

(1) communications with a public official, board, committee, or body; or

(2) communications otherwise authorized by law or a court order.

(d) For purposes of this rule:

(1) "Managing agent" means an employee, member, agent, or other constituent of an organization with substantial* discretionary authority over decisions that determine organizational policy.

(2) "Public official" means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, with the comparable decision-making authority and responsibilities as the organizational constituents described in paragraph (b)(1).

**Comment**

[1] This rule applies even though the represented person* initiates or consents to the communication. A lawyer must immediately terminate communication with a person* if, after commencing communication, the lawyer learns that the person* is one with whom communication is not permitted by this rule.

[2] "Subject of the representation," "matter," and "person" are not limited to a litigation context. This rule applies to communications with any person,*

whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[3] The prohibition against communicating "indirectly" with a person* represented by counsel in paragraph (a) is intended to address situations where a lawyer seeks to communicate with a represented person* through an intermediary such as an agent, investigator or the lawyer's client. This rule, however, does not prevent represented persons* from communicating directly with one another with respect to the subject of the representation, nor does it prohibit a lawyer from advising a client concerning such a communication. A lawyer may also advise a client not to accept or engage in such communications. The rule also does not prohibit a lawyer who is a party to a legal matter from communicating on his or her own behalf with a represented person* in that matter.

[4] This rule does not prohibit communications with a represented person* concerning matters outside the representation. Similarly, a lawyer who knows* that a person* is being provided with limited scope representation is not prohibited from communicating with that person* with respect to matters that are outside the scope of the limited representation. (See, e.g., Cal. Rules of Court, rules 3.35 – 3.37, 5.425 [Limited Scope Representation].)

[5] This rule does not prohibit communications initiated by a represented person* seeking advice or representation from an independent lawyer of the person's* choice.

[6] If a current constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication is sufficient for purposes of this rule.

[7] This rule applies to all forms of governmental and private organizations, such as cities, counties, corporations, partnerships, limited liability companies, and unincorporated associations. When a lawyer communicates on behalf of a client with a governmental organization, or certain employees, members, agents, or other constituents of a governmental organization, however, special considerations exist as a result of the right to petition conferred by the First Amendment of the United States Constitution and article I, section 3 of the California Constitution. Paragraph (c)(1) recognizes these special considerations by generally exempting from application of this rule communications with public boards, committees, and bodies, and with public officials as defined in paragraph (d)(2) of this rule. Communications with a governmental organization constituent who is not a public official, however, will remain subject to this rule when the lawyer knows* the governmental organization is represented in the matter and the communication with that constituent falls within paragraph (b)(2).

[8] Paragraph (c)(2) recognizes that statutory schemes, case law, and court orders may authorize communications between a lawyer and a person* that would otherwise be subject to this rule. Examples of such statutory schemes include those protecting the right of employees to organize and engage in collective bargaining, employee health and safety, and equal employment opportunity. The law also recognizes that prosecutors and other government lawyers are authorized to contact represented persons,* either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law. (See, e.g., *United States v. Carona* (9th Cir. 2011) 630 F.3d 917; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133.) The rule is not intended to preclude communications with represented persons* in the course of such legitimate investigative activities as authorized by law. This rule also is not intended to preclude communications with represented persons* in the course of legitimate investigative activities engaged in, directly or indirectly, by lawyers representing persons* whom the government has accused of or is investigating for crimes, to the extent those investigative activities are authorized by law.

[9] A lawyer who communicates with a represented person* pursuant to paragraph (c) is subject to other restrictions in communicating with the person.* (See, e.g. Bus. & Prof. Code, § 6106; *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187, 1213 [7 Cal.Rptr.3d 119]; *In the Matter of Dale* (2005) 4 Cal. State Bar Ct. Rptr. 798.)

### Rule 4.3 Communicating with an Unrepresented Person*

(a) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows* or reasonably should know* that the unrepresented person* incorrectly believes* the lawyer is disinterested in the matter, the lawyer shall make reasonable* efforts to correct the misunderstanding.

If the lawyer knows* or reasonably should know* that the interests of the unrepresented person* are in conflict with the interests of the client, the lawyer shall not give legal advice to that person,* except that the lawyer may, but is not required to, advise the person* to secure counsel.

(b) In communicating on behalf of a client with a person* who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows* or reasonably should know* the person* may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

**Comment**

[1] This rule is intended to protect unrepresented persons,* whatever their interests, from being misled when communicating with a lawyer who is acting for a client.

[2] Paragraph (a) distinguishes between situations in which a lawyer knows* or reasonably should know* that the interests of an unrepresented person* are in conflict with the interests of the lawyer's client and situations in which the lawyer does not. In the former situation, the possibility that the lawyer will compromise the unrepresented person's* interests is so great that the rule prohibits the giving of any legal advice, apart from the advice to obtain counsel. A lawyer does not give legal advice merely by stating a legal position on behalf of the lawyer's client. This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.* So long as the lawyer discloses that the lawyer represents an adverse party and not the person,* the lawyer may inform the person* of the terms on which the lawyer's client will enter into the agreement or settle the matter, prepare documents that require the person's* signature, and explain the lawyer's own view of the meaning of the document and the underlying legal obligations.

[3] Regarding a lawyer's involvement in lawful covert activity in the investigation of violations of law, see rule 8.4, Comment [5].

### Rule 4.4 Duties Concerning Inadvertently Transmitted Writings*

Where it is reasonably* apparent to a lawyer who receives a writing* relating to a lawyer's representation of a client that the writing* was inadvertently sent or produced, and the lawyer knows* or reasonably should know* that the writing* is privileged or subject to the work product doctrine, the lawyer shall:

(a) refrain from examining the writing* any more than is necessary to determine that it is privileged or subject to the work product doctrine, and

(b) promptly notify the sender.

**Comment**

[1] If a lawyer determines this rule applies to a transmitted writing,* the lawyer should return the writing* to the sender, seek to reach agreement with the sender regarding the disposition of the writing,* or seek guidance from a tribunal.* (See *Rico v. Mitsubishi* (2007) 42 Cal.4th 807, 817 [68 Cal.Rptr.3d 758].) In providing notice required by this rule, the lawyer shall comply with rule 4.2.

[2] This rule does not address the legal duties of a lawyer who receives a writing* that the lawyer knows* or reasonably should know* may have been inappropriately disclosed by the sending person.* (See *Clark v. Superior Court* (2011) 196 Cal.App.4th 37 [125 Cal.Rptr.3d 361].)

## CHAPTER 5.
## LAW FIRMS* AND ASSOCIATIONS

### Rule 5.1 Responsibilities of Managerial and Supervisory Lawyers

(a) A lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act.

(b) A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm,* shall make reasonable* efforts to ensure that the other lawyer complies with these rules and the State Bar Act.

(c) A lawyer shall be responsible for another lawyer's violation of these rules and the State Bar Act if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, whether or not a member or employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

**Comment**

*Paragraph (a) – Duties Of Managerial Lawyers To Reasonably* Assure Compliance with the Rules*

[1] Paragraph (a) requires lawyers with managerial authority within a law firm* to make reasonable* efforts to establish internal policies and procedures designed, for example, to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

[2] Whether particular measures or efforts satisfy the requirements of paragraph (a) might depend upon the law firm's structure and the nature of its practice, including the size of the law firm,* whether it has more than one office location or practices in more than one jurisdiction, or whether the firm* or its partners* engage in any ancillary business.

[3] A partner,* shareholder or other lawyer in a law firm* who has intermediate managerial responsibilities satisfies paragraph (a) if the law firm* has a designated managing lawyer charged with that responsibility, or a management committee or other body that has appropriate managerial authority and is charged with that responsibility. For example, the managing lawyer of an office of a multi-office law firm* would not necessarily be required to promulgate firm-wide policies intended to reasonably* assure that the law firm's lawyers comply with the rules or State Bar Act. However, a lawyer remains responsible to take corrective steps if the lawyer knows* or reasonably should know* that the delegated body or person* is not providing or implementing measures as required by this rule.

[4] Paragraph (a) also requires managerial lawyers to make reasonable* efforts to assure that other lawyers in an agency or department comply with these rules and the State Bar Act. This rule contemplates, for example, the creation and implementation of reasonable* guidelines relating to the assignment of cases and the distribution of workload among lawyers in a public sector legal agency or other legal department. (See, e.g., State Bar of California, Guidelines on Indigent Defense Services Delivery Systems (2006).)

*Paragraph (b) – Duties of Supervisory Lawyers*

[5] Whether a lawyer has direct supervisory authority over another lawyer in particular circumstances is a question of fact.

*Paragraph (c) – Responsibility for Another's Lawyer's Violation*

[6] The appropriateness of remedial action under paragraph (c)(2) would depend on the nature and seriousness of the misconduct and the nature and immediacy of its harm. A managerial or supervisory lawyer must intervene to prevent avoidable consequences of misconduct if the lawyer knows* that the misconduct occurred.

[7] A supervisory lawyer violates paragraph (b) by failing to make the efforts required under that paragraph, even if the lawyer does not violate paragraph (c) by knowingly* directing or ratifying the conduct, or where feasible, failing to take reasonable* remedial action.

[8] Paragraphs (a), (b), and (c) create independent bases for discipline. This rule does not impose vicarious responsibility on a lawyer for the acts of another lawyer who is in or outside the law firm.* Apart from paragraph (c) of this rule and rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner,* associate, or subordinate lawyer. The question of whether a lawyer can be liable civilly or criminally for another lawyer's conduct is beyond the scope of these rules.

## Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.*

(b) A subordinate lawyer does not violate these rules or the State Bar Act if that lawyer acts in accordance with a supervisory lawyer's reasonable* resolution of an arguable question of professional duty.

**Comment**

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to the lawyers' responsibilities under these rules or the State Bar Act and the question can reasonably* be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. Accordingly, the subordinate lawyer must comply with his or her obligations under paragraph (a). If the question reasonably* can be answered more than one way, the supervisory lawyer may assume responsibility for determining which of the reasonable* alternatives to select, and the subordinate may be guided accordingly. If the subordinate lawyer believes* that the supervisor's proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.

## Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a lawyer who individually or together with other lawyers possesses managerial authority in a law firm,* shall make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm,* shall make reasonable* efforts to ensure that the person's* conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person* that would be a violation of these rules or the State Bar Act if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or

(2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm* in which the person* is employed, or has direct supervisory authority over the person,* whether or not an employee of the same law firm,* and knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable* remedial action.

**Comment**

Lawyers often utilize nonlawyer personnel, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment. The measures employed in instructing and supervising nonlawyers should take account of the fact that they might not have legal training.

## Rule 5.3.1 Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Lawyer

(a) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Member" means a member of the State Bar of California;

(3) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections 6007, 6203, subdivision (d)(1), or California Rules of Court, rule 9.31(d);

(4) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending; and

(5) "Ineligible person" means a member whose current status with the State Bar of California is disbarred, suspended, resigned, or involuntarily inactive.

(b) A lawyer shall not employ, associate in practice with, or assist a person* the lawyer knows* or reasonably should know* is an ineligible person to perform the following on behalf of the lawyer's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities that constitute the practice of law.

(c) A lawyer may employ, associate in practice with, or assist an ineligible person to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active lawyer in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active lawyer who will appear as the representative of the client.

(d) Prior to or at the time of employing, associating in practice with, or assisting a person* the lawyer knows* or reasonably should know* is an ineligible person, the lawyer shall serve upon the State Bar written* notice of the employment, including a full description of such person's current bar status. The written* notice shall also list the activities prohibited in paragraph (b) and state that the ineligible person will not perform such activities. The lawyer shall serve similar written* notice upon each client on whose specific matter such person* will work, prior to or at the time of employing, associating with, or assisting such person* to work on the client's specific matter. The lawyer shall obtain proof of service of the client's written* notice and shall retain such proof and a true and correct copy of the client's written* notice for two years following termination of the lawyer's employment by the client.

(e) A lawyer may, without client or State Bar notification, employ, associate in practice with, or assist an ineligible person whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(f) When the lawyer no longer employs, associates in practice with, or assists the ineligible person, the lawyer shall promptly serve upon the State Bar written* notice of the termination.

**Comment**

If the client is an organization, the lawyer shall serve the notice required by paragraph (d) on its highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 1.13.)

[***Publisher's Note re rule 5.3.1:*** *Operative January 1, 2019, Business and Professions Code section 6002, in part, provides that any provision of law referring to the "member of the State Bar" shall be deemed to refer to a licensee of the State Bar. In accordance with this law, references to a "member" included in the current Rules of Professional Conduct are deemed to refer to a "licensee."*]

## Rule 5.4 Financial and Similar Arrangements with Nonlawyers

(a) A lawyer or law firm* shall not share legal fees directly or indirectly with a nonlawyer or with an organization that is not authorized to practice law, except that:

(1) an agreement by a lawyer with the lawyer's firm,* partner,* or associate may provide for the payment of money or other consideration over a reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;*

(2) a lawyer purchasing the practice of a deceased, disabled or disappeared lawyer may pay the agreed-upon purchase price, pursuant to rule 1.17, to the lawyer's estate or other representative;

(3) a lawyer or law firm* may include nonlawyer employees in a compensation or

retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, provided the plan does not otherwise violate these rules or the State Bar Act;

(4) a lawyer or law firm* may pay a prescribed registration, referral, or other fee to a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for Lawyer Referral Services;

(5) a lawyer or law firm* may share with or pay a court-awarded legal fee to a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter; or

(6) a lawyer or law firm* may share with or pay a legal fee that is not court-awarded but arises from a settlement or other resolution of the matter with a nonprofit organization that employed, retained, recommended, or facilitated employment of the lawyer or law firm* in the matter provided:

(i) the nonprofit organization qualifies under section 501(c)(3) of the Internal Revenue Code;

(ii) the lawyer or law firm* enters into a written* agreement to divide the fee with the nonprofit organization;

(iii) the lawyer or law firm* obtains the client's consent in writing,* either at the time the lawyer or law firm* enters into the agreement with the nonprofit organization to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of the fact that a division of fees will be made, the identity of the lawyer or law firm* and the nonprofit organization that are parties to the division, and the terms of the division, including the restriction imposed under paragraph (a)(6)(iv); and

(iv) the total fee charged by the lawyer or law firm* is not increased solely by reason of the agreement to divide fees.

(b) A lawyer shall not form a partnership or other organization with a nonlawyer if any of the activities of the partnership or other organization consist of the practice of law.

(c) A lawyer shall not permit a person* who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's independent professional judgment or interfere with the lawyer-client relationship in rendering legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or other organization authorized to practice law for a profit if:

(1) a nonlawyer owns any interest in it, except that a fiduciary representative of a lawyer's estate may hold the lawyer's stock or other interest for a reasonable* time during administration;

(2) a nonlawyer is a director or officer of the corporation or occupies a position of similar responsibility in any other form of organization; or

(3) a nonlawyer has the right or authority to direct or control the lawyer's independent professional judgment.

(e) The Board of Trustees of the State Bar shall formulate and adopt Minimum Standards for Lawyer Referral Services, which, as from time to time amended, shall be binding on lawyers. A lawyer shall not accept a referral from, or otherwise participate in, a lawyer referral service unless it complies with such Minimum Standards for Lawyer Referral Services.

(f) A lawyer shall not practice with or in the form of a nonprofit legal aid, mutual benefit or advocacy group if the nonprofit organization allows any third person* to interfere with the lawyer's independent professional judgment, or with the lawyer-client relationship, or allows or aids any person* to practice law in violation of these rules or the State Bar Act.

**Comment**

[1] Paragraph (a) does not prohibit a lawyer or law firm* from paying a bonus to or otherwise compensating a nonlawyer employee from general revenues received for legal services, provided the arrangement does not interfere with the independent professional judgment of the lawyer or lawyers in the firm* and does not violate these rules or the State Bar Act. However, a nonlawyer employee's bonus or other form of compensation may not be based on a percentage or share of fees in specific cases or legal matters.

[2] Paragraph (a) also does not prohibit payment to a nonlawyer third-party for goods and services provided to a lawyer or law firm;* however, the compensation to a nonlawyer third-party may not be determined as a percentage or share of the lawyer's or law firm's overall revenues or tied to fees in particular cases or legal matters. A lawyer may pay to a nonlawyer third-party, such as a collection agency, a percentage of past due or delinquent fees in concluded matters that the third-party collects on the lawyer's behalf.

[3] Paragraph (a)(5) permits a lawyer to share with or pay court-awarded legal fees to nonprofit legal aid, mutual benefit, and advocacy groups that are not engaged in the unauthorized practice of law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]; see also rule 6.3.) Under the specified circumstances, paragraph (a)(6) permits a lawyer to share with or pay legal fees arising from a settlement or other resolution of the matter to 501(c)(3) organizations, such as nonprofit legal aid and charitable groups that are not engaged in the unauthorized practice of law. Paragraphs (a)(5) and (a)(6) include the concept of a nonprofit organization facilitating the employment of a lawyer to provide legal services. One example of such facilitation is a nonprofit organization's operation of a law practice incubator program.

[4] A lawyer or law firm* who has agreed to share with or pay legal fees to a qualifying organization under paragraphs (a)(5) or (a)(6) remains obligated to exercise independent professional judgment in the client's best interest. See rules 1.7 and 2.1. Regarding a lawyer's contribution of legal fees to a legal services organization, see rule 1.0, Comment [5] on financial support for programs providing pro bono legal services.

[5] Nothing in paragraphs (a)(5) or (a)(6) is intended to alter the regulation of lawyer referral activity set forth in Business and Professions Code section 6155. In addition, a lawyer must comply with rules 5.4(a)(4) and 7.2(b).

[6] This rule is not intended to affect case law regarding the relationship between insurers and lawyers providing legal services to insureds. (See, e.g., *Gafcon, Inc. v. Ponsor Associates* (2002) 98 Cal.App.4th 1388 [120 Cal.Rptr.2d 392].)

[7] Paragraph (c) is not intended to alter or diminish a lawyer's obligations under rule 1.8.6 (Compensation from One Other than Client).

[***Publisher's Note:*** *Rule 5.4 was amended by order of the Supreme Court, effective March 22, 2021.*]

## Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction; or

(2) knowingly* assist a person* in the unauthorized practice of law in that jurisdiction.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

**Comment**

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. (See, e.g., Bus. & Prof. Code, § 6125 et seq.; see also Cal. Rules of Court, rules 9.40 [counsel pro hac vice], 9.41 [appearances by military counsel], 9.42 [certified law students], 9.43 [out-of-state attorney arbitration counsel program], 9.44 [registered foreign legal consultant], 9.45 [registered legal services attorneys], 9.46 [registered in-house counsel], 9.47 [attorneys practicing temporarily in California as part of litigation], 9.48 [non-litigating attorneys temporarily in California to provide legal services].)

## Rule 5.6 Restrictions on a Lawyer's Right to Practice

(a) Unless authorized by law, a lawyer shall not participate in offering or making:

(1) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement that concerns benefits upon retirement; or

(2) an agreement that imposes a restriction on a lawyer's right to practice in connection with a settlement of a client controversy, or otherwise.

(b) A lawyer shall not participate in offering or making an agreement which precludes the reporting of a violation of these rules.

(c) This rule does not prohibit an agreement that is authorized by Business and Professions Code sections 6092.5, subdivision (i) or 6093.

**Comment**

[1] Concerning the application of paragraph (a)(1), see Business and Professions Code section 16602; *Howard v. Babcock* (1993) 6 Cal.4th 409, 425 [25 Cal.Rptr.2d 80].

[2] Paragraph (a)(2) prohibits a lawyer from offering or agreeing not to represent other persons* in connection with settling a claim on behalf of a client.

[3] This rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to rule 1.17.

### Rule 5.7 [Reserved]

## CHAPTER 6. PUBLIC SERVICE

### Rule 6.1 [Reserved]

### Rule 6.2 [Reserved]

### Rule 6.3 Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm* in which the lawyer practices, notwithstanding that the organization serves persons* having interests adverse to a client of the lawyer. The lawyer shall not knowingly* participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Business and Professions Code section 6068, subdivision (e)(1) or rules 1.6(a), 1.7, 1.9, or 1.18; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

**Comment**

Lawyers should support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a lawyer-client relationship with persons* served by the organization. However, there is potential conflict between the interests of such persons* and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

### Rule 6.4 [Reserved]

### Rule 6.5 Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association, law school, or nonprofit organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to rules 1.7 and 1.9(a) only if the lawyer knows* that the representation of the client involves a conflict of interest; and

(2) is subject to rule 1.10 only if the lawyer knows* that another lawyer associated with the lawyer in a law firm* is prohibited from representation by rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), rule 1.10 is inapplicable to a representation governed by this rule.

(c) The personal disqualification of a lawyer participating in the program will not be imputed to other lawyers participating in the program.

**Comment**

[1] Courts, government agencies, bar associations, law schools and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or

the completion of legal forms that will assist persons* in addressing their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, whenever a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond that limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen* for conflicts of interest as is generally required before undertaking a representation.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent* to the limited scope of the representation. (See rule 1.2(b).) If a short-term limited representation would not be reasonable* under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, these rules and the State Bar Act, including the lawyer's duty of confidentiality under Business and Professions Code section 6068, subdivision (e)(1) and rules 1.6 and 1.9, are applicable to the limited representation.

[3] A lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest. Therefore, paragraph (a)(1) requires compliance with rules 1.7 and 1.9(a) only if the lawyer knows* that the representation presents a conflict of interest for the lawyer. In addition, paragraph (a)(2) imputes conflicts of interest to the lawyer only if the lawyer knows* that another lawyer in the lawyer's law firm* would be disqualified under rules 1.7 or 1.9(a).

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's law firm,* paragraph (b) provides that imputed conflicts of interest are inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) imputes conflicts of interest to the participating lawyer when the lawyer knows* that any lawyer in the lawyer's firm* would be disqualified under rules 1.7 or 1.9(a). By virtue of paragraph (b), moreover, a lawyer's participation in a short-term limited legal services program will not be imputed to the lawyer's law firm* or preclude the lawyer's law firm* from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, rules 1.7, 1.9(a), and 1.10 become applicable.

## CHAPTER 7.
## INFORMATION ABOUT LEGAL SERVICES

### Rule 7.1 Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

(b) The Board of Trustees of the State Bar may formulate and adopt standards as to communications that will be presumed to violate rule 7.1, 7.2, 7.3, 7.4 or 7.5. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all lawyers.

**Comment**

[1] This rule governs all communications of any type whatsoever about the lawyer or the lawyer's services, including advertising permitted by rule 7.2. A communication includes any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm* directed to any person.*

[2] A communication that contains an express guarantee or warranty of the result of a particular representation is a false or misleading communication under this rule. (See also Bus. & Prof. Code, § 6157.2, subd. (a).)

[3] This rule prohibits truthful statements that are misleading. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if it is presented in a manner that creates a substantial* likelihood that it will lead a reasonable* person* to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable* factual foundation. Any communication that states or implies "no fee without recovery" is also misleading unless the communication also expressly discloses whether or not the client will be liable for costs.

[4] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients, or a testimonial about or endorsement of the lawyer, may be misleading if presented so as to lead a reasonable* person* to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable* person* to conclude that the comparison can be substantiated. An appropriate disclaimer or qualifying language often avoids creating unjustified expectations.

[5] This rule prohibits a lawyer from making a communication that states or implies that the lawyer is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states in the language of the communication the employment title of the person* who speaks such language.

[6] Rules 7.1 through 7.5 are not the sole basis for regulating communications concerning a lawyer's services. (See, e.g., Bus. & Prof. Code, §§ 6150 – 6159.2, 17000 et seq.) Other state or federal laws may also apply.

## Rule 7.2 Advertising

(a) Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through any written,* recorded or electronic means of communication, including public media.

(b) A lawyer shall not compensate, promise or give anything of value to a person* for the purpose of recommending or securing the services of the lawyer or the lawyer's law firm,* except that a lawyer may:

(1) pay the reasonable* costs of advertisements or communications permitted by this rule;

(2) pay the usual charges of a legal services plan or a qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service established, sponsored and operated in accordance with the State Bar of California's Minimum Standards for a Lawyer Referral Service in California;

(3) pay for a law practice in accordance with rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an arrangement not otherwise prohibited under these Rules or the State Bar Act that provides for the other person* to refer clients or customers to the lawyer, if:

(i) the reciprocal referral arrangement is not exclusive; and

(ii) the client is informed of the existence and nature of the arrangement;

(5) offer or give a gift or gratuity to a person* having made a recommendation resulting in the employment of the lawyer or the lawyer's law firm,* provided that the gift or gratuity was not offered or given in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

(c) Any communication made pursuant to this rule shall include the name and address of at least one lawyer or law firm* responsible for its content.

**Comment**

[1] This rule permits public dissemination of accurate information concerning a lawyer and the lawyer's services, including for example, the lawyer's name or firm* name, the lawyer's contact information; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their

consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance. This rule, however, prohibits the dissemination of false or misleading information, for example, an advertisement that sets forth a specific fee or range of fees for a particular service where, in fact, the lawyer charges or intends to charge a greater fee than that stated in the advertisement.

[2] Neither this rule nor rule 7.3 prohibits communications authorized by law, such as court-approved class action notices.

*Paying Others to Recommend a Lawyer*

[3] Paragraph (b)(1) permits a lawyer to compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers. See rule 5.3 for the duties of lawyers and law firms* with respect to supervising the conduct of nonlawyers who prepare marketing materials and provide client development services.

[4] Paragraph (b)(4) permits a lawyer to make referrals to another lawyer or nonlawyer professional, in return for the undertaking of that person* to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. (See rules 2.1 and 5.4(c).) Conflicts of interest created by arrangements made pursuant to paragraph (b)(4) are governed by rule 1.7. A division of fees between or among lawyers not in the same law firm* is governed by rule 1.5.1.

## Rule 7.3 Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for doing so is the lawyer's pecuniary gain, unless the person* contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written,* recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the person* being solicited has made known* to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.

(c) Every written,* recorded or electronic communication from a lawyer soliciting professional employment from any person* known* to be in need of legal services in a particular matter shall include the word "Advertisement" or words of similar import on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person* specified in paragraphs (a)(1) or (a)(2), or unless it is apparent from the context that the communication is an advertisement.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person, live telephone or real-time electronic contact to solicit memberships or subscriptions for the plan from persons* who are not known* to need legal services in a particular matter covered by the plan.

(e) As used in this rule, the terms "solicitation" and "solicit" refer to an oral or written* targeted communication initiated by or on behalf of the lawyer that is directed to a specific person* and that offers to provide, or can reasonably* be understood as offering to provide, legal services.

**Comment**

[1] A lawyer's communication does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] Paragraph (a) does not apply to situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Therefore, paragraph (a) does not prohibit a lawyer from participating in constitutionally protected activities of bona fide public or charitable legal-service organizations, or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal

services to its members or beneficiaries. (See, e.g., *In re Primus* (1978) 436 U.S. 412 [98 S.Ct. 1893].)

[3] This rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a bona fide group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm* is willing to offer.

[4] Lawyers who participate in a legal service plan as permitted under paragraph (d) must comply with rules 7.1, 7.2, and 7.3(b). (See also rules 5.4 and 8.4(a).)

### Rule 7.4 Communication of Fields of Practice and Specialization

(a) A lawyer shall not state that the lawyer is a certified specialist in a particular field of law, unless:

(1) the lawyer is currently certified as a specialist by the Board of Legal Specialization, or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Trustees; and

(2) the name of the certifying organization is clearly identified in the communication.

(b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of rule 7.1.

### Rule 7.5 Firm* Names and Trade Names

(a) A lawyer shall not use a firm* name, trade name or other professional designation that violates rule 7.1.

(b) A lawyer in private practice shall not use a firm* name, trade name or other professional designation that states or implies a relationship with a government agency or with a public or charitable legal services organization, or otherwise violates rule 7.1.

(c) A lawyer shall not state or imply that the lawyer practices in or has a professional relationship with a law firm* or other organization unless that is the fact.

**Comment**

The term "other professional designation" includes, but is not limited to, logos, letterheads, URLs, and signature blocks.

### Rule 7.6 [Reserved]

## CHAPTER 8.
## MAINTAINING THE INTEGRITY OF THE PROFESSION

### Rule 8.1 False Statement Regarding Application for Admission to Practice Law

(a) An applicant for admission to practice law shall not, in connection with that person's* own application for admission, make a statement of material fact that the lawyer knows* to be false, or make such a statement with reckless disregard as to its truth or falsity.

(b) A lawyer shall not, in connection with another person's* application for admission to practice law, make a statement of material fact that the lawyer knows* to be false.

(c) An applicant for admission to practice law, or a lawyer in connection with an application for admission, shall not fail to disclose a fact necessary to correct a statement known* by the applicant or the lawyer to have created a material misapprehension in the matter, except that this rule does not authorize disclosure of information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(d) As used in this rule, "admission to practice law" includes admission or readmission to membership in the State Bar; reinstatement to active membership in the State Bar; and any similar process relating to admission or certification to practice law in California or elsewhere.

**Comment**

[1] A person* who makes a false statement in connection with that person's* own application for admission to practice law may be subject to discipline under this rule after that person* has been admitted.

(See, e.g., *In re Gossage* (2000) 23 Cal.4th 1080 [99 Cal.Rptr.2d 130].)

[2] A lawyer's duties with respect to a *pro hac vice* application or other application to a court for admission to practice law are governed by rule 3.3.

[3] A lawyer representing an applicant for admission to practice law is governed by the rules applicable to the lawyer-client relationship, including Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. A lawyer representing a lawyer who is the subject of a disciplinary proceeding is not governed by this rule but is subject to the requirements of rule 3.3.

### Rule 8.1.1 Compliance with Conditions of Discipline and Agreements in Lieu of Discipline

A lawyer shall comply with the terms and conditions attached to any agreement in lieu of discipline, any public or private reproval, or to other discipline administered by the State Bar pursuant to Business and Professions Code sections 6077 and 6078 and California Rules of Court, rule 9.19.

**Comment**

Other provisions also require a lawyer to comply with agreements in lieu of discipline and conditions of discipline. (See, e.g., Bus. & Prof. Code, § 6068, subds. (k), (l).)

### Rule 8.2 Judicial Officials

(a) A lawyer shall not make a statement of fact that the lawyer knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or judicial officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office in California shall comply with canon 5 of the California Code of Judicial Ethics. For purposes of this rule, "candidate for judicial office" means a lawyer seeking judicial office by election. The determination of when a lawyer is a candidate for judicial office by election is defined in the terminology section of the California Code of Judicial Ethics. A lawyer's duty to comply with this rule shall end when the lawyer announces withdrawal of the lawyer's candidacy or when the results of the election are final, whichever occurs first.

(c) A lawyer who seeks appointment to judicial office shall comply with canon 5B(1) of the California Code of Judicial Ethics. A lawyer becomes an applicant seeking judicial office by appointment at the time of first submission of an application or personal data questionnaire to the appointing authority. A lawyer's duty to comply with this rule shall end when the lawyer advises the appointing authority of the withdrawal of the lawyer's application.

**Comment**

To maintain the fair and independent administration of justice, lawyers should defend judges and courts unjustly criticized. Lawyers also are obligated to maintain the respect due to the courts of justice and judicial officers. (See Bus. & Prof. Code, § 6068, subd. (b).)

### Rule 8.3 [Reserved]

### Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly* assist, solicit, or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud,* deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official, or to achieve results by means that violate these rules, the State Bar Act, or other law; or

(f) knowingly* assist, solicit, or induce a judge or judicial officer in conduct that is a violation of an applicable code of judicial ethics or code of judicial conduct, or other law. For purposes of this rule, "judge" and "judicial officer" have the same meaning as in rule 3.5(c).

**Comment**

[1] A violation of this rule can occur when a lawyer is acting in propria persona or when a lawyer is not practicing law or acting in a professional capacity.

[2] Paragraph (a) does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[3] A lawyer may be disciplined for criminal acts as set forth in Business and Professions Code sections 6101 et seq., or if the criminal act constitutes "other misconduct warranting discipline" as defined by California Supreme Court case law. (See *In re Kelley* (1990) 52 Cal.3d 487 [276 Cal.Rptr. 375].)

[4] A lawyer may be disciplined under Business and Professions Code section 6106 for acts involving moral turpitude, dishonesty, or corruption, whether intentional, reckless, or grossly negligent.

[5] Paragraph (c) does not apply where a lawyer advises clients or others about, or supervises, lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these rules and the State Bar Act.

[6] This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

## Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons* on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.*

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly* permit unlawful discrimination;

(ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.*

(c) For purposes of this rule:

(1) "protected characteristic" means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) "knowingly permit" means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) "retaliate" means to take adverse action against a person* because that person* has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.

(d) A lawyer who is the subject of a State Bar investigation or State Bar Court proceeding alleging a violation of this rule shall promptly notify the State Bar of any criminal, civil, or administrative action premised, whether in whole or part, on the same

conduct that is the subject of the State Bar investigation or State Bar Court proceeding.

(e) Upon being issued a notice of a disciplinary charge under this rule, a lawyer shall:

(1) if the notice is of a disciplinary charge under paragraph (a) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Department of Justice, Coordination and Review Section; or

(2) if the notice is of a disciplinary charge under paragraph (b) of this rule, provide a copy of the notice to the California Department of Fair Employment and Housing and the United States Equal Employment Opportunity Commission.

(f) This rule shall not preclude a lawyer from:

(1) representing a client alleged to have engaged in unlawful discrimination, harassment, or retaliation;

(2) declining or withdrawing from a representation as required or permitted by rule 1.16; or

(3) providing advice and engaging in advocacy as otherwise required or permitted by these rules and the State Bar Act.

**Comment**

[1] Conduct that violates this rule undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. (See rule 8.4(a).) In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel. Law firm* management and supervisorial lawyers retain their separate responsibility under rules 5.1 and 5.3. Neither this rule nor rule 5.1 or 5.3 imposes on the alleged victim of any conduct prohibited by this rule any responsibility to advocate corrective action.

[2] The conduct prohibited by paragraph (a) includes the conduct of a lawyer in a proceeding before a judicial officer. (See Cal. Code Jud. Ethics, canon 3B(6) ["A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation against parties, witnesses, counsel, or others."].) A lawyer does not violate paragraph (a) by referring to any particular status or group when the reference is relevant to factual or legal issues or arguments in the representation. While both the parties and the court retain discretion to refer such conduct to the State Bar, a court's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a).

[3] A lawyer does not violate this rule by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer also does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.

[4] This rule does not apply to conduct protected by the First Amendment to the United States Constitution or by Article I, section 2 of the California Constitution.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisorial lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.

[6] Paragraph (d) ensures that the State Bar and the State Bar Court will be provided with information regarding related proceedings that may be relevant in determining whether a State Bar investigation or a State Bar Court proceeding relating to a violation of this rule should be abated.

[7] Paragraph (e) recognizes the public policy served by enforcement of laws and regulations prohibiting unlawful discrimination, by ensuring that the state and

federal agencies with primary responsibility for coordinating the enforcement of those laws and regulations is provided with notice of any allegation of unlawful discrimination, harassment, or retaliation by a lawyer that the State Bar finds has sufficient merit to warrant issuance of a notice of a disciplinary charge.

[8] This rule permits the imposition of discipline for conduct that would not necessarily result in the award of a remedy in a civil or administrative proceeding if such proceeding were filed.

[9] A disciplinary investigation or proceeding for conduct coming within this rule may also be initiated and maintained if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

## Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority.

A lawyer admitted to practice in California is subject to the disciplinary authority of California, regardless of where the lawyer's conduct occurs. A lawyer not admitted in California is also subject to the disciplinary authority of California if the lawyer provides or offers to provide any legal services in California. A lawyer may be subject to the disciplinary authority of both California and another jurisdiction for the same conduct.

(b) Choice of Law.

In any exercise of the disciplinary authority of California, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal,* the rules of the jurisdiction in which the tribunal* sits, unless the rules of the tribunal* provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes* the predominant effect of the lawyer's conduct will occur.

**Comment**

*Disciplinary Authority*

The conduct of a lawyer admitted to practice in California is subject to the disciplinary authority of California. (See Bus. & Prof. Code, §§ 6077, 6100.) Extension of the disciplinary authority of California to other lawyers who provide or offer to provide legal services in California is for the protection of the residents of California. A lawyer disciplined by a disciplinary authority in another jurisdiction may be subject to discipline in California for the same conduct. (See, e.g., § 6049.1.)

# OSC Exhibit 2
# February 20, 2020 Ruling in Gandsey

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Civil Division**

Central District, Spring Street Courthouse, Department 12

**BC601844** February 20, 2020
**WILLAM GANDSEY VS SOUTHERN CALIFORNIA GAS COMPANY ET AL** 8:14 AM

Judge: Honorable Carolyn B. Kuhl
Judicial Assistant: Lori M'Greené
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

**NATURE OF PROCEEDINGS:** Ruling on Submitted Matter

The Court, having taken the matter under submission on 02/11/2020 for Hearing on Motion for Sanctions of Private Plaintiffs for monetary, evidentiary and issue sanctions and an adverse-inference jury instruction (BC601844) on case BC601844, now rules as follows:

Motion of Private Plaintiffs for Monetary, Evidentiary, and Issue Sanctions and an Adverse-Inference Jury Instruction

Court's Ruling: The motion is granted in part. For the reasons set forth below, the court awards monetary sanctions of $525,610 against Defendant and defense counsel jointly, payable within 20 days. The court also orders that Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions. Plaintiffs may submit an accounting of such reasonable costs and fees to the court, to be accompanied by briefing if necessary. The court also imposes the following issue sanctions: (1) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed authenticated; and (2) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed admissible under the business records exception to the hearsay rule (but Defendants may object to a hearsay statement within such documents).

I. The Current Motion

Private Plaintiffs bring the current motion in order to seek monetary, evidentiary and issue sanctions, which Plaintiffs premise on Defendants' repeated failure to provide sufficient justification for the withholding of thousands of supposedly privileged documents. Plaintiffs

argue that sanctions are warranted because Defendants have violated this court's September 18, 2019 order requiring production of a good faith and legally compliant privilege log and have engaged in a pattern of abusive discovery by repeatedly withholding large numbers of documents without substantial justification and by producing privilege logs that are insufficient to allow Plaintiffs or the court to evaluate Defendants' claims of privilege. Plaintiffs seek hundreds of thousands of dollars in monetary sanctions and numerous evidentiary and issue sanctions as set forth in Private Plaintiffs' Amended Notice of Motion, filed on January 16, 2020. They also seek a jury instruction pursuant to Evidence Code section 413.

Defendants argue that their claims of privilege were made in good faith and that their decisions to withdraw multiple claims of privilege also should be viewed as evidence of their good faith conduct of discovery. They point out that this case is large and complex, making discovery very burdensome for Defendants and state that they have done their best to meet their discovery obligations while acknowledging that some mistakes were made. They argue that this court's September 18, 2019 order is unenforceable, but that they have tried to comply with this court's "high standards" for claiming privilege. Defendants also argue that the requested sanctions are inappropriate, grossly excessive, and unavailable as a matter of law.

In their Reply papers, Plaintiffs challenge the argument that they will not suffer significant prejudice as a result of the late production of documents previously designated as privileged by Defendants. Lead counsel for Plaintiffs, Mr. Panish, explains that, with four months until trial, Plaintiffs have been placed at a significant disadvantage in trial preparation because they now will be required to spend time reviewing thousands of late-produced documents, and potentially have to reconvene completed depositions and spend substantial time questioning witnesses about those documents. (See Panish Decl. ISO Reply, ¶¶ 9-13.) Moreover, Mr. Panish states that continuing the trial date would prejudice his clients, as it would delay much-needed relief for a community that has been waiting for relief for over four years. (Panish Decl. ISO Reply, ¶ 8.)

II. Chronology of Defendants' Prior Unsubstantiated Claims of Privilege in this Case

The chronology below is largely repeated from this court's prior ruling of January 14, 2020 on Private Plaintiffs' Motions to Compel. It is equally relevant to the current Motion for Sanctions.

A. Summary of Prior Claims of Privilege and Extent of Unsubstantiated Claims

The current motion must be decided against the backdrop of the prior history of Defendants' withholding of documents purportedly on the basis of privilege. In summary:

• As to one group of documents (AECOM communications), Defendants originally claimed privilege with respect to 771 documents; after two motions, claims of privilege were sustained as to a mere 6 documents.
• As to another group of documents (communications with public relations firms), an initial claim of privilege as to 358 documents was eventually reduced to 32 claims of privilege after this court required trial counsel to personally assert that there was a good faith basis for assertion of the privilege as to each document.
• Regarding a third group of documents (documents concerning development of data to be furnished to regulatory agencies) claims of privilege with respect to more than 4,000 documents were eventually reduced to 176 documents.
• SoCalGas listed more than 36,000 privileged documents on a privilege log in June of 2019. On September 18, 2019 there were 14,417 documents still listed. And 3,472 documents of the original 36,000 documents claimed to be privileged were listed on the November 1, 2019 SoCalGas privilege log.

Based on the prior history of this case up to the time Defendants filed their November 1, 2019 privilege logs, Defendants' initial claims of privilege are unsupportable and/or are withdrawn an average of 94 percent of the time.

As demonstrated by the tortured history below, the documents that were withheld by Defendants were provided only after extraordinary efforts by Plaintiffs' counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. What is not evident from this recitation, but is undeniably the case, is that the Plaintiffs were deprived of relevant documents during the time they were taking percipient discovery to meet the discovery deadline agreed to by the parties. (On July 2, 2019 this court set a trial date of June 24, 2020 for the first phase trial. Although counsel for defense requested a later trial date, both sides agreed to set the cut-off for percipient discovery of January 31, 2020. (See Minute Order of July 31, 2019.))

B. Detailed Chronology Regarding Defendants' Prior Claims of Privilege

AECOM was an environmental consultant to SoCalGas. On August 2, 2017, Private Plaintiffs issued a deposition subpoena for production of documents to AECOM. SoCalGas served objections, including objections on the basis of attorney client and work product privilege. After meet and confer efforts between counsel, AECOM produced documents on December 5, 2017, December 28, 2017 and June 7, 2018; eventually the production totaled 53,000 documents. The June 7, 2018 production included a 34-page privilege log listing 771 items. Subsequent to meet and confer discussions between Private Plaintiffs and SoCalGas, on July 26, 2018, AECOM,

with SoCalGas's permission, produced 62 documents previously withheld on the basis of privilege. (Private Plaintiffs' Motion to Compel Production of Documents, Aug. 1, 2018, at pp. 4-5.)

At a hearing on August 27, 2018, the Hon. Lisa Hart Cole ordered the parties to continue to meet and confer in order to either resolve the issues or to narrow them for the court's consideration. Pursuant to the meet and confer, SoCalGas authorized the production of an additional 97 documents that previously were asserted to be privileged. (Defendant SoCalGas Company's Supplemental Brief in Opposition to Motion to Compel Production of Documents Relating to AECOM, Oct. 12, 2018, at p. 1.)

On October 18, 2018, the Hon. John Wiley ruled on Private Plaintiffs' Motion with respect to the remaining assertedly privileged AECOM documents and held as follows:
For the most part, Southern California Gas Company has failed to prove the voluminous and diverse communications among Company employees, people at third-party contractor AECOM, and Company lawyers were "reasonably necessary" for the lawyers to represent the Company. [Citations omitted.] There is no attorney work product privilege for the same reason. There is an exception, however, for four categories of documents: One: Documents that AECOM authored at the request of a Company lawyer. Two: Documents Company lawyers gave to AECOM for review and comment regarding technical expertise that would assist the lawyers in developing legal strategy. Three: Documents containing legal opinions that Company lawyers gave to AECOM for the purpose of evaluating whether technical information in the document was accurate. Four: Documents that are communications with the Company's retained (but not testifying) experts. As to these four categories of documents, the motion is denied. These four categories of documents are privileged.
(Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, Oct. 19, 2018.) Defendants were ordered to produce all documents not included in these four specific categories. As explained below, Defendants did not do so.

When this court took over as the coordination trial judge for this proceeding, privilege issues had proliferated. In a Status Conference statement filed April 26, 2019, Plaintiffs attached a 26-page Appendix discussing Plaintiffs' disagreements with Defendants' claims of privilege and the status of meet and confer efforts with respect to those issues.

In a Minute Order dated May 1, 2019, the court ordered counsel to file (1) a joint statement of issues with respect to interpretation and application of Judge Wiley's ruling regarding documents involving AECOM and (2) a joint statement of issues regarding documents withheld by

Defendants on the basis of privilege regarding development of data to be furnished by Defendants to regulatory authorities.

Having reviewed those joint statements, at a hearing on June 17, 2019 this court ordered Defendants to file a motion for protective order "[w]ith respect to privilege issues concerning the 400+ documents subpoenaed from AE Com [sic] that have been withheld on grounds of privilege." (Minute Order, June 17, 2019.) With respect to "the 4000+ documents withheld by So Cal Gas on the theory that the data collection for regulatory agencies was directed by in-house counsel" the court ordered that Defendants "supplement the privilege log within 30 days by adding a column giving dates and names of counsel who directed the strategy for a particular data request that is the subject of the document and/or what other attorney involvement justifies the assertion of privilege as to that document." (Id.)

In the Joint Status Conference Report filed August 12, 2019, Private Plaintiffs stated that they had become aware at a deposition that Defendants had withheld as privileged all communications between Defendants and a public relations firm. Defendants contended that Private Plaintiffs were incorrect in their "extreme, categorical position that no communications between a client, its attorneys and a public relations consultant can ever be protected by the attorney-client privilege or attorney work product doctrine." (Joint Status Conference Statement for August 14, 2019, Aug. 12, 2019, at p. 13 (emphasis in original).) Defendants did not contest Private Plaintiffs' representation that Defendants had withheld all communications with the public relations firm. Defendants asserted that the issue was not "ripe" for the court's decision and that further meet and confer should take place. (Id. at pp. 13-16.)

On August 12, 2019, the court heard argument on Defendants' Motion for a Protective Order with respect to the AECOM documents on which Defendants continued to claim privilege. The court ruled on the Motion on August 15, 2019. In the Motion, Defendants continued to claim privilege with respect to 174 AECOM documents. The court ordered all but 6 documents to be produced. The court ordered sanctions against Defendants because "there was not a colorable claim of privilege supported by this motion as to the vast majority of the documents at issue." In litigating this motion, and true to a pattern of updating privilege logs only once formally challenged, Defendants filed an "updated version of the AECOM [privilege] Log" with its Reply brief. Even after the court issued a tentative ruling on August 11, 2019, on the day of the hearing Defendants attempted to file a supplemental declaration to support their privilege claims. The court did not consider those manifestly late-filed documents. (Minute Order, Aug. 15, 2019.)

The court's level of concern with respect to Defendants' good faith in claiming privilege was

heightened at that juncture. Defendants had claimed privilege on a group of 771 AECOM documents. After a ruling by Judge Wiley, they continued to claim privilege on over 400 documents, and then on 174 documents. Defendants' claims of privilege were colorable only as to 6 of the original 771 documents.

Because of the court's concern over the good faith basis for Defendants' privilege claims, the court issued an order that was unprecedented in this court's 24 years of experience on the bench (including more than 12 years in a complex civil litigation assignment). With respect to the 358 documents evidencing communications between Defendants and their public relations consultant, the court ordered trial counsel to submit a "declaration stating that counsel has personally reviewed the documents in this category as to which privilege continues to be claimed, that counsel is familiar with the relevant case law and statutes pertaining to privilege concerning such documents and that there is a good faith basis for withholding such documents on the basis of privilege." (Minute Order, Aug. 14, 2019 (emphasis added).)

On September 3, 2019, trial counsel for Defendants filed declarations with respect to the 358 documents involving or referencing public relations consultants that had been withheld based on privilege. Counsel stated that attorneys under their direction or control had reviewed the documents, that SoCalGas was continuing to claim privilege as to 32 such documents, and that the declarants had a good faith basis to assert SoCalGas's attorney-client or work product privilege as to the 32 documents. (Declarations of James J. Dragna and Michelle Park Chiu, Sept. 3, 2019.) In a subsequent joint status conference report, counsel for Private Plaintiffs asserted that, of the 32 documents listed on that privilege log, only 17 continued to be withheld in their entirety, and that 14 documents had an identical redaction of an email communication. (Joint Status Conference Statement filed Sept. 20, 2019, at p. 14.)

On July 17, 2019, Defendants produced a revised privilege log with regard to the documents pertaining to data collection for regulatory agencies. Defendants continued to withhold 1,293 such documents (out of the original 4000+ documents claimed to be privileged). Private Plaintiffs contended that there was no appropriate basis for privilege disclosed in the revised privilege log. (Joint Status Conference Statement for Sept. 11, 2019, at pp. 16-19, 43-44.)

At the September 11, 2019 status conference, the court issued the following order: "Defense counsel shall report to the court at a specially set status conference on Sept. 18, 2019 at 1:45 pm as to how they propose to address the problem of Defendants' over-designation of privileged documents." (Minute Order, Sept. 11, 2019.)

**BC601844** February 20, 2020
**WILLAM GANDSEY VS SOUTHERN CALIFORNIA GAS COMPANY ET AL** 8:14 AM

Judge: Honorable Carolyn B. Kuhl
Judicial Assistant: Lori M'Greené
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

At the September 18, 2019 status conference, after hearing argument from counsel, the court ordered as follows:
• Within 45 days defense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.
• Before the September 25, 2019 status conference, defense counsel shall produce to plaintiffs all "data request" documents as to which privilege is not legally supportable and shall re-serve the privilege log previously produced for this category of documents so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable. To the extent any document is redacted to protect a legally supportable privilege, the redacted document shall be produced to plaintiffs. Defense counsel shall bring to the September 25, 2019 status conference all documents in the "data request" category that have been fully or partially withheld on the basis of privilege.
• Counsel shall meet and confer with respect to the deadline(s) for defendants to prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.

At the September 25, 2019 status conference, counsel for Defendants reported that 176 "data request" documents remained on the Defendants' privilege log. Originally, privilege had been claimed on more than 4000 of these documents, and the previous privilege log (of July 17, 2019) listed 1293 documents in this set. The court reviewed the privilege log and discussed with both counsel several of the documents on which privilege continued to be claimed. The revised log had been produced at 6:00 pm the prior evening, and counsel for Private Plaintiffs had little time to prepare for the informal discussion with the court. The court ordered counsel to meet and confer if Plaintiffs' counsel had additional questions with respect to the "data request" group of documents.

On November 1, 2019, Defendants produced a privilege log for SoCalGas with over 150,000 entries, as well as a privilege log for Sempra with 5,913 entries. As stated above, on September 18, 2019 the court had ordered Defendants to "correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable." At a status conference on December 4, 2019, the court asked counsel for Defendants to state how many documents that had been listed on previous privilege logs remained on the November 1, 2019 privilege log. In response to the court's query, defense counsel reported that, whereas there had been 36,295 documents on SoCalGas's privilege log in

June 2019, on September 18, 2019 there were 14,417 documents still listed, and of those, 3,472 documents remained on the November 1, 2019 SoCalGas privilege log. (Declaration of Deanne L. Miller re Minute Order of December 4, 2019 Regarding Defendant Southern California Gas Company's Privilege Log, ¶¶ 3-10.)

At the December 4, 2019 status conference, this court ordered counsel for Private Plaintiffs to lodge 80 consecutive pages of the November 1, 2019 SoCalGas privilege log for the court's review. The court also ordered counsel for each side to file a two-page document on December 9, 2019 making a recommendation as to how the court should address the extent to which Defendants' claims of privilege were proper in light of Private Plaintiffs' claims that they were overbroad.

On December 10, 2019, the court held an informal discovery conference to discuss the court's observations about the sufficiency of the November 1, 2019 defense privilege logs. The court will let the court reporter's record for that hearing speak for itself and will not attempt to summarize the discussion. At the conclusion of the December 10, 2019 status conference, the court stated that Private Plaintiffs would be permitted to file a motion to compel with respect to Defendants' privilege claims.

C. Plaintiffs' Motion to Compel Production of Documents Listed on Defendants' November 1, 2019 Privilege Logs

On December 19, 2019, Private Plaintiffs filed a Motion to Compel Production of 136,504 of the documents as to which SoCalGas claimed privilege in its November 1, 2019 privilege log and a Motion to Compel Production of 5,459 of the documents as to which Sempra claimed privilege in its November 1, 2029 privilege log. These Motions were set for hearing on January 14, 2020.

Although Defendants' Opposition Briefs on the Motions to Compel contended that the November 1, 2019 privilege logs were sufficient to meet legal requirements, Defendants nevertheless filed substitute privilege logs with their Opposition Briefs on January 6, 2020. These privilege logs dropped claims of privilege as to 33,787 documents listed on the SoCalGas November 2019 privilege log, and as to 1,550 documents listed on the Sempra November 2019 privilege log. The January 6, 2020 privilege logs also provided some additional information as to claims of privilege for some documents for which privilege continued to be asserted. (On January 10, 2020, Private Plaintiffs filed the current Motion for Sanctions.)

On January 14, 2020, this court heard argument on the Motions to Compel and issued its

decision. The court's reasoning is set forth at length in the January 14, 2020 Minute Order. The court ordered Defendants to produce by February 11, 2020 a privilege log for all documents that continue to be claimed as privileged by Defendants. The court required the privilege log to comply with the prior rulings of the court (including the prior rulings of Judge Wiley), and required it to be sufficient under the law set forth in the court's January 14 ruling. Further, the court required the revised privilege logs to be accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed. The court ordered rolling production of documents on which the Defendants will not be claiming privilege as a result of this further review. As of the date the current Motion for Sanctions was argued, the revised privilege logs and declarations of counsel had not been filed. Thus, the legal sufficiency of those privilege logs and of the claims of privilege included therein are not considered in ruling on the current motion.

The court also ordered Defendants to produce by Friday, January 17, 2020 all documents listed on the January 6, 2020 privilege logs that are claimed to be privileged solely on the basis that they were attachments to a privileged communication. This order extended to documents where the asserted basis for the privilege claim was only the following: "Attachment to confidential communication between client and in-house and/or outside counsel made in the course of the attorney-client relationship." This portion of the court's order subsequently was stayed by the Court of Appeal after Defendants (without seeking a stay from this court) filed a petition for writ of mandate and request for an immediate stay. The Court of Appeal ordered a briefing schedule, which was concluded on January 31, 2020. The stay was lifted by the Court of Appeal on February 19, 2020, but this court has not considered the substance of the appellate court's order in this ruling on the Motion for Sanctions.

III. Sanctions Are Warranted in Light of Defendants' Abuse of the Discovery Process

A court may impose monetary, issue, evidence, terminating, and contempt sanctions "against anyone engaging in conduct that is a misuse of the discovery process." (Code Civ. Proc., § 2023.030.) "Misuse of the discovery process" includes, but is not limited to, such actions as "[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense," "[m]aking, without substantial justification, an unmeritorious objection to discovery," or "[m]aking an evasive response to discovery." (Code Civ. Proc., § 2023.010.) Code of Civil Procedure Section 128(a)(4) empowers a court to "compel obedience to its judgments, order, and process . . . ." (See also Peat, Marwick, Mitchell & Co. v. Superior Court (1988) 200 Cal.App.3d 272, 288 (holding that courts have the inherent power to curb abuses and promote fair process");

Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 967 ("courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them").)

The court finds that Defendants' (1) abusive misconduct in discovery; (2) repeated, unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants' claims of privilege; and (4) willful violation of court orders addressing these issues, when taken together, warrant sanctions under Code of Civil Procedure section 2023.030, under Code of Civil Procedure section 128(a)(4), and pursuant to the inherent authority of the court.

A. Unmeritorious Objections to Discovery

As set forth above in the "Summary of Prior Claims of Privilege and Extent of Unsubstantiated Claims," more than 90 percent of Defendants' initial claims of privilege either have been determined by the court to be unsupportable or have been withdrawn by Defendant. As described in detail above in the "Detailed Chronology," the documents that were withheld by Defendants were provided only after extraordinary efforts by Private Plaintiffs' counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. Thus, Defendants have misused the discovery process by making unmeritorious objections to discovery without substantial justification and by using those objections, and the quantity of unsupported objections, to delay Plaintiffs' right to discovery of relevant documents.

Defendants attempt to defend their conduct by asserting that they removed from earlier privilege logs "approximately 36.40% of the 197,513 documents over which Defendants have asserted privilege in the course of these proceedings (not 94%)." (Defs' Opp., at p. 16.) Defendants' calculation is based on initial claims of privilege that include the more than 150,000 documents on the November 1, 2019 privilege log. However, it remains to be seen how many of the documents listed as privileged on the November 1, 2019 privilege log will meet the test of a good faith assertion of privilege. This court ordered on January 14, 2020 that Defendants were required to produce by February 11, 2020 a privilege log that "compl[ies] with the prior rulings of this court (including the prior rulings of Judge Wiley), [is] sufficient under the law set forth [in this court's order of January 14, 2020] and [is] accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed." (Minute Order, Jan. 14, 2020.) The court further ordered that documents on which the Defendants are no longer claiming privilege are to be produced on a "rolling" basis. (Id.) As stated above, because the

February 11, 2020 compliance date was the same date that the current Motion for Sanctions was heard, the court has no final tally with which to calculate the percentage of initial claims of privilege on the November 1, 2019 privilege log that will be withdrawn or determined to be without merit. Defendants do not take issue with the court's calculation of 94% as the percentage of their claims of privilege withdrawn or determined to be unsupported prior to November 1, 2019.

Defendants argue that their initial claims of privilege have been made in good faith. The record does not support that characterization. Defendants complain that they have produced more than 1.5 million documents in this case and have borne an exceptional burden to collect and produce these documents as well as to prepare privilege logs for withheld documents. The necessary document production in this case has been exceptional, but it has not necessarily been more challenging than the burden other mass tort defendants face in JCCP or MDL litigation (for example, in litigation against pharmaceutical defendants). The firm appearing to represent Defendants in this case does not contend that it lacks the resources to properly litigate this case.

Defendants argue that the privilege issues were difficult and that initially they lacked clear guidance. However, even when Defendants had clear guidance from a prior court order, they ignored those legal standards. As discussed above, on October 18, 2018 then-Judge John Wiley ruled on a discovery motion and explained that Defendants had failed to demonstrate privilege as to "the voluminous and diverse communications" between SoCalGas and AECOM. The court's order carefully delineated four specific categories of documents involving AECOM as to which privilege could be claimed. (Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, filed Oct. 19, 2018.) Rather than carefully apply Judge Wiley's ruling, Defendants required this court to hear another Motion, with respect to 174 AECOM documents. The court determined that all but 6 documents were required to be produced and determined that "there was not a colorable claim of privilege supported by this motion as to the vast majority of the documents at issue." (Minute Order, Aug. 15, 2019.)

With respect to the data request documents, Defendants admit that they did not make sufficient inquiry to determine whether there was a defensible claim of privilege for each document when submitting the privilege logs. Defendants state: "In order to comply with the evidentiary requirements this Court requires for Defendants to protect their privileged communications, Defendants would have had to muster proof of attorney involvement and direction on a document-by-document basis for tens thousands [sic] of data request documents. … [T]hat would have been extremely burdensome and in many instances, impossible." (Defs' Opp., at p. 11.) When a party asserts a claim of privilege on the ground that an attorney directed the actions

of non-attorneys in creating documents so as to assist counsel in providing legal advice, the party must have a basis for stating that the attorney did provide such direction and that the documents claimed to be privileged resulted from carrying out that direction. (See Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725, 735-736 (fact-gathering by an attorney is privileged where its purpose is to allow the attorney to render legal advice); Cal. Prac. Guide Civ. Trials & Ev. (The Rutter Group) Ch. 8E-A ¶ 8:1946 ("[t]he party claiming a privilege has the burden of establishing whatever preliminary facts are essential to the claim (e.g., existence of privileged relationship when communication was made") (emphasis in original).) Whether or not this is burdensome, it is legally required. The size of these proceedings does not give Defendants license to hide behind unjustified privilege claims; nor does it mean that Plaintiffs and the court must be subject to an infinite process wherein Defendants' logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privilege claims.

In their papers, Defendants repeatedly make reference to the court's "high standards" for claims of privilege. (See, e.g., Def's Opp., at p. 4.) Defendants do not argue in opposing the current Motion that the court's standards for review of privilege have been wrong—just "high." The requirements for a claim of privilege are established by case law. "It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." (Zurich American Ins. Co. v. Superior Court (2007) 155 Cal.App.4th 1485, 1504.) "[T]he attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship." (Catalina Island Yacht Club v. Superior Court (2015) 242 Cal.App.4th 1116, 1129, fn. 5 (Catalina Island).) Sometimes these determinations can be made on the face of the document; sometimes they cannot. Certainly, further inquiry is necessary when the document is not itself a communication to or from an attorney. For example, many of the documents concerning development of data to be furnished to regulatory agencies were not directed to or from an attorney. In order to have a reasonable basis to claim privilege on these documents, inquiry beyond the face of the document was necessary. Defendants apparently take the position that they can claim privilege without making an individualized inquiry as to the basis for a claim of privilege where the basis for the claim of privilege is not apparent on the face of the document. By this reasoning, Defendants have attempted to shift the burden to the Plaintiffs to challenge Defendants' broad claims of privilege. However, our discovery statutes make clear that it is sanctionable conduct to "[m]ak[e], without substantial justification, an unmeritorious objection to discovery." (Code Civ. Proc., § 2023.010, subd. (e).)

In many ways, what is most upsetting about the litigation tactics of Defendants is that they have

only asserted good faith objections when threatened with sanctions or when this court required trial counsel to declare under penalty of perjury that there was a good faith basis for the privilege claims asserted. As described in the chronology above, after finding that the Defendants' claims of privilege for the AECOM documents were not substantially justified (even after a prior order by Judge Wiley), the court continued to be faced with extensive, broad claims of privilege that were insufficiently described on existing privilege logs. This court then issued an order that the court never before had felt necessary in the court's previous 24 years of experience as a judge. The August 14, 2019 Minute Order required, as to 358 documents that involved Defendants' public relations firm, that trial counsel declare under penalty of perjury that there was a good faith basis for a claim of privilege. When counsel's declaration was filed, there were 32 documents remaining on the privilege log. (In a subsequent status conference report, Plaintiffs asserted that of the 32 documents only 17 continued to be withheld in their entirety and 14 had an identical redaction of an email communication; Defendants did not take issue with this characterization.)

On the basis of that exercise of good faith by counsel, the court did not require trial counsel's declaration under penalty of perjury to support the privilege log revisions ordered by the court on September 18, 2019. The court expected that counsel would ensure that only objections in good faith and with substantial justification would be made when the court ordered that privilege logs be prepared "so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable." (Minute Order, Sept. 18, 2019.) The court did not wish to impose a specific burden on Defendants' trial counsel in the midst of the many depositions that were occurring at that time. However, the November 1, 2019 privilege logs had over 155,000 entries and the court has found that these privilege logs were legally insufficient. (Minute Order, Jan. 14, 2020.) It is disturbing, to say the least, that the court only can obtain legally compliant litigation conduct by making outside trial counsel individually responsible in a posture that could support sanctions against counsel personally.

B. Defendants Have Repeatedly Failed to Provide Legally Adequate Privilege Logs in a Manner that Has Caused Private Plaintiffs Undue Burden and Expense

As the procedural history above makes clear, this court has repeatedly found that Defendants have failed to offer sufficient explanation to support their claims of privilege. In this court's January 14, 2020 Minute Order deciding Private Plaintiffs' Motions to Compel, the court found that Defendants' November 1, 2019 privilege logs did not provide the information required by the caselaw and did not provide Private Plaintiffs or the court with sufficient information to evaluate Defendants' claims of privilege as to the 155,000 documents listed on those privilege

logs. (Minute Order, Jan. 14, 2020.)

In part this court found:
The November 1, 2019 privilege logs do not meet the standard set forth in Catalina Island. As the court noted at the December 10, 2019 status conference, after the court had reviewed 80 pages of the November 1, 2019 log entries, the logs substantially employ generic macros that fail to offer a sufficiently detailed explanation of the basis for withholding individual documents. Thousands of documents contain the explanation "Confidential communication between client and in-house and/or outside counsel made in the course of the attorney-client relationship." Seldom does the accompanying description of the document itself meet the statutory requirement of "provid[ing] sufficient factual information for other parties to evaluate the merits of [the privilege] claim . . . ." (CCP sec. 2031.240(c)(1).) "Even assuming all of the documents were communications with an attorney, not all communications with an attorney are privileged. Instead, the attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship." (Catalina Island, supra, 242 Cal.App.4th at p. 1130, fn. 5.) "The purpose of providing a specific factual description of documents is to permit a judicial evaluation of the claim of privilege." (Hernandez v. Superior Court (2003) 112 Cal.App.4th 285, 292.) "The information in the privilege log must be sufficiently specific to allow a determination of whether each withheld document is or is not in fact privileged." (Wellpoint Health Networks v. Superior Court (1997) 59 Cal.App.4th 110, 130.)

Many of the documents on which privilege is claimed have an attorney listed among several "cc" recipients and have a generic "re" line subject matter. Defendants' conclusory statement that such documents are communications "made in the course of the attorney-client relationship" are insufficient to allow Private Plaintiffs or the court to evaluate whether each withheld document is or is not in fact privileged. This is particularly so when the attorney name is an in-house counsel, who may be involved in a communication in a business capacity. As discussed in previous rulings of this court, when business persons are doing their work and copying an in-house lawyer, the communication may not be privileged unless the business person is seeking advice of counsel or is providing information requested by counsel so as to assist counsel in providing legal advice. (Minute Order of Sept. 11, 2019 at pp. 3-4.) "It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." (Zurich American Ins. Co. v. Superior Court (2007) 155 Cal.App.4th 1485, 1504.) Unless Defendants provide factual information to indicate the purpose of the communication, Defendants have not met the requirements for

creating a legally compliant privilege log.

(Minute Order, Jan. 14, 2020 at pp. 10-11.) This court also found that Defendants had failed to provide a complete list of attorneys who had represented Defendants and whose names appeared on the privilege logs until January 6, 2020. (Id. at pp. 11-12.) Finally, the court found that Defendants had improperly claimed privilege for documents attached to emails sent to attorneys on the sole basis that such documents were sent to counsel. (Id. at pp. 12-15.) The court's order as to the latter finding currently was stayed by the Court of Appeal until yesterday. In ruling on the current Motion for Sanctions, the court does not rely on its prior finding with respect to attachments claimed to be privileged on that basis alone.

The undue burden and expense caused to Private Plaintiffs by Defendants' insufficient privilege logs is obvious. The chronology set forth above details Private Plaintiffs' repeated attempts to challenge Defendants' claims of privilege and to find a way to overcome the disadvantage of privilege logs that were manifestly inadequate to allow Plaintiffs or the court to evaluate the claims of privilege. Defendants further manipulated the vague claims of privilege to present a moving target as they backed off substantial numbers of claims of privilege tardily and only when challenged. Such behavior continued even as Plaintiffs' Motions to Compel were being litigated in December 2019 and January 2020. With their Opposition to Plaintiffs Motion to Compel, Defendants submitted, on January 6, 2020, privilege logs that dropped claims of privilege as to 22% of the documents on the November 1, 2019 privilege logs and provided more detail as to the claims of privilege for some of the privilege claims. The undue burden and expense caused to Private Plaintiffs was substantially magnified by the fact that Plaintiffs were deprived of documents to which they were entitled during periods of intense litigation activity while the majority of Defendants' current and former employees were deposed.

C. Defendants' Conduct Was Willful and Violated Court Orders

Judge Wiley issued an order on October 18, 2018 stating that Defendants had, for the most part, failed to prove that voluminous claims of privilege with regard to communications involving third-party contractor AECOM were privileged. As part of that order, Judge Wiley defined four specific categories of AECOM documents as to which privilege could be claimed and ordered all other AECOM documents to be produced. (Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, filed Oct. 19, 2018.) Nearly a year later, Defendants had not complied with Judge Wiley's Order. On August 12, 2019, this court heard argument on Defendants' Motion for a Protective Order with respect to the AECOM documents as to which Defendants continued to claim privilege. As to all but 6 of the 174

documents still being withheld by Defendants the court found "there was not a colorable claim of privilege supported by this motion . . . ." (Minute Order, Aug. 15, 2019.) The failure to produce these documents during the 10-month period following Judge Wiley's ruling was without substantial justification and constituted a violation of Judge Wiley's order.

As the pattern of Defendants' over-designation and insufficient designation of purportedly privileged documents continued to reveal itself (as described in the detailed chronology set forth above) the court ordered as follows: "Defense counsel shall report to the court at a specially set status conference on Sept. 18, 2019 at 1:45 pm as to how they propose to address the problem of Defendants' over-designation of privileged documents." (Minute Order, Sept. 11, 2019.) The court already had ordered defense trial counsel to declare under penalty of perjury that there was a good faith basis for withholding documents evidencing communications between Defendants and their public relations consultants. (Minute Order, Aug. 14, 2019.) The court was searching for a way to ensure that only good faith claims of privilege were asserted without imposing on trial counsel the personal obligation to review each document and declare under penalty of perjury that there was a good faith basis for claiming privilege. At the September 18, 2019 status conference, after hearing argument from counsel, the court ordered that, by November 1, 2019:

• [D]efense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.
. . . . .
• [D]efendants [shall] prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.

(Minute Order, Sept. 18, 2019.)

As discussed above, the court's January 14, 2020 order determined that the November 1, 2019 privilege logs were "insufficient to meet the legal requirement that a privilege log contain sufficient information to allow the requesting party to evaluate whether there is a colorable basis for the assertion of privilege." (Minute Order, Jan. 14, 2020, at p. 9.) This violation of the court's September 18, 2019 Order was not limited to a few document descriptions – it was widespread in the logs of 156,000 documents.

Defendants contend that this court's September 18, 2019 order "cannot support the imposition of nonmonetary sanctions" because the order "was issued following a discussion by counsel during

a status conference and was not based on the identification of specific documents or any briefing." (Defs' Opp., at p. 23.) Appellate precedent does not allow a trial court's orders to be so lightly dismissed. Unless appellate review is timely sought, even an erroneous trial court order "does not excuse the failure to obey; i.e., disobedient parties may not avoid sanctions by challenging the validity of the order." (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group) Ch. 8M-5 ¶ 8:2150 (emphasis in original), citing Marriage of Niklas (1989) 211 Cal.App.3d 28, 34-35.) Defendants also argue (without citation) that "[a] general directive to limit privilege claims to those that are 'legally supportable' is not so definite and does not compel production of certain documents; it permits good-faith privilege positions . . . ." (Defs' Opp., at p. 23.) Given the prior history of the case, there was nothing vague about the court's direction to produce legally supportable privilege logs. Defendants had previously been instructed as to the required content of a privilege log sufficient to allow opposing counsel and the court to evaluate the claims of privilege. Indeed, the court's order did permit good faith assertions of privilege and a good faith effort to present a compliant privilege log. The clear and widespread deficiencies in the privilege logs demonstrate that Defendants' noncompliance with the September 18, 2019 order was not in good faith but rather was part of a continuing effort to delay production of documents to which Plaintiffs were entitled while critical depositions proceeded.

Before Private Plaintiffs filed their Motions to Compel, this court had held an informal discovery conference based on review of 80 pages of the November 1, 2019 privilege logs and informed Defendants of the court's tentative views that the privilege log was substantially insufficient. The court also had given Defendants an opportunity to state how the court should address the extent to which Defendants' claims of privilege were proper. (Minute Order, Dec. 4, 2019.) Defendants did not offer to revise the November 1, 2019 privilege logs or to re-review and produce documents when the claim of privilege was not substantially justified. (See, e.g., Defendants' Statement Pursuant to December 4, 2019 Minute Order, filed Dec. 9, 2019.) It is especially telling that Defendants, in a pattern that had already become familiar, attempted to derail a formal motion to challenge their actions by submitting revised (although still insufficient) privilege logs on January 6, 2020, with Defendants' Opposition Brief to Private Plaintiffs' Motion to Compel.

The intentionality of Defendants' conduct in asserting unsubstantiated privilege claims and stonewalling Plaintiffs' efforts to challenge those claims is evident from Defendants' conduct (through its counsel) dating back to 2017. As recited in Plaintiffs' Opening Brief on this Motion, and as supported by accompanying evidence, a privilege log produced by Defendants in 2017 had an identifiable attorney listed on only 2% of the 12,000 entries, and a privilege log produced

in 2018 with 39,000 entries had an attorney identified on only 2% of the entries. (Motion for Sanctions, at p. 5, lines 8-12, p. 7, lines 15-19.) While documents that are not directed from or to an attorney may be privileged under certain circumstances (for example, if they disclose the legal advice of counsel), subsequent events have demonstrated that Defendants' claims of privilege where no attorney is an author or recipient have frequently been unsupported and withdrawn. Subsequently, defense counsel sought to shift the burden to Plaintiffs to identify documents from the privilege logs that did not include an attorney, provide a basis for why Plaintiffs required more information to evaluate such privilege claims, and provide legal authority for why non-attorney communications were not privileged. (Id. at p. 7, lines 10-14.)

In 2018, Plaintiffs filed three motions to compel production of documents withheld as privileged. Two of the motions addressed documents listed as privileged involving two custodians who were to be deposed as PMQ witnesses. In their Opposition briefs on these motions, Defendants represented that they had not refused to produce non-privileged documents pertaining to these witnesses. Private Plaintiffs withdrew those motions and proceeded with the PMQ depositions without the documents listed as privileged. Plaintiffs assert that they did so based on the presumed good faith of Defendants' assurances. However, according to Plaintiffs' evidence, in the past two months as Defendants have produced documents previously claimed to be privileged, Defendants produced 2,362 documents involving those two PMQ witnesses. (Id. at p. 7, line 20, to p.8, line 4.)

Thus, Defendants, through their counsel, stonewalled over an extended period of this litigation by misusing claims of privilege to attempt to throw Plaintiffs' counsel off the track with respect to documents to which they were entitled. As a result, Plaintiffs' counsel were delayed in obtaining documents at a time when they could have been used in deposing Defendants' current and former employees.

When resisting the production of documents listed on deficient privilege logs, Defendants have relied on Catalina Island, supra, to argue that a trial court may not find a waiver of attorney-client privilege and work product doctrine when an objecting party submits an inadequate privilege log. (See Catalina Island, 242 Cal.App.4th at p. 1120.) But the court in Catalina Island did not leave Plaintiffs without a remedy in the face of Defendants' repeated failure to justify the withholding of documents they claim to be privileged.

The court in Catalina Island offered guidance for the very situation before this court:
If the response and any privilege log provide sufficient information to permit the court to determine whether the asserted privilege protects specific documents from disclosure, the court

may rule on the merits of the objection by either sustaining it or overruling it as to each document. [Citation.]

If the response and any privilege log fail to provide sufficient information to allow the trial court to rule on the merits, the court may order the responding party to provide a further response by serving a privilege log or, if one already has been served, a supplemental privilege log that adequately identifies each document the responding party claims is privileged and the factual basis for the privilege claim. [Citations.] In ordering a further response, the court also may impose monetary sanctions on the responding party if that party lacked substantial justification for providing its deficient response or privilege log. (§ 2031.310, subd. (h).)

If the responding party thereafter fails to adequately comply with the court's order and provide the information necessary for the court to rule on the privilege objections, the propounding party may bring another motion seeking a further response or a motion for sanctions. At that stage, the sanctions available include evidence, issue, and even terminating sanctions, in addition to further monetary sanctions. (§ 2031.310, subd. (i).) But the court may not impose a waiver of the attorney-client privilege or work product doctrine as a sanction for failing to provide an adequate response to an inspection demand or an adequate privilege log. [Citations.]

(Id. at pp. 1127 (emphasis added) (citations omitted).) Notwithstanding Defendants' arguments to the contrary, it is clear that Defendants have failed to adequately comply with court orders, and that sanctions are therefore justified under the structure adopted by Catalina Island as an alternative to requiring production of assertedly privileged documents.

Refusal to furnish an adequate privilege log is not an insignificant violation of the duty to abide by the rules of discovery. A privilege log not only allows the opposing party to assess the claims of privilege; a factual description of withheld documents also permits a judicial evaluation of the claim of privilege. (Best Products, Inc. v. Superior Court (2004) 119 Cal.App.4th 1181, 1188–1189.) In the absence of a good-faith attempt to inform the parties and the court of the basic facts supporting a claim of privilege, a party's privilege claims could easily serve as a mere strategy for flaunting the discovery rules and thereby avoiding the disclosure of relevant information. That is the case here.

"A trial court has broad discretion to impose discovery sanctions, but two facts are generally prerequisite to the imposition of nonmonetary sanctions . . . : (1) absent unusual circumstances, there must be a failure to comply with a court order, and (2) the failure must be willful." (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.) Findings that a party "acted

intentionally and in bad faith are the functional equivalent of a finding that it acted willfully." (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1225 (Karlsson).) A finding of bad faith need not be based only on the circumstances surrounding a violation of a court order or orders, but may consider "a persistent pattern of discovery abuse." (Id. at p. 1217.)

Given the history of Defendants' repeated failure to submit adequate privilege logs, the court concludes that Defendants' failure to comply with the September 18, 2019 order was willful. The court, through its past orders and comments during hearings and status conferences, gave more than sufficient guidance on what the law requires in preparing privilege logs; Defendants repeatedly failed to comply.

Defendants have repeatedly failed to stand by their initial privilege claims. The court, after viewing the conduct of Defendants and defense counsel over the course of the proceedings, determines that Defendants make blanket, unsupported claims of privilege, which then force Plaintiffs to dedicate hours reviewing deficient privilege logs and bringing privilege issues to this court's attention. Pushed to offer basic justifications for the withholding of documents, Defendants either make unsupported statements to try to deter Plaintiffs from pursuing assistance from the court or hand over some documents and further edit the privilege logs. The sheer number of privilege assertions that ultimately were unsupportable is evidence that Defendants' conduct is the result of a concerted policy, and not the hapless mistakes of a few document-review attorneys.

The court already has discussed and rejected Defendants' excuse that the work was burdensome and that a document-by-document review should not be expected. The court has merely required that Defendants meet their most basic obligations under the discovery rules: namely, that an assertion of privilege be made in good faith and supported by sufficient factual information so that it can be evaluated by Plaintiffs and by this court; anything less would allow a party to hide relevant, non-privileged documents from its opponent, thereby undermining the entire litigation process. Plaintiffs and the court cannot be subjected to an infinite process wherein Defendants' logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privileges. Catalina Island offers the imposition of sanctions as Plaintiffs' only way out of such an impasse.

The court finds that Defendants' pattern of conduct in this case with respect to Defendants' claims of privilege, including repeated assertion of unmeritorious objections, repeated refusal to furnish a legally compliant privilege log, violation of court orders (in particular this court's September 18, 2019 order) and related efforts over an extended period (as discussed above) to

misuse claims of privilege to attempt to deprive Plaintiffs of documents to which they are entitled, was willful, intentional and in bad faith.

IV. Determination of Appropriate Sanctions

There is clear prejudice to Plaintiffs resulting from Defendants' conduct. Fact discovery as to Defendants' current and former employees and as to the initial discovery group of individual Plaintiffs was ordered to end (by agreement of the parties) on January 31, 2020. Ninety-four depositions occurred before November 1, 2019, when Defendants submitted yet another set of inadequate privilege logs. More documents may be produced with the privilege logs required to be filed February 11, 2020. The late production of documents for which there was no colorable claim of privilege has meant that Plaintiffs conducted many depositions without access to necessary documents, that deposition witnesses were improperly instructed on the grounds of privilege not to answer questions, and that Plaintiffs have been delayed in general case preparation and strategy.

Moreover, while defense counsel now can turn to depositions of third-party witnesses and to preparing for expert depositions, Plaintiffs' counsel is required to (1) continue to analyze yet another revised privilege log to be produced with a declaration by trial counsel on February 11, 2020; (2) review for the first time key documents recently produced (as described by Plaintiffs' counsel at oral argument on this Motion) and documents that will be produced with the again-revised privilege logs of February 11; (3) make decisions as to which witnesses that have already have been deposed will need to be deposed again in order to allow Plaintiffs' counsel to question witnesses as to key documents recently produced; (4) as part of the decision as to which witnesses to depose again, weigh the potential value of a renewed deposition against the loss of time and effort from other trial preparation tasks; and (5) prepare experts for their testimony without knowing whether recently produced documents can be authenticated and without having a deposition to lay a foundation for the business records exception to the hearsay rule. These are substantial disadvantages to Private Plaintiffs in this challenging litigation.

Where "sanctions are called for, they " '… "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] " '… [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]' " [Citations.]' [Citation.]" (Do it Urself, supra, 7 Cal.App.4th at p. 35.)" (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.)

"Sanctions should be designed to remedy discovery abuses, but should not put the party seeking the sanctions in a better position than he or she would have been in, had the requested discovery been provided." (NewLife Sciences, LLC v. Weinstock (2011) 197 Cal.App.4th 676, 689, fn. 10.) In other words, the court should utilize sanctions to level the playing field in light of the discovery abuse.

A. Monetary Sanctions

In their motion, Plaintiffs seek a total of $949,699.50 in monetary sanctions: $498,650 in monetary sanctions against Defendants and their counsel for time spent directly on privilege disputes; and $451,049.50 in monetary sanctions against Defendants and their counsel for lost productivity and inefficiencies related to depositions resulting from Defendants' misuse of discovery. Given Defendants' discovery abuses, Plaintiffs are entitled to recover "the reasonable expenses, including attorney's fees, incurred by anyone as a result of [Defendants'] conduct." (Code Civ. Proc., § 2023.030, subd. (a).)

As for the first category of sanctions, Defendants point to time spent directly on privilege disputes, "including meet and confers, analysis of Defendants' privilege logs, court hearings, and motion practice." (Pls' Mot., at p. 26.) To support this claim, Plaintiffs point to the declarations of Jesse Creed, Devin Bolton, Gary Praglin, Kelly Weil, Michael Kelly, Patricia Oliver, Brian Panish, and Alexander Behar. For example, Mr. Praglin states that he has been in practice for 38 years, his published billing rate is $850.00, and that he spent approximately three hours meeting and conferring regarding privilege issues and preparing his declaration. (Praglin Decl., ¶¶ 11-13.) Mr. Panish gives his billing rate as $1,500 per hour and asserts that he spent approximately 10 hours on activities such as meeting and conferring on privilege issues with Defense counsel and collaborating with Mr. Creed on privilege issues. (Panish Decl., ¶¶ 1-7.) Mr. Behar states that he spent 3 hours preparing an ex parte application related to privilege issues in this coordinated proceeding and provides a billing rate of $250 per hour. (Behar Decl., ¶ 2-5.) Ms. Weil declares that she spent 10 hours meeting and conferring regarding privilege and contributing to Plaintiffs' motion to compel, that she spent 1.5 hours preparing her declaration, and that her published hourly billing rate is $650. (Weil Decl., ¶ 12-14.) Mr. Kelly states that he spent one hour preparing his declaration in support of the Motion for Sanctions, and that his hourly billing rate is $950.00. (Kelly Decl., ¶¶ 15-16.) Mr. Bolton states that he has spent 303.49 hours working to resolve privilege issues and to obtain the discovery to which Plaintiffs believe they are entitled, and that he anticipates spending another 10 hours responding to this issue, for a total of $172,419.50 at an hourly rate of $550. (Bolton Decl., ¶¶ 31-33.) Mr. Creed, who claims an hourly billable rate of $650, requests $196,878.50 in fees for 302.89 hours spent on privilege

issues. (Creed Decl., ¶¶114-117.)

The vast majority of hours claimed are from Mr. Creed, Ms. Oliver, and Mr. Bolton. Mr. Creed offers a detailed account of his hours spent on privilege issues. (See Creed Decl., ¶ 14.) Though Mr. Creed includes travel time to and from court in his total hours, he only does so where his participation in a status conference was due to the fact that privilege issues were set to be discussed at the hearing. (Creed Decl., ¶ 14(g), fn. 1.) Similarly, Mr. Bolton has lodged with the court a ten-page document offering a detailed account of his time spent working on privilege issues. (See Bolton Decl., Ex. 28.) The court is satisfied by Exhibit 28 that Mr. Bolton's claimed costs are reasonable.

Ms. Oliver asserts that her team spent 238.30 hours (with a cost of more than $101,277 in attorney fees) reviewing privilege logs, and that this time estimate excludes paralegal work. (Oliver Decl., ¶ 21.) To explain the billing rate, Ms. Oliver states that her team "relied almost entirely on first year attorneys billing at $425 to assess these privilege log issues to avoid excess costs." (Oliver Decl., ¶ 21.) She also states that she spent approximately 2 hours preparing her declaration, and that her hourly billing rate is roughly $675. (Oliver Decl., ¶ 23-24.) The court credits Ms. Oliver's statement that her team spent 238.30 hours reviewing privilege logs. Defendants have not challenged any of the hourly rates sought by the various members of Plaintiffs' counsel's team.

The court credits the declarations of counsel and finds that the billable rates and time spent on privilege issues are reasonable in light of the large number of documents at issue. The majority of these costs are due to the fact that Plaintiffs, rather than Defendants, were required to expend time reviewing the withheld documents to assess the claims of privilege. These costs were the result of Defendants' conduct.

With their Reply papers, Plaintiffs request an additional $33,460 for time spent on the privilege disputes after the filing of the current motion. Mr. Creed asserts that he has spent 38.4 hours preparing for oral argument on the January 14, 2020 privilege motions, on appearing for that hearing, on reviewing Defendants' Opposition to the current motion, and preparing the Reply papers for the current motion. (Creed Decl. ISO Reply, ¶ 22.) This time amounts to $24,960. (Creed Decl. ISO Reply, ¶ 23.) Similarly, Mr. Praglin asserts that, since the time of the filing of the current motion, he has spent approximately 10 hours in connection with evaluating privilege issues for the current motion: i.e., reading the Opposition papers, reviewing privilege claims and making comparisons to previous versions, searching deposition transcripts, and conferring with co-counsel. (Praglin Decl. ISO Reply, ¶ 9.) Given Mr. Praglin's hourly rate of $850, the cost of

such time is $8,500. (Praglin Decl. ISO Reply, ¶ 9.) These costs are reasonable.

The court may not award monetary sanctions on top of monetary sanctions that already have been awarded based on Defendants' unmeritorious privilege claims. In denying Defendants' Motion for a Protective Order with respect to the vast majority of AECOM documents, the court awarded monetary sanctions in the amount of $6,500. (Minute Order, Aug. 15, 2019, at p. 1.) The court therefore deducts that amount from the monetary sanctions awarded on this Motion.

The court awards monetary sanctions in favor of Private Plaintiffs' counsel and jointly against Defendants and defense counsel in the amount of $525,610, payable within 20 days. Counsel should meet and confer with respect to how Private Plaintiffs' counsel desire to receive payment.

With respect to the monetary sanctions Plaintiffs' counsel request for lost productivity, however, the court finds that Plaintiffs' counsel have failed to offer a reasonable basis on which to award sanctions. To illustrate what Plaintiffs mean by "lost productivity and inefficiencies," they offer the example of Mr. Creed, who states that, when preparing for a deposition, he has "repeatedly had [the] experience of searching for unprivileged versions of improperly redacted documents that are clearly privileged." (Creed Decl., ¶ 133.) Other declarants note that the prevalence of claims of privilege slows down the deposition, requires more preparation, and may ultimately require that some depositions be retaken. (See, e.g., Weil Decl., ¶¶ 2-10.) From these claims, most counsel declarants take the position that roughly 20% of the total time spent on preparing for and completing depositions can be attributed to inefficient or lost time because of privilege issues. (Weil Decl., ¶ 11; Praglin Decl., ¶ 9; Oliver Decl., ¶ 22; Baymann Decl., ¶ 3.) Apart from lacking sufficient evidentiary support, the 20% figure appears to be an arbitrary number that is not likely to represent the actual amount of time wasted because of privilege issues. At oral argument Mr. Panish stated that there were inefficiencies because he would fully prepare to depose a witness only to receive, the night before the deposition, newly produced documents as to which Defendants previously had claimed privilege. The court does not doubt that additional time had to be spent preparing for depositions of defense witnesses when counsel taking the deposition had to add preparation time because of recently produced documents. But there has been no reliable estimate to show that this added preparation time resulted in a 20% inefficiency as to every deposition.

As Plaintiffs state, the effect of Defendants' conduct is likely to result in the reopening of certain depositions, given that previously withheld documents have since been produced or may be produced in the future. A more certain calculation of Plaintiffs' reasonable costs with respect to depositions can thus be determined based on the time spent in taking those future depositions.

Therefore, the court rules that Private Plaintiffs counsel are entitled to reasonable costs, including attorneys' fees, for the taking of any future depositions that are reopened due to the late production of documents over which Defendants previously asserted privilege or work product protection. The court will allow Plaintiffs to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document which was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Once such depositions are concluded, Plaintiffs may submit an accounting of such costs and fees to the court, to be accompanied by briefing if necessary.

B. Non-monetary Sanctions

Given the conduct of Defendants and Defense counsel, the court may "impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process," "impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses," and/or "impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence." (Code Civ. Proc., § 2023.030, subds. (b), (c).)

This court is not able to level the playing field for the parties to try this case by precluding the party that misused the discovery process from introducing previously withheld documents that are unfavorable to that party. Nevertheless, the court needs to consider how the delay in production of documents previously claimed to be privileged has adversely affected Plaintiffs' trial preparation, and to determine whether that disadvantage can be mitigated.

Ninety-four depositions took place prior to November 1, 2019, the date on which Defendants produced another inadequate privilege log. Plaintiffs were disadvantaged during those depositions because they were unable to question witnesses based on Defendants' documents that were initially withheld on the basis of privilege but produced after November 1, 2019. Because of the delay in production of purportedly privileged documents, Plaintiffs are now put to the choice of whether to spend valuable trial preparation time setting additional days of deposition of previously deposed witnesses merely to lay a foundation for documents that were withheld on the basis of Defendants' claims of privilege. Plaintiffs are now having to depose third party witnesses based on such documents without knowing whether a foundation can be laid for the admissibility of such documents. And Plaintiffs are having to prepare their experts' testimony without knowing whether they will be able to lay an evidentiary foundation for the

admissibility of such documents.

These adverse effects on Private Plaintiffs caused by Defendants' unwarranted withholding of documents on the basis of privilege can be mitigated by an issue sanction that limits the grounds upon which Defendants can challenge the admissibility of any document that once appeared on Defendants' privilege logs but was produced after November 1, 2019. In order to attempt to even the playing field but not punish Defendants, the court determines that Defendants may not oppose admissibility of such documents on the basis of lack of authenticity or the inapplicability of the business records exception to the hearsay rule. These are, after all, Defendants' own records. Defendants are not precluded, however, from objecting to a hearsay statement within such documents.

These sanctions will allow Plaintiffs to immediately begin relying on the documents as to which Defendants' improperly delayed production on grounds of privilege. However, such sanctions are not sufficient to level the playing field in light of Defendants' misconduct. Private Plaintiffs do not have unlimited resources and they do not have unlimited time. Defendants repeatedly say that there is still plenty of time for Plaintiffs to prepare their case set for trial four months from now. But Defendants cannot deny that the preparation of this case for trial is such a mammoth undertaking that Defendants themselves argued strenuously for a trial in September, 2020, not June, 2020, on the assumption that the cut-off for discovery of Defendants' and Plaintiffs' witnesses would be January 31, 2020. It ill-behooves Defendants now to argue that four months is plenty of time for Plaintiffs to prepare for trial.

Plaintiffs should not have to accept a trial continuance in order be able to properly prepare for trial in light of Defendants' misconduct. There are 36,000 Plaintiffs in this case and, despite this court's best efforts, not a single trial has begun. The event that is the subject of this lawsuit occurred in 2015 and the five-year rule on the first cases filed would run in November 2020 if the parties had not waived that rule in light of the exigencies of case management and trial preparation. The Plaintiffs' right to present their case to a jury should not be further delayed as a result of Defendants' misconduct.

At this time, Plaintiffs have not made a sufficient showing to justify issue sanctions that affect proof of the elements of Plaintiffs' claims. However, even on the eve of the hearing on this Motion for Sanctions, Plaintiffs were reviewing for the first time recently produced documents that, Plaintiffs contend, contradicted the positions that Defendants' witnesses had taken in deposition. Without the documents, Plaintiffs assertedly were unable effectively to cross examine Defendants' witnesses at deposition. Nevertheless, the Motion currently before the

court does not draw a sufficient connection between late-produced or still-withheld documents formerly claimed by Defendants to be privileged and a disadvantage suffered by Plaintiffs in their ability to prove a particular element of their claims against Defendants. Without such a connection, issue sanctions that would find Plaintiffs to have made out a prima facie case on an element or elements of one of their claims or would preclude Defendants from offering a defense on a matter at issue in the case are not currently appropriate.

As to Plaintiffs' request for a jury instruction pursuant to Evidence Code section 413, such an instruction is meant to inform a jury about their consideration of evidence when a party's conduct has made evidence unavailable, or effectively unavailable, at trial. (CACI 204; Karlsson, supra, 140 Cal.App.4th at pp. 1215, 1224-1227.) Evidence Code section 413 allows a jury to have insight into the discovery process (e.g., spoliation of evidence) and invites them to draw conclusions unfavorable to a party when evidence is absent. As with Private Plaintiffs' request for stronger issue sanctions, the current Motion does not sufficiently connect the Defendants' misuse of privilege claims, privilege logs, or late production of evidence to specific categories of documents that have not been made available to them. The court will not, at this stage of the proceedings, determine that CACI 204 should be given to the jury.

The sanctions imposed herein are made under the assumption that Defendants will keep their promise that "Plaintiffs have received or will receive by the deadline set by this Court's January 14, 2020 order every document to which they are entitled." (Defs' Opp., at p. 22.) If Defendants fail to keep their promise to abide by this court's January 14, 2020 order, then the court will allow further briefing and consider stricter additional evidentiary and issue sanctions, as well as a jury instruction under Evidence Code section 413. The court also may permit Private Plaintiffs to seek additional sanctions based on information about withheld documents that have only recently been disclosed to them.

The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.

A copy of this minute order will append to the following coordinated case under JCCP4861: BC601844.

# OSC Exhibit 3
# August 3, 2020 Ruling in Gandsey

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Civil Division**

Central District, Spring Street Courthouse, Department 12

**JCCP4861** August 3, 2020
**SOUTHERN CALIFORNIA GAS LEAK CASES** 1:13 PM

Judge: Honorable Carolyn B. Kuhl
Judicial Assistant: L. M'Greené
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

**NATURE OF PROCEEDINGS:** Court Order: Ruling on Submitted Matter

The Court, having taken the matter under submission on 7/22/2020 on Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies, now rules as follows:

Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies

Court's Ruling: For the reasons stated below, the court continues this Motion until a date after the completion of non-expert discovery in order to be able to determine the extent to which this court's prior sanctions orders are providing an adequate remedy for the detriment to Plaintiffs from the discovery abuses committed by Defendants as described below. The court reserves for future determination whether issue or evidentiary sanctions or a curative jury instruction are appropriate. The court does not impose further monetary sanctions at this time. The court does not award any sanctions to Developer Plaintiffs.

Procedural Posture of the Current Motion

Plaintiffs, in their original Motion for Sanctions filed March 4, 2020, sought the following sanctions for Defendants' repeated discovery abuses:
(a) An order striking service of Defendants' February Privilege Logs on the basis that they are unreliable and requiring Defendants to re-serve privilege logs accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege were made in good faith and the information contained in the privilege logs accurately describes the documents at issue;
(b) An order requiring Defendants and their counsel of record, Morgan, Lewis & Bockius, LLP, to pay $50,000 for each day from February 11, 2020 to the date they re-serve the privilege logs

with the declarations described above, see Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc., 246 Cal. App. 4th 566, 605 (2016) (A court is permitted to 'impose[] a significant monetary penalty . . . for each day the responsive documents were not produced");
(c) Issue sanctions designating the following facts to be established:
Issue Sanction # 1 – SoCalGas and Sempra Energy formed a joint enterprise in responding to the SS-25 Blowout.
Issue Sanction # 2 – SoCalGas was and is Sempra's agent in operating the Aliso Canyon facility and responding to the SS-25 Blowout.
Issue Sanction # 3 – Sempra and SoCalGas knew of the risk of a well failure like SS-25 Blowout before the SS-25 Blowout and knew the consequences of such a well failure would be severe, but failed to take timely action to address those risks.
Issue Sanction # 4 – SoCalGas knew emissions from SS-25 were capable of causing and did in fact cause symptoms associated with exposure to mercaptans by the Porter Ranch community.
Issue Sanction # 5 – SoCalGas knew at the time of the SS-25 Blowout that it was industry custom and practice to have a storage well integrity program and to use Vertilog inspection tools to predict casing integrity
(d) Evidence/issue sanctions precluding Defendants from doing the following with respect to their presentation of evidence at trial:
Evidence Sanction # 1 – Defendants should be precluded from using any documents produced after November 1, 2019 and from questioning witnesses regarding the same.
Evidence/Issue Sanctions # 2 to 6 – Defendants should be precluded from introducing any evidence regarding the issue sanction topics noted above.
(e) A suppression-of-evidence jury instruction against Defendants, as follows:
Jury Instruction No. 1: "Counsel for both Parties will have an opportunity to examine witnesses regarding documents in this case. In the course of such examination, you may hear counsel for the Plaintiffs describe how Defendants failed to produce certain documents to Plaintiffs during the period for discovery. Those documents have been marked with a red sticker. You may consider whether Defendants intended to conceal those documents. If you decide that Defendants did so, you may decide that the documents would have been damaging to Defendants."
(f) A monetary sanction of $29,250 against Defendants and their counsel of record, Morgan, Lewis & Bockius, LLP for amounts associated with bringing the Motion.

Developer Plaintiffs filed a Joinder to the motion on March 5, 2020.

Plaintiffs filed an ex parte application to have the March 4, 2020 motion for sanctions heard earlier. The court granted that request only with respect to the Motion's request for relief designed to ensure compliance with discovery; the court did not allow expedited consideration of issue, evidence and jury instruction sanctions. (Minute Order, Mar. 5, 2020, at p. 1; Minute

Order, March 20, 2020, p. 2.)

On March 20, 2020, the court granted the relief requested in (a) and (f) above and partially granted the relief requested in (b) above. The court struck service of Defendants' February 11, 2020 privilege logs on the basis that they were unreliable; Defendants were required to re-serve privilege logs within 30 days, accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege are made in good faith and the information in the logs accurately describes the documents at issue. (Minute Order, Mar. 20, 2020, at p. 2.) The court further stated as follows: "If the revised privilege logs and declarations are not served within 30 days of this date, a daily sanction of $50,000 is imposed jointly and severally against Defendants and their counsel until such time as Defendants comply with this Order." (Id.) The court awarded $46,800 in sanctions jointly against Defendants and their counsel. (Id.) The court continued for further consideration the other relief requested.

On May 26, 2020, Plaintiffs filed an "Amended" Motion for Sanctions, along with a "Supplemental Brief" meant to update the court on events since March 20, 2020. Plaintiffs state that Defendants have continued to abuse the discovery process and defy this court's previous discovery orders. The issue, evidence, and jury instructions sanctions requested are identical to those in the original motion, with one addition: "Private Plaintiffs request that the Court enter an order under Section 2019.020(b) of the Code of Civil Procedure and its inherent power over case management sequencing the depositions of experts such that the depositions of Defendants' experts precede the depositions of Plaintiffs' experts." (Pls' Am. Mot., at p. 8.) Plaintiffs also seek new monetary sanctions.

On May 29, 2020, Developer Plaintiffs Toll Brothers, Inc. and Porter Ranch Development Company filed their "Joinder to Amended Motion of Private Plaintiffs for Issue, Evidence, and Monetary sanctions, and Other Remedies." On June 3, 2020, Developer Plaintiffs TF Hidden Creeks, L.P., Forestar Chatsworth, LLC, and Shappell Liberty Investment Properties filed their "Joinder to Private Plaintiffs' Amended Motion for Issue, Evidence, and Monetary Sanctions, and Other Remedies."

On June 8, 2020 Defendants filed their Opposition to the Amended Motion. On June 12, 2020 Plaintiffs filed their Reply. The court issued a tentative decision on the motion on June 24, 2020 and heard argument the next day. The court's tentative ruling is recorded in the Minute Order for June 25, 2020. At the June 25, 2020 hearing, the court allowed the parties to submit supplemental briefing after Plaintiffs asserted at oral argument that they could show how the prejudice caused by Defendants' discovery abuse would be remedied by the requested sanctions. Plaintiffs filed their Supplemental Brief on July 6, 2020; Defendants filed their Supplemental

Opposition on July 13, 2020. Although the court only allowed supplemental briefing from Plaintiffs and Defendants, Developer Plaintiffs chose to file supplemental briefing on July 17, 2020.

Defendants' and Defense Counsel's Long History of Abuse

As recently stated in Siry Investment, L.P. v. Farkhondehpour (2020) 45 Cal.App.5th 1098, 1118 (Siry), in considering sanctions for discovery misconduct, a court must consider whether the party's non-compliance is the latest chapter in a longer "history of abuse," and must look to "the number of formal and informal attempts to obtain the discovery" as well as whether prior court orders compelling discovery have gone unheeded.

The appropriate place to begin the history of Defendants' discovery abuse is a motion brought by Plaintiffs against a third-party contractor named AECOM on August 1, 2018 to compel production of all unprivileged documents withheld from AECOM's production at the direction of SoCalGas. Then-judge John S. Wiley granted the motion in part on October 17, 2018, holding that there was no proper assertion of privilege or attorney work product over hundreds of documents except as to four specific categories of documents:
One: Documents that AECOM authored at the request of a Company lawyer.
Two: Documents Company lawyers gave to AECOM for review and comment regarding technical expertise that would assist the lawyers in developing legal strategy.
Three: Documents containing legal opinions that Company lawyers gave to AECOM for the purpose of evaluating whether technical information in the document was accurate.
Four: Documents that are communications with the Company's retained (but not testifying) experts.
(Minute Order, Oct. 17, 2018, at p. 3.)

Unfortunately, Judge Wiley's ruling on the AECOM documents did not definitively resolve the dispute. Plaintiffs later claimed that Defendants failed to produce AECOM documents not included in one of Judge Wiley's four categories and this court agreed that SoCalGas had failed to offer a basis for withholding AECOM documents. (See Minute Order, Aug. 15, 2019.) Ruling on SoCalGas' motion for protective order, this court ordered that 168 of the 174 AECOM documents at issue be produced; the court also awarded $6,500 in sanctions jointly against SoCalGas and defense counsel. (Id. at p. 1.) In what was to become a pattern in this case, SoCalGas simply "fail[ed] to provide evidentiary support sufficient to allow the court to find that SoCalGas ha[d] met its burden of establishing privilege by demonstrating that the documents fall within the categories earlier defined by Judge Wiley." (Id. at p. 2.) In order to justify the withholding of 174 documents, SoCalGas chose to submit as evidence only three "remarkably

short" declarations. (Id.) Not willing to stand by its own AECOM privilege log, SoCalGas even filed an "updated version of the AECOM [privilege] Log" with its Reply brief. (Id. at p. 9.) Defendants' eleventh-hour abandonment of their prior privilege logs is something to which this court and Plaintiffs have become painfully accustomed.

It is also worth noting that, prior to Plaintiffs' challenge to the withholding of AECOM documents, SoCalGas asserted that approximately 771 AECOM documents were privileged, only to later withdraw those claims and limit its assertions of privilege to 174 documents. (Id. at p. 2.) This practice of abandoning their own initial privilege assertions when challenged, as will be shown below, has come to be a defining aspect of Defendants' discovery practice in this litigation. Though Defendants claim that they have willingly removed documents from privilege logs in an effort to reduce disputes and seek compromise, this court has concluded that Defendants have instead engaged in a practice of making broad and unjustified assertions of privilege over large swathes of documents, only to back down when met with motion practice (or threat thereof) by Plaintiffs. In sum then, of the supposedly privileged 771 AECOM documents, Defendants' claims of privilege were sustained as to a mere 6 documents.

On the same day as the hearing on the AECOM documents, the court heard discussion as to documents related to a separate third-party contractor named Sitrick. With respect to documents prepared by or exchanged with public relations consultants, the court ruled as follows:
The Court orders that within 20 days of today's date (9/3/19), counsel for So Cal Gas who has appeared before the Court this date, shall review all documents with respect to such privilege claims and shall provide to plaintiff's [sic] counsel and file a declaration stating that counsel has personally reviewed the documents in this category as to which privilege continues to be claimed, that counsel is familiar with the relevant case law and statutes pertaining to privilege concerning such documents and that there is a good faith basis for withholding such documents on the basis of privilege.
(Minute Order, Aug. 14, 2019, at p. 12.) As this court has explained before, this order was unprecedented in this court's 24 years of experience on the bench, and was the result of the court's concern over the good faith basis for Defendants' privilege claims. The court's level of concern with respect to Defendants' good faith in claiming privilege was heightened when it became clear that Defendants had continued to assert privilege over 700 AECOM documents after Judge Wiley's order, only to reduce those claims to 174 documents when Plaintiffs threatened motion practice.

On September 3, 2019, Defendants communicated that, of the 358 public relations consultant documents originally claimed to be privileged in a log served on July 19, 2019, Defendants continued to assert claims of privilege only as to 32 documents. (See Declaration of James J.

Dragna Regarding SoCalGas' PR Documents, filed Sept. 3, 2019, ¶¶ 3-5.) In other words, when asked to file a declaration as to the good-faith basis of their claims, Defendants chose to abandon over 90 percent of those claims.

At a subsequent status conference, the court ordered Defense counsel to report at a September 18, 2019 status conference as to how they proposed to address the problems of Defendants' over-designation of documents as privileged. (Minute Order, Sept. 11, 2019, at p. 7.) On September 18, 2019, the court held the "Status Conference re: Defendant's privilege claim." (Minute Order, Sept. 18, 2019, at p. 1.) After hearing the parties' positions as to discovery propounded on Sempra and "Defendants' over-designation of privileged documents," the court ruled as follows:
• Within 45 days defense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.
• Before the September 25, 2019 status conference, defense counsel shall produce to plaintiffs all "data request" documents as to which privilege is not legally supportable and shall re-serve the privilege log previously produced for this category of documents so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable. To the extent any document is redacted to protect a legally supportable privilege, the redacted document shall be produced to plaintiffs. Defense counsel shall bring to the September 25, 2019 status conference all documents in the "data request" category that have been fully or partially withheld on the basis of privilege.
• Counsel shall meet and confer with respect to the deadline(s) for defendants to prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.
(Id. at pp. 1-2 (emphasis added).) Defendants did not claim that they needed more time to serve accurate and legally sufficient privilege logs by the court's deadline.

At a subsequent status conference on September 25, 2019, Defendants reported that, of the more than 4,000 original claims of privilege for "data request" documents, only 176 "data request" documents remained on Defendants' privilege log. Moreover, Defendants chose to produce the updated privilege log at 6:00 p.m. the prior evening, robbing Plaintiffs' counsel of adequate time to prepare to discuss the updated log with the court at the status conference.

On November 1, 2019, Defendants served privilege logs on Plaintiffs, claiming privilege over 150,527 of the documents otherwise subject to production by SoCalGas, and over 5,912 of the documents otherwise subject to production by Sempra (the November 2019 Logs). (Minute

Order, Jan. 14, 2020, at p. 2.)

On December 19, 2019, Plaintiffs filed a motion to compel production of 136,204 of the SoCalGas documents, and of 5,459 of the Sempra documents. (Id.) True to form, Defendants, when presented with a formal challenge to their privilege claims, chose to drop their claims of privilege for thousands of documents. (Id. at p. 3.) Moreover, Defendants tellingly chose not to stand by the original November 2019 logs, instead providing substitute privilege logs with their opposition briefs. (Id.) The court explained this repeated tactic by Defendants:
… with their Opposition Briefs, Defendants nevertheless filed and served a substitute privilege log, dropping their claims of privilege for thousands of documents and providing additional information as to claims of privilege for some of the documents for which privilege continues to be asserted. SoCalGas' supposedly privileged documents have, in the span of two months, dropped from 150,527 to 116,740; Sempra's documents on its log have gone from 5,912 to 4,362. … Defendants have repeatedly retreated from initial claims of privilege and have a history of filing "new" privilege logs in a time frame that gives Plaintiffs insufficient time to respond before a court hearing. Indeed, as described below, in every instance that has been the subject of a court order, over 90 percent of Defendants' initial claims of privilege have been determined to be unsupportable and/or withdrawn.
(Id.) The new privilege logs (the January 2020 Logs) reflected the fact that Defendants had dropped privilege claims made in the November 2019 privilege logs as to 22 percent of the SoCalGas documents, and as to 26 percent of the Sempra documents.

The court held that the November 2019 Logs were deficient. (Minute Order, Jan. 14, 2020, at pp. 10-12.) The November 2019 Logs "employ[ed] generic macros that fail to offer a sufficiently detailed explanation of the basis for withholding individual documents." (Id. at p. 10.) Defendants failed to offer factual information to indicate the purpose of a supposedly privileged communication; in fact, Defendants even failed to identify all of the attorneys who were allegedly involved in the assertedly privileged communications or who purportedly generated the work product. The court found that the failure even to properly identify attorneys was "emblematic of Defendants' approach to dealing with their burden of asserting privilege in a manner that allows evaluation by opposing counsel and the court." (Id. at p. 12.) As the court explained, "[i]n a variety of ways, Defendants' numerous and vague claims of privilege attempt to shift the burden to Private Plaintiffs and the court to sort through an unreasonable number of privilege claims as to which, in the end, there is no legal basis to support the vast majority of the claims." (Id.)

The court then ordered Defendants to provide by February 11, 2020 a new, legally-compliant set of privilege logs that would "comply with the prior rulings of this court (including the prior

rulings of Judge Wiley), shall be sufficient under the law set forth [in the court's January 14, 2020 Minute Order], and shall be accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed." (Minute Order, Jan. 14, 2020, at p. 17.) The court noted that "Defendants' conduct to this point will be the subject of [Plaintiffs'] Motion for Sanctions, and this court expresses no view on the outcome of that Motion at this time." (Id.) While the court had hoped that Defendants would comply with the February 11, 2020 date to produce all non-privileged documents, it should be noted here that Defendants produced at least 3,961 documents after the February 11, 2020 deadline but before the March 20, 2020 Minute Order. (Blair Decl., ¶ 52.)

The court also ordered Defendants to produce all documents listed on the January 2020 Logs that were claimed to be privileged solely on the basis that they were attachments to a privileged communication. (Minute Order, Jan. 14, 2020, at pp. 12-15.) Defendants sought review of this court's ruling on the attachments, bringing the dispute the Second District Court of Appeal and then to the California Supreme Court. With the exception of a single document, this court's ruling on the attachments was allowed to stand.

A few days before the court issued the above ruling, Plaintiffs filed a motion for discovery sanctions. (Motion of Private Plaintiffs for Monetary, Evidentiary, and Issue Sanctions and an Adverse-Inference Jury Instruction, filed Jan. 10, 2020.) The court granted that motion in part:
… the court awards monetary sanctions of $525,610 against Defendant and defense counsel jointly, payable within 20 days. The court also orders that Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions. Plaintiffs may submit an accounting of such reasonable costs and fees to the court, to be accompanied by briefing if necessary. The court also imposes the following issue sanctions: (1) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed authenticated; and (2) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed admissible under the business records exception to the hearsay rule (but Defendants may object to a hearsay statement within such documents). (Minute Order, Feb. 20, 2020, at p. 1.)

The court found that (1) Defendants' abusive misconduct in discovery; (2) repeated unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants' claims of privilege; and (4)

willful violation of court orders addressing these issues, when taken together, warranted the imposition of sanctions. (Id. at p. 10.)

The court determined that Defendants had engaged in a practice of providing documents only after extraordinary efforts by Plaintiffs' counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. (Id.) The court found that Defendants made unmeritorious objections to discovery in order to delay Plaintiffs' right to discover relevant documents. (Id.) The court thus concluded that the record did not support Defendants' contention that its initial claims of privilege had been made in good faith. (Id.)

The court explained that Defendants had repeatedly provided legally inadequate privilege logs in this litigation. (Id. at pp. 13-15.) The court also concluded that Defendants' conduct prejudiced Plaintiffs:

> The undue burden and expense caused to Private Plaintiffs by Defendants' insufficient privilege logs is obvious. The chronology set forth above details Private Plaintiffs' repeated attempts to challenge Defendants' claims of privilege and to find a way to overcome the disadvantage of privilege logs that were manifestly inadequate to allow Plaintiffs or the court to evaluate the claims of privilege. Defendants further manipulated the vague claims of privilege to present a moving target as they backed off substantial numbers of claims of privilege tardily and only when challenged. Such behavior continued even as Plaintiffs' Motions to Compel were being litigated in December 2019 and January 2020. … The undue burden and expense caused to Private Plaintiffs was substantially magnified by the fact that Plaintiffs were deprived of documents to which they were entitled during periods of intense litigation activity while the majority of Defendants' current and former employees were deposed.
> (Id. at p. 15.)

Critically, the court found that Defendants' misconduct was both willful and in violation of prior court orders. (Id. at pp. 15-19.) Defendants failed to comply with Judge Wiley's original AECOM order: "The failure to produce these documents during the 10-month period following Judge Wiley's ruling was without substantial justification and constituted a violation of Judge Wiley's order." (Id. at p. 16.) The court also determined that, because the court found the November 2019 Logs to be legally inadequate, the inadequate November 2019 Logs constituted a violation of the court's September 18, 2019 Minute Order to "prepare and serve additional legally supportable privilege logs … ." (Id. at p. 16.) The court explained: "The clear and widespread deficiencies in the [November 2019 Logs] demonstrate that Defendants' noncompliance with the September 18, 2019 order was not in good faith but rather was part of a continuing effort to delay production of documents to which Plaintiffs were entitled while critical depositions proceeded." (Id. at p. 17.)

To aid in the understanding of this court's conclusions regarding Defendants' discovery misconduct, it is worth quoting at length from the February 20, 2020 Minute Order:
Defendants have repeatedly failed to stand by their initial privilege claims. The court, after viewing the conduct of Defendants and defense counsel over the course of the proceedings, determines that Defendants make blanket, unsupported claims of privilege, which then force Plaintiffs to dedicate hours reviewing deficient privilege logs and bringing privilege issues to this court's attention. Pushed to offer basic justifications for the withholding of documents, Defendants either make unsupported statements to try to deter Plaintiffs from pursuing assistance from the court or hand over some documents and further edit the privilege logs. The sheer number of privilege assertions that ultimately were unsupportable is evidence that Defendants' conduct is the result of a concerted policy, and not the hapless mistakes of a few document review attorneys.

The court already has discussed and rejected Defendants' excuse that the work was burdensome and that a document-by-document review should not be expected. The court has merely required that Defendants meet their most basic obligations under the discovery rules: namely, that an assertion of privilege be made in good faith and supported by sufficient factual information so that it can be evaluated by Plaintiffs and by this court; anything less would allow a party to hide relevant, non-privileged documents from its opponent, thereby undermining the entire litigation process. Plaintiffs and the court cannot be subjected to an infinite process wherein Defendants' logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privileges. [California case law] offers the imposition of sanctions as Plaintiffs' only way out of such an impasse.
(Id. at p. 20.)

The court did not impose all of the sanctions requested by Plaintiffs in their January 2020 sanctions motion. For example, the court determined that it was not yet appropriate to impose Plaintiffs' requested jury instruction sanction. (Id. at p. 27.) However, the court limited the imposition of sanctions in the hope that Defendants would cease their pattern of discovery abuse and the court threatened further sanctions might be imposed in the event Defendants did not correct their behavior:
The sanctions imposed herein are made under the assumption that Defendants will keep their promise that "Plaintiffs have received or will receive by the deadline set by this Court's January 14, 2020 order every document to which they are entitled." (Defs' Opp., at p. 22.) If Defendants fail to keep their promise to abide by this court's January 14, 2020 order, then the court will allow further briefing and consider stricter additional evidentiary and issue sanctions, as well as a jury instruction under Evidence Code section 413. The court also may permit Private Plaintiffs to

seek additional sanctions based on information about withheld documents that have only recently been disclosed to them.
(Id. at p. 27.) Defendants did not move to have the court reconsider the February 20, 2020 Minute Order.

Nine days before the court's February 20, 2020 Minute Order, Defendants served revised privilege logs (February 2020 Logs) that were meant to comply with the court's January 14, 2020 Minute Order. As already noted above, Plaintiffs found the February 2020 Logs deficient and, on March 4, 2020, filed the "Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies," which is the current motion before the court.

On March 20, 2020, as indicated above, the court issued a ruling on a portion of the current Motion, but did not consider issue or evidentiary sanctions. The court struck the February 2020 privilege log and awarded monetary sanctions.

The court awards $46,800 in sanctions jointly against Defendants and their counsel, payable to Private Plaintiffs' counsel within 10 days. The court also strikes service of Defendants' February 11, 2020 privilege logs on the basis that they are unreliable and requires Defendants to re-serve privilege logs within 30 days, accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege are made in good faith and the information contained in the privilege logs accurately describes the documents at issue.
If the revised privilege logs and declarations are not served within 30 days of this date, a daily sanction of $50,000 is imposed jointly and severally against Defendants and their counsel until such time as Defendants comply with this Order. The court will make a further Order regarding the method and timing of payment of the $50,000 daily sanction.

It is further ordered that as soon as Defendants identify documents that previously were claimed to be privileged, but which will not be listed on the privilege log that complies with this Order, Defendants shall produce those documents to Plaintiffs forthwith.
(Id. at pp. 2-3.)

The court's findings in its Minute Order of March 20, 2020 are equally relevant to the remainder of the Motion for Sanctions, which remains pending. The court found that there were "clear misstatements of fact" in the February 2020 Logs. (Id. at p. 3.) The court also found that "[d]efense counsel [did] not acknowledge and apologize for the misrepresentations, [did] not state they [were] concerned about how or why the misrepresentations were made, [did] not attempt to explain how or why the misrepresentations happened and [did] not describe what steps [were] being taken to ensure there [were] no other misrepresentations and to correct any that

[were] found." (Id. at p. 3-4.) The clear misrepresentations in the February 2020 Logs were of grave concern to the court: "It follows [from California law] that when a party through counsel provides an untrue description of a document in a privilege log, the party and its counsel make a misrepresentation not only to opposing counsel, but also to the court. A court cannot take that dissembling lightly." (Id. at p. 4.)

The court surveyed multiple examples of Defendants' mischaracterization of documents in the February 2020 Logs. (See id. at pp. 5-9.) The court noted that any claim that Defendants had provided good-faith descriptions of withheld documents was undermined by the existence of plainly incorrect descriptions. (Id. at p. 5.) When presented with the fact that a certain document was mischaracterized in the February 2020 Logs, Defendants sometimes offered little to no argument to refute Plaintiffs' position: "Tellingly, Defendants do not now claim that the redacted message is privileged; nor do they offer any evidence to support the view that the redacted material is privileged. Instead, Defendants state that the 'redactions of that communication are at least arguably appropriate.' (Opp., at pp. 7-8.) Most importantly, Defendants' Opposition does not attempt to defend the privilege log description of the communication, which, again, states that the communication is one in which in-house counsel 'provides legal advice . . . .' " (Id. at pp. 6-7.) The court also found that the document descriptions in the February 2020 Logs were "not 'errors,' but rather amount[ed] to factually incorrect and misleading descriptions of documents (or portions of documents) withheld." (Id. at p. 9.)

The court explained that Plaintiffs had once again been prejudiced by Defendants' discovery abuse:

> The prejudice to the Plaintiffs is that they believe they cannot trust the accuracy of Defendants' description of the basis for Defendants' claims of privilege. As discussed above, Plaintiffs and the court are entitled to a complete and accurate privilege log that not only allows the opposing party to assess the claims of privilege, but also permits a judicial evaluation of the claim of privilege.

(Id. at pp. 9-10.)

Defendants' decision to serve the February 2020 Logs with false and misleading descriptions of documents was a violation of the January 14, 2020 Minute Order. With that in mind, the court offered yet another warning to Defendants:

> … as stated in previous rulings, the court cannot ignore the disadvantages caused Plaintiffs by delayed production of documents to which they are entitled and the consequential effects in developing the factual record in this case. Therefore, the court may be forced to impose issue or monetary sanctions or draft an appropriate jury instruction regarding effective spoliation; but that determination cannot be made until the further briefing to which both sides are entitled on those

aspects of Plaintiffs' current Motion for Sanctions. Defendants' compliance, or lack thereof, with this court's current Order will bear upon whether or not the court imposes issue or evidentiary sanctions and the nature of any such sanctions.
(Id. at p. 11.)

Discovery Abuses Since the March 20 Minute Order

Instances of Privilege Log Non-Compliance

Though Defendants stood before this court and defended the accuracy of the February 2020 Logs, after further court-ordered review, and after trial counsel was asked to yet again submit declarations as to the good faith assertions of privilege, Defendants themselves admit that they subsequently produced 34,530 documents listed on the February 2020 Logs. (Blair Decl., ¶ 47.) And Plaintiffs claim that the real number of documents produced since March 20, 2020 is 41,561. (Creed Decl. 5/26, ¶ 3.) To be sure, 25,419 of these documents were attachments ordered to be produced by the court in the January 14, 2020 Minute Order. But even after excluding the attachment documents, at least around 9,000 other documents on the February 2020 Logs were removed by Defendants before the filing of new logs on April 20, 2020 (April 2020 Logs). These 9,000 documents would have remained on the logs were it not for Plaintiffs' extreme efforts to compel Defendants to meet their most basic discovery obligations.

The April 2020 Logs list 55,785 documents, which means that Defendants have removed 100,400 documents from their November 2019 Logs, which listed 156,185 supposedly privileged documents. (Blair Decl., ¶ 55.) In other words, even though this court ordered on September 18, 2019 that Defendants produce all non-privileged documents by November 1, 2019, Defendants' April 2020 Logs show that Defendants have now produced around two-thirds of the documents listed on the November 2019 Logs. Again, Defendants were ordered to "correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable" by November 1, 2019. (Minute Order, Sept. 18, 2019, at p. 2 (emphasis added).)

As the court has previously concluded, the production of 100,400 documents since November 2019 simply would not have happened had Plaintiffs not brought a series of discovery motions. Moreover, such a large number of documents (constituting two-thirds of those listed on the November 2019 Logs) cannot, as Defendants claim, be ascribed to simple good-faith human error: Defendants have, time and again, clearly failed to meet their most basic discovery obligations.

Lamentably, the court is unable to conclude that Defendants have entirely ceased their pattern of discovery abuse. Plaintiffs, in their "Amended Motion" filed May 26, 2020, attack the accuracy of the April 2020 Logs by examining 6 log entries. Plaintiffs argue that the April 2020 Logs mischaracterize these documents and that Defendants continue to withhold unprivileged documents. In their Opposition, filed June 5, 2020, Defendants state that they do not intend to assert privilege over five of these six entries; in Defendants' words "[t]he erroneous inclusion of these documents on the logs confirms, that despite Defendants' good faith efforts, perfection is simply not attainable on a review of this scale and under these unprecedented circumstances." (Defs' Opp. 6/5, at p. 36.)

Considering the history outlined above, it is surprising that Defendants merely shrug off yet another faulty set of privilege log entries as a small human error. Plaintiffs have succeeded in showing that the five entries in the April 2020 Logs were made in error. In response, Defendants do not explain why this error occurred or whether similar errors might currently exist in the April 2020 Logs with respect to other documents. The court again concludes that these particular five entries would have remained on the log had Plaintiffs not filed the Amended Motion.

Log Entry 5458 contains a mischaracterization of the redacted portions of a document. Defendants describe the privilege redactions as follows on the SoCalGas April 2020 Log: "Redactions of confidential email communications between SoCalGas personnel and J. Dave (in-house counsel) to facilitate the attorney-client relationship and the provision of legal advice regarding a draft letter to SoCalGas customers explaining the facts surrounding the Aliso Canyon gas leak." The two privilege redactions are from an email from Javier Mendoza, a media relations executive, to nine businesspeople, copying one lawyer. (Creed Decl. 5/26, Ex. 9.) Mr. Mendoza notes in the redacted portion that he is sending a "draft customer letter" for the non-lawyers' review, and that Mr. Mendoza will eventually send a final version of the "draft customer letter" to Jamiel Dave for "review once I receive and incorporate your comments." (Id.) Clearly, this email was not a communication between SoCalGas personnel and Mr. Dave, but was instead a communication among SoCalGas personnel in order to draft a "customer letter." Again, this inaccurate description would not have allowed Plaintiffs or the court to assess the true privilege claim over this document.

Moreover, the claims of privilege on the April 2020 log do not in all instances comply with this court's prior orders. Log Entry 28,555 was withheld in its entirety and is described as follows on the log: "Draft supplemental testimony to the CPUC concerning SoCalGas' pipeline safety enhancement plan testimony containing the revisions of M. Thorp." This court has already explained that documents containing attorney work product should be produced in redacted form, with the claimed work product redacted. (See, e.g., Minute Order, Mar. 4, 2020, at p. 11

(ordering a "talking points" document to be produced with the attorney comments redacted).) With respect to Log entry 28,555, Defendants have failed to follow this court's past instructions with regard to documents containing work product in the form of attorney comments to otherwise non-privileged material.

There is a similar problem with the document listed on the SoCalGas April 2020 Log as entry 112,366 and described as "Draft presentation addressing Aliso Canyon's gas storage facilities containing the opinions of J. Egan (in-house counsel)." The document was withheld in its entirety, only to be produced 45 minutes before what Jesse Creed describes as "the relevant deposition of Ms. Sedgwick." (Creed Decl. 6/12, ¶ 11.) Only a very small portion of this 17-page document allegedly contains the opinions of counsel. (See Creed Decl. 6/12, Ex. 9.) The document should have been produced long ago in the current redacted form; tardy production right before a deposition does not inspire confidence in the accuracy of the April 2020 privilege log.

Shortcomings in Compliance by Trial Counsel

Defendants offer no assurances that these are the only mischaracterizations or errors present in the April 2020 Logs. Indeed, the declarations by trial counsel do not explain the process for correcting errors identified by trial counsel during their review of the "privilege review team's" work. It is unclear from the trial counsel declarations just how often the privilege review team's prior work was found to be in error and thus in need of correction; moreover, it does not appear that the identification of such errors led to any systematic change in the directions given to the privilege review team.

Morgan Lewis partner Karen Hourigan, who as a member of the eData Practice Group helped oversee the review process, states as follows:

After the Trial Team Partners provided feedback regarding specific documents that they reviewed, I oversaw the process for implementing any proposed changes for the treatment of a specific document and, if applicable, its description. I instructed a team of Morgan Lewis attorneys to implement the specific changes to the documents in the review database including its description (as applicable), which would then be incorporated into the April Privilege Logs. [¶] To the extent possible, if the specific changes identified on a particular document applied to similar or duplicative documents that the team of Morgan Lewis attorneys was able to identify within the email thread sets identified in the review database (for example, earlier email chains that contained the same information as the specific document reviewed by the Trial Team Partners), I instructed a team of Morgan Lewis attorneys to make similar changes to those

documents in the review database, including (as appropriate) to the documents' descriptions on the April Privilege Log.

(Hourigan Decl., ¶¶ 13-14.) Again, this raises the following question: how often did trial counsel determine that the inclusion of a document on the April 2020 Logs was in error, or that a document description was inaccurate? It appears from Ms. Hourigan's declaration that, while the treatment of individual documents (along with similar or duplicative documents) on the log would be updated after trial counsel gave feedback regarding those documents, the quality and extent of trial counsel's feedback apparently was not used to amend the treatment of other, non-duplicative documents. (See also Blair Decl., ¶ 34.) The court did not expect trial counsel to review each and every document listed on the April 2020 Logs; but if trial counsel's review revealed that a non-negligible amount of documents were receiving improper treatment by the privilege review team, then the trial counsel should have stated what corrective action was taken.

In an effort to show their compliance with this court's orders, Defendants also submit under seal the "new protocol" used to create the April 2020 Logs. It does not appear that Plaintiffs have been served with the new protocol. The court thus finds that the submission of the protocol is an ex parte argument and that it would be improper for the court to review the protocol. The court has not done so.

The court also determines that trial counsel should have allocated more time to the review of documents for which Defendants assert privilege in the April 2020 Logs and should personally have reviewed more documents. For example, it appears that trial counsel spent time reviewing hundreds of documents that the privilege review team had already determined were not privileged. (See, e.g., Schrader Decl. 6/5, ¶ 10 (over 20 percent of the documents reviewed by Mr. Schrader had already been de-designated by the privilege review team).) Given both Defendants' repeated discovery abuses and the deadline to produce reliable log entries, trial counsel should have devoted their time to those documents that were going to be included on the final version of the April 2020 Logs. The court did not impose the requirement of trial counsel declarations so as to add an extra layer of protection for Defendants' overly-broad privilege claims, but rather to protect Plaintiffs by ensuring that Defendants' logs contained only good-faith assertions of privilege.

Moreover, it appears from Plaintiffs' Amended Motion that Defense counsel has spent a great deal of time since the March 20, 2020 Minute Order reviewing previously produced documents to aid Defendants' clawback efforts. On April 7, 2020, while Defense counsel was supposed to be engaged in the task of reviewing documents to create the April 2020 Logs, Mr. Dragna sent a letter to Plaintiffs' counsel stating that Defense counsel had spent time reviewing documents

ordered produced by this court on January 14, 2020, and that Defense counsel requested Plaintiffs to return or destroy all copies of such documents. (Creed Decl. 5/26, Ex. 26.) Mr. Dragna explained:

Our review of the privileged status of the attachments produced in response to the Court's January [1]4 Order is continuing. We expect that this review will be completed at or about the same time as the submission of our updated privilege log, required to be produced pursuant to the Court's March 20, 2020 order. As a result, we anticipate identifying additional documents that are privileged or subject to another legal protection, including attachments that are protected under the attorney work product doctrine, and should therefore be returned as set forth in paragraph 30 of the ESI Order.

(Id.) In other words, even after having failed in the Second District Court of Appeal and in the Supreme Court to overturn this court's January 14, 2020 Minute Order, Defendants are now attempting to claw back the attachment documents already ordered by this court to be produced. Critically for purposes of this Motion, Defense counsel has spent time reviewing these attachments instead of using its time and resources during the thirty-day period to prepare the April 2020 Logs, which have been shown to be at least partially deficient. Defendants' repeated claim that the thirty-day deadline was difficult to meet is undermined by the fact that Defense counsel chose to spend crucial time reviewing documents already ordered produced.

Potential Further Remedial Measures for Defendants' Discovery Abuses

As this court has stated elsewhere, the purpose of discovery sanctions is not to punish the offending or non-compliant party, but to attempt "to level the playing field in light of the discovery abuse." (Minute Order, Feb. 20, 2020, at p. 22.) Yet, it must be admitted, imposing the amount and type of sanctions to strike this balance will almost never be an exact science. The court, like Plaintiffs, will never know just what type of documents plaintiffs might have gained had Defendants not repeatedly abused the discovery process; it is impossible to know how Plaintiffs might have prepared their case had they not been forced to move forward on depositions and trial planning without large swathes of non-privileged documents. The counterfactual of what Plaintiffs might have known, when they might have known it, and exactly how this knowledge would have aided in their preparation of trial will remain shrouded from view.

With this in mind, the court has followed appellate guidance, taking an "incremental approach" to discovery sanctions and favoring sanctions that are more likely to incentivize compliance than to punish Defendants. When attempting to strike the appropriate balance between the imposed

sanctions and Defendants' discovery misconduct, appellate authority directs the court to examine the "totality of the circumstances," which includes the five following inquiries:

(1) whether the party's non-compliance is the latest chapter in a longer "history of abuse," which looks to "the number of formal and informal attempts to obtain the discovery" as well as whether prior court orders compelling discovery have gone unheeded [Citations];
(2) whether the party's non-compliance was "willful" [Citations];
(3) whether the non-compliance persisted despite warnings from the court that greater sanctions might follow [Citation];
(4) whether the non-compliance encompasses all or only some of the issues in the case [Citation]; and
(5) the extent of the "detriment to the propounding party" that flows from the inability to obtain the discovery at issue [Citation.]

(Siry, supra, 45 Cal.App.5th at p. 1118 (internal citations omitted and format altered to clearly enumerate the five inquiries of the "totality of the circumstances standard).) "[W]here a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction [i.e., terminating sanctions]." (Creed-21 v. City of Wildomar (2017) 18 Cal.App.5th 690, 702 (internal citations and quotation marks omitted).)

As for the fifth and final inquiry in Siry, it is important to note that the propounding party (even in the case of terminating sanctions) "need not prove prejudice where, as here, the misconduct relates to discovery the moving party propounded." (Siry, 45 Cal.App.5th at p. 1122.) The soundness of such a rule was explained by the Second District Court of Appeal:
A prejudice requirement would be "difficult," if not "impossible," for a propounding party to meet because a showing of prejudice would likely turn on the significance of the information that the non-compliant party is refusing to disclose. [Citation.] A prejudice requirement would also empower intransigent parties to continue their intransigence on the ground that the documents they were withholding are not that important. As we noted above, such selective lawlessness is still lawlessness.
(Id.)

Of the five inquires under Siry's "totality of the circumstances" standard for imposing serious non-monetary sanctions, it is clear from the extensive discussion above that four of the five inquiries point strongly in favor of imposing sanctions upon Defendants: (1) there has been a long history of abuse; (2) this court has found Defendants' non-compliance to be willful; (3) Defendants persisted despite warnings from the court that greater sanctions might follow; and (4)

the non-compliance encompasses virtually every issue in this case.

The court previously has found that Defendants' sanctionable conduct was willful. The court takes Defendants' offer to pay for a special master to review the remaining withheld documents as a current demonstration of good faith. However, the efforts to create the April 2020 Logs outlined by Defendants in their declarations filed in Opposition to this Motion should have occurred before November 1, 2019 and without the need for Plaintiffs' and this court's exhaustive participation over several months. The use of a special master can only be viewed as a remedy to correct Defendants' own failings in the discovery process. Plaintiffs do not accept Defendants' offer to appoint a discovery referee to review the remaining privileged documents. The court will not force this remedy on Plaintiffs in light of the delay that already has occurred in this case due to Defendants' wrongful conduct and the delay that would be inherent in having one person as special master reviewing over 50,000 documents claimed to be privileged.

Thus, following the Siry court's analysis, the only question remaining is the extent of the detriment to Plaintiffs flowing from Defendants' discovery abuses. Under Siry, Plaintiffs need not necessarily prove prejudice, but they must still argue it. Plaintiffs do not argue that they are prejudiced because Defendants may currently be withholding non-privileged documents that would help Plaintiffs prove (1) Sempra's relationship to SoCalGas or (2) Defendants' knowledge as to the risks of well failure and as to possible health effects of emissions from SS-25.

Rather than claim that there are key, non-privileged documents currently being withheld by Defendants, Plaintiffs list six ways in which they have been prejudiced by Defendants' discovery abuses: (1) Plaintiffs have been left unprepared for trial; (2) Plaintiffs cannot prepare their experts for trial; (3) Plaintiffs cannot do any tag-along discovery into new witnesses and new document requests; (4) many Plaintiffs are entitled to trial-setting preference under the Five-Year Rule; (5) Plaintiffs are unprepared to oppose Defendants' potentially dispositive motions on punitive damages and the liability of Sempra; and (6) delay in production has led to the "fading memories" of witnesses. These claims of prejudice are further explained in the declarations of Plaintiffs' counsel filed with the Reply. After being given a further opportunity in supplemental briefing to explain the prejudice caused by the discovery abuse, Plaintiffs continue to maintain that "the detriment is Plaintiffs' unending inability to turn their efforts to trial preparation and the inability to proceed to trial in the near term." (Pls' Supp. Br. 7/6, at p. 1.)

The court agrees that Defendants' discovery abuse has caused significant prejudice to Plaintiffs: Plaintiffs' case preparation has been needlessly delayed and, in a certain sense, will never be what it might have been had Defendants met their most basic discovery obligations. However, although the prejudice is real and the discovery abuse extensive, the court has awarded a strong

sanction to address the prejudice to the Plaintiffs, with the exception of delay. As stated above, the court has ordered that "Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions." (Minute Order, Feb. 20, 2020, at p. 1.)

The question now is whether that sanction will be effective to substantially ameliorate Plaintiffs' prejudice or whether Defendants will act so as to thwart Plaintiffs' efforts to cure their prejudice by exacerbating the delay Plaintiffs already have suffered or by otherwise thwarting Plaintiffs' efforts to repair the damage done to their case. The court is quite concerned about the delays described in Plaintiffs' Motion papers. It is understandable that counsel would have some difficulties in making a transition to remote depositions during the COVID-19 pandemic. However, that does not explain all of the deposition scheduling delays. For example, Mr. Arriola's deposition was delayed by Defendants purportedly on the ground that he is essential to Defendants' operations, only to be followed by the announcement that he is leaving the company and moving out of state.

But the court concludes at this point that the issue and evidence sanctions are likely to work as an incentive for Defendants to quickly schedule depositions. Defendants now state that they will not challenge whether the 55 requested depositions are within the scope of the deposition sanction. (Defs' Supp. Opp. 7/13, at p. 5, fn. 2.) Furthermore, no doubt incentivized by this court's previous comments and sanctions rulings, Defendants now express a desire to quickly move through depositions. (Id. at p. 6.) The extent to which Defendants do not live up to these promises may be relevant to any issue or evidence sanctions ultimately imposed after the close of discovery.

Plaintiffs argue that a trial date for a first phase trial already had been set for late June, 2020 and that they should not be subjected to further delay due to Defendants' misconduct. Plaintiffs undoubtedly have been negatively affected by delay due to Defendants' misconduct; but all discovery misconduct necessarily involves some delay due to the need for the affected party to obtain a court ruling and relief from the misconduct. Delay necessitated by discovery misconduct may be a factor in deciding an appropriate sanction, but delay by itself is not a decisive factor requiring issue or evidence sanctions where other curative sanctions are available. This case is thus different from Siry, supra, where the defendants' failure to answer discovery "left [the plaintiff] with almost no time on the clock before the three-year period for retrial following remand expired." (45 Cal.App.5th at p. 1119.) In Siry, the defendants' misconduct put the affected party up against a timeline that threatened to end the plaintiff's opportunity to recover.

But here, delay, though significant, does not threaten Plaintiffs' ultimate opportunity to recover because Defendants have stipulated to waive the "five year rule" for bringing a case to trial.

The court will postpone a decision on issue and evidentiary sanctions in order to make an overall assessment as to whether the lesser sanctions already awarded will be effective in ameliorating the prejudice Plaintiffs have suffered from Defendants' discovery violations. Let me be clear: delaying decision on issue and evidentiary sanctions and a possible jury instruction is intended to incentivize Defendants to be cooperative in scheduling the discovery to be taken pursuant to this court's prior order and to refrain from any action that obstructs the completion of the discovery. The court therefore will continue its consideration of other sanction options; if the remedy of reopening depositions fails, the court necessarily will have to consider other sanction options.

The court will not award a sanction that changes the order of expert discovery by requiring Defendants' experts to be deposed first. Mr. Boucher states that "much of the preparation necessary for plaintiffs' experts has been put on hold because many of the documents that are emerging are significant and go to the heart of the liability, punitive damage, and Sempra issues in this case." (Boucher Decl. 6/12, ¶ 12.) The court does not doubt that this is so. However, if Plaintiffs' experts are waiting to develop further opinions, it would be a waste of time to depose Defendants' experts. When Plaintiffs' experts offer their opinions, it is inevitable that defense experts will be entitled to supplement their testimony to counter Plaintiffs' opinions. Three rounds of expert depositions – Defense experts, then Plaintiffs' experts, then Defense rebuttal – would inevitably follow. The court believes that this requested sanction would only lead to further delay and additional disputes about reopening depositions.

Deposition Disputes Involving Evidence Code section 771

The court believes, however, that it may be helpful to address the issue of Evidence Code section 771, as it was discussed extensively in both sides' briefs. Plaintiffs note that there is "[a] longstanding dispute in this litigation … whether a witness who reviews a document with counsel in preparation for a deposition is required under Evidence Code Section 771 to produce such a document at the deposition." (Pls' Am. Mot., at p. 15.) According to Plaintiffs, "Defendants have taken the position that Section 771 only requires them to produce documents that 'refreshed the witness's recollection in preparation for his or her deposition.' " (Id.) The court agrees with Defendants' reading of section 771, but with an important qualification.

"[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the

witness concerning such matter shall be stricken." (Evid. Code, ¶ 771, subd. (a).) Section 771 does not state that all documents reviewed by a witness in preparation for a deposition must be produced at the deposition or hearing. (See International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal.App.3d 1367, 1372 (Montrose) ("section 771 requires the production of documents used to refresh [the witness's] memory with respect to any matter about which he testifies, no more and no less").) However, when a witness states that he has used certain documents he reviewed to refresh his memory concerning testimony but cannot recall which document refreshed his recollection, all of the reviewed documents should be produced. (Id. at pp. 1372-1373; see also Cal. Judges Benchbook Civ. Proc. Trial (2019) § 8.66 ("If the witness reviewed several documents before testifying and is unable to state which of these documents actually refreshed his or her recollection, then all must be produced").)

Defense counsel Thomas Lotterman states that he met virtually with David Taylor on May 4, 2020 to prepare for Mr. Taylor's deposition that was scheduled for the following day. (Lotterman Decl. 6/5, ¶ 6.) Mr. Lotterman showed some documents to Mr. Taylor during their meeting, but it was Mr. Lotterman's "express understanding that none of the documents shown to him on May 4 refreshed his recollection." (Lotterman Decl. 6/5, ¶ 7 (emphasis in original).) At the deposition, Mr. Taylor first stated that none of the documents he reviewed had refreshed his memory. (Creed Decl. 5/26, Ex. 23 at p. 322:7-13.) At this point, despite the fact that Mr. Taylor had reviewed documents, there was no obligation under section 771 to produce any such documents.

Mr. Lotterman goes on to state in his declaration that, after being shown some documents by Plaintiffs' counsel during the deposition, "Mr. Taylor indicated that his memory may have been refreshed by reviewing a document entitled '2013 SoCalGas Risk Registry; Version: Final (Sharon's Version).' " (Lotterman Decl. 6/5, ¶ 9.) The transcript states that Mr. Taylor answered in the affirmative to the following question by Plaintiffs' counsel: "In order to refresh your memory for today's deposition, did you review any version of the 2013 registry spreadsheet?" (Weil Decl. 6/12, Ex. B, at p. 355:14-18.) Mr. Lotterman then explains that it was unclear which document actually refreshed Mr. Taylor's memory. (Id.) Plaintiffs' counsel then renewed the request that the reviewed documents be produced, but Mr. Lotterman stated that he would discuss the documents privately with Mr. Taylor during a break and "try to find out what the document is." (Lotterman Decl. 6/5, Ex. 1, at p. 371:7-10.) Mr. Lotterman states that "[d]uring the lunch break, [Mr. Lotterman] conferred with Mr. Taylor, located the document (which was undated and not the document labeled '2013 SoCalGas Risk Registry; Version: Final (Sharon's Version)'), and sent it by email to [Plaintiffs' counsel]." (Lotterman Decl. 6/5, ¶ 10 (emphasis in original).)

The entire deposition transcript is not before the court and the court must thus rely on the

declaration of Mr. Lotterman and the portions of the transcript offered by the parties. Under Mr. Lotterman's presentation of the facts, and pursuant to the rule in Montrose, supra, it appears that all of the documents reviewed by Mr. Taylor to prepare for his deposition should have been produced when Mr. Taylor stated that document review had refreshed his memory but that he was unable to identify which of the reviewed documents helped him refresh his memory. The identification of documents to be produced under section 771 should occur through testimony in the presence of all counsel, not in private with the witness's attorney. This should be the practice going forward

Monetary Sanctions

As the parties well know, Plaintiffs have recovered a large sum of monetary sanctions for costs and fees incurred due to Defendants' repeated discovery abuses. Plaintiffs have received well over half a million dollars in monetary sanctions, which does not include the fact that Defendants must pay for the reopening of depositions due to late-produced documents.

In the Amended Motion, Plaintiffs request two additional categories of monetary sanctions in the sum of $98,198.69. First, Plaintiffs request $83,678.69 in "supplemental fees and costs incurred in combatting Defendants' fruitless efforts to reverse" this court's January 14, 2020 Minute Order in the Second District Court of Appeal and the California Supreme Court. (Pls' Am. Mot., at p. 26.) Second, Plaintiffs request $14,520.00 for the work of Margaret Grignon and Anne Grignon "for drafting this motion." (Pls' Am. Mot., at p. 26; see also Grignon Decl. 6/5, ¶ 6.)

This court will not award monetary sanctions under Code of Civil Procedure section 2023.030 for costs incurred because of representation in the court of appeal and the Supreme Court. "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (Code Civ. Proc., § 2023.030, subd. (a).) Thus, to award Plaintiffs $83,678.69, the court would have to conclude that seeking review of this court's orders in a higher court is somehow "discovery abuse." This position does not accord with the language of the Code of Civil Procedure; moreover, Plaintiffs do not offer—and this court has not found—any authority that would support such a position. The appellate courts have the power to award costs to the prevailing party and/or to impose sanctions for frivolous or dilatory writ petitions. (Cal. Rules of Court, rules 8.492, 8.493.) The Second District Court of Appeal did not impose sanctions and specifically refused to award costs for the writ proceedings. ("Order denying petition filed," Feb. 26, 2020, https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2309926&doc_no=B303675&request_token=NiIwLSEmXkw5WzBBSCM9VEhJUFw6USxXIyIuXz1SICAgC

g%3D%3D.) Any monetary sanctions for costs in the higher courts should have been sought in those fora; they will not be awarded here.

The additional requested monetary sanctions are also improper because they were not included in the Notice of Motion for the Amended Motion. "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought." (Code Civ. Proc., § 2023.040.) Indeed, Plaintiffs' failure to request the monetary sanctions in their Notice of Motion led to confusion that was no doubt compounded by language in the Amended Motion such as the following heading: "Plaintiffs Are Entitled to $98,198.69 in Monetary Sanctions for Defendants' Unsuccessful Appeals from the Court's Attachments Orders." (Pls' Am. Mot., at p. 25 (underlined and bolded in original).) Defendants were thus not properly notified that $14,520.00 of the total monetary sanctions were not incurred in connection with the appeals process.

Plaintiffs also request fees and costs incurred when preparing the Reply. Plaintiffs do not state in their Reply the amount of requested fees, but merely direct the court to six separate declarations by Plaintiffs' counsel. (See 6/12 Panish Decl. ¶ 34; 6/12 Kelly Decl. ¶¶ 15-16; 6/12 Praglin Decl. ¶ 27; 6/12 Weil Decl. ¶ 42; 6/12 Creed Decl. ¶ 35; 6/12 P. Oliver Decl. ¶ 46.) If one adds up all the hours listed in these declarations (keeping in mind each attorney's claimed hourly billing rate), one arrives at the total sum of $106,647. But again, the Notice of Motion for the Amended Motion did not seek monetary sanctions for attorney's fees incurred in connection with the Amended Motion. Moreover, while the original motion for sanctions sought monetary sanctions in the form of incurred attorney's fees and costs, the court separated the issue of monetary sanctions for earlier determination and awarded Plaintiffs $46,800 in sanctions. (Minute Order, Mar. 20, 2020, at p. 1.) The court will not order further monetary sanctions here.

Joinder by Developer Plaintiffs

Developer Plaintiffs claim that they have been similarly prejudiced by Defendants' discovery abuse and that they are entitled to non-monetary discovery sanctions. Developer Plaintiffs offer no legal authority and little evidence to justify their claim to sanctions. The monumental task of addressing the discovery abuse has fallen to Private Plaintiffs' counsel. The court is not convinced from the short joinder motions that Developer Plaintiffs were forced to deal with the discovery abuse in the same way.

As noted above, this court requested additional briefing from Plaintiffs and Defendants after hearing oral argument. (Minute Order, June 25, 2020, at p. 25.) The court stated that Plaintiffs would file their supplemental brief by July 6, 2020, and that Defendants would file their response

by July 13, 2020; the court did not allow Developer Plaintiffs to file any supplemental briefing. The court thus does not consider the supplemental briefing filed by Defendants on July 17, 2020: no such briefing was authorized by the court; and Defendants were not given a meaningful opportunity to respond to the brief and accompanying declarations filed by Developer Plaintiffs.

A copy of this minute order will append to the following coordinated cases under JCCP4861: 18STCV00854, 18STCV01009, 18STCV01013, 18STCV01838, 18STCV04969, 18STCV05328, 18STCV06820, 18STCV10135, 19CHCV00618, 19STCV02570, 19STCV11792, 19STCV19104, 19STCV20976, 19STCV39324, 19STCV41696, 20STCV01226, 20STCV13797, 20STCV21003, 37-2017-00007459-CU-SL-CTL, BC378875, BC601844, BC602866, BC602973, BC602996, BC603602, BC603747, BC604036, BC604099, BC604247, BC604248, BC604353, BC604414, BC604592, BC604815, BC604816, BC604817, BC605084, BC605085, BC605173, BC605190, BC605406, BC605407, BC605860, BC605892, BC606427, BC606555, BC606736, BC606776, BC606844, BC606941, BC607057, BC607087, BC607347, BC607540, BC607541, BC607542, BC607685, BC607697, BC607839, BC607840, BC607841, BC607923, BC608037, BC608322, BC608377, BC608539, BC608540, BC608575, BC608658, BC608931, BC608950, BC608967, BC609083, BC609189, BC609288, BC609289, BC609329, BC609370, BC609526, BC609535, BC609776, BC609777, BC609820, BC609917, BC610257, BC610280, BC610535, BC610555, BC610621, BC610622, BC610652, BC610826, BC610832, BC610888, BC611106, BC611107, BC611237, BC611319, BC611485, BC611551, BC611552, BC611620, BC611845, BC611846, BC611981, BC612031, BC612034, BC612035, BC612119, BC612185, BC612189, BC612191, BC612258, BC612269, BC612394, BC612458, BC612564, BC612570, BC612613, BC612705, BC612967, BC613100, BC613463, BC613608, BC613657, BC613658, BC613813, BC614029, BC614035, BC614036, BC614410, BC614501, BC615840, BC615877, BC616152, BC616237, BC616450, BC616505, BC616541, BC616543, BC616544, BC616545, BC616859, BC617216, BC617444, BC617490, BC617675, BC617989, BC618330, BC618460, BC619939, BC620226, BC620231, BC620342, BC620550, BC620639, BC620809, BC620843, BC620921, BC621327, BC621401, BC621531, BC621532, BC621546, BC621684, BC621720, BC621876, BC621933, BC621978, BC621979, BC621985, BC621986, BC621995, BC621996, BC621997, BC622393, BC622448, BC622632, BC623031, BC623085, BC624391, BC624550, BC625240, BC625751, BC626200, BC627186, BC627404, BC627639, BC627795, BC628120, BC628301, BC628345, BC628346, BC628467, BC628523, BC628613, BC630021, BC631251, BC631502, BC631929, BC632263, BC633689, BC633690, BC633691, BC633692, BC633971, BC634131, BC634407, BC635684, BC635685, BC635686, BC636231, BC636745, BC637503, BC637538, BC637673, BC638032, BC638075, BC638197, BC638230, BC638284, BC638319, BC638352, BC638624, BC639255, BC639300, BC639302, BC639317, BC639489, BC639614, BC639789, BC639808, BC641734, BC641735, BC641736, BC641737,

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The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.

# OSC Exhibit 4
# Reporter's Transcript of Proceedings
# June 25, 2020 in Gandsey

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SSC 12 HON. CAROLYN B. KUHL, JUDGE

| | |
|---|---|
| SOUTHERN CALIFORNIA GAS LEAK CASES. | SUPERIOR COURT CASE NO. JCCP4861 |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THURSDAY, JUNE 25, 2020

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INDEX FOR THURSDAY, JUNE 25, 2020

CASE NUMBER: BC 601844
CASE NAME: STATE V. SO CAL GAS
LOS ANGELES, CALIFORNIA THURSDAY, JUNE 25, 2020
DEPARTMENT SSC 12 CAROLYN B. KUHL, JUDGE
REPORTER: DAVID A. SALYER, CSR 4410
TIME: 9:00 A.M.

-o0o-

THE COURT: All right. Good morning, everyone.

We'll call the roll as usual. Okay?

THE CLERK: Susan Owen?

MR. OWEN: Good morning.

THE CLERK: Thomas Girardi?

Kevin Hannifan?

MR. HANNIFAN: Yes. Good morning, your Honor.

THE CLERK: Robert Begland?

MR. BEGLAND: Good morning. Present.

THE CLERK: Justin Eballar?

MR. EBALLAR: Good morning.

THE CLERK: Frank Petosa?

MR. PETOSA: Good morning, your Honor. Present.

THE CLERK: Jessica Hansen Arenas?

MS. HANSEN-ARENAS: Good morning. Present.

THE CLERK: George Stiefel?

MR. STIEFEL: Good morning, present.

THE CLERK: Thomas Lotterman?

MR. LOTTERMAN: Good morning, present.

THE CLERK: Randy Levine?

MR. LEVINE: Good morning, present.

THE CLERK: David Barrett?
MR. BARRETT: Good morning, present.
THE CLERK: Jae Lee?
MR. LEE: Good morning, present.
THE CLERK: Jesse Krompier?
MR. KROMPIER: Good morning, present.
THE CLERK: Yardena Zwang-Weissman?
MS. ZWANG-WEISSMAN: Good morning. Present in the courtroom.
THE CLERK: Kent Kraushaar?
MR. KRAUSHAAR: Good morning, present.
THE CLERK: Deanne Miller?
MS. MILLER: Present here in the courtroom, as well.
THE CLERK: David Schrader?
MR. SCHRADER: Present. Here.
THE CLERK: Austin Norris?
MR. NORRIS: Good morning, present.
THE CLERK: Allen Lanstra?
MR. LANSTRA: Good morning, present.
THE CLERK: Christina Kim?
MS. KIM: Present.
THE CLERK: Ben Gold?
MR. GOLD: Good morning, present.
THE CLERK: Gary Praglin?
MR. PRAGLIN: Good morning, present.
THE CLERK: Taras Kick?
MR. KICK: Good morning, present.
THE CLERK: Lindsey Bayman?

MS. BAYMAN: Good morning, present.
THE CLERK: Michael Kelly?
MR. KELLY: Good morning, present.
THE CLERK: Andrew Jacobson?
MR. JACOBSON: Good morning, present.
THE CLERK: Jeff Westerman?
MR. WESTERMAN: Good morning, present.
THE CLERK: Mariana McConnell?
MS. McCONNELL: Good morning, present.
THE CLERK: Paul Kiesel?
MR. KIESEL: Good morning.
Welcome back.
THE CLERK: Casey O'Neil?
MR. O'NEILL: Good morning, present.
THE CLERK: George Stiefel?
MR. STIEFEL: Good morning, present.
THE CLERK: And Regina Bagdasarian?
Kimberly McDonald?
MS. McDONALD: Good morning, present.
THE CLERK: David Logan?
MR. LOGAN: Good morning, present.
THE CLERK: Robert Borthwick?
MR. BORTHWICK: Good morning, present.
THE CLERK: Frank Pitre?
Kelly Weil?
MS. WEIL: Good morning. Present on CourtCall.
THE CLERK: Christopher Casillas?
MR. CASILLAS: Good morning, present.

THE CLERK: Lusine Coppock?
MS. COPPOCK: Good morning, present.
THE CLERK: Patricia Oliver?
MS. OLIVER: Good morning, present.
THE CLERK: Rex Parris?
MR. PARRIS: Good morning.
THE CLERK: Alison Chase?
MS. CHASE: Good morning, present.
THE CLERK: Raymond Boucher?
MR. BOUCHER: Good morning. Present in the courtroom.
THE CLERK: Alan Schimmel?
MR. SCHIMMEL: Good morning.
THE CLERK: Evan Zucker.
MR. ZUCKER: Good morning, present.
THE CLERK: Gregg Garfinkel.
MS. GARABEDIAN: Present.
THE CLERK: Robert Gooding?
MR. GOODING: Good morning, present.
THE CLERK: Collie James?
MR. JAMES: Good morning, present.
THE CLERK: Cathy Kim?
MS. KIM: Good morning, present.
THE CLERK: James Frantz?
MR. FRANTZ: Good morning.
THE CLERK: Devin Bolton?
MS. BOLTON: Present.
THE CLERK: Matthew Nezhad?
William Aiken?

MR. AIKEN: Present.

THE CLERK: Is there anyone else on CourtCall that would like to appear?

MR. GIRARDI: Tom Girardi. Present, your Honor.

THE CLERK: Anyone else?

Court Call is complete, your Honor.

THE COURT: Thank you. Further appearances in the courtroom if you haven't stated them.

MR. PANISH: Yes. Good morning, your Honor. Brian Panish for the plaintiffs.

MS. ELIZABETH: Good morning, your Honor. Sierra Elizabeth for plaintiffs Toll Brothers and Porter Ranch Development Co.

MR. BOUCHER: Good morning, your Honor. Raymond Boucher on behalf of plaintiffs.

MR. HOLSCHER: Good morning, your honor. Mark Holscher Kirkland Ellis for the plaintiffs.

MR. CREED: Good morning, your Honor. Jesse Creed for the private plaintiffs.

MS. MILLER: I announced myself on CourtCall. Deanne Miller for the defendants.

THE COURT: All right. Very good.

So you can be seated.

MR. KELLY: Your Honor, this is Michael Kelly. I'm sorry to interrupt.

Someone is on CourtCall unmuted, and they're breathing very heavily, making it extremely difficult to hear anything.

THE COURT: Yes. Thank you.

I am going to ask everyone on CourtCall please to put yourselves on mute. Further, please do not put us on hold, because then we will hear hold music, which is even worse.

Okay. Thank you very much.

MR. DRAGNA: Your Honor, I don't think I made an appearance.

Jim Dragna, Morgan Lewis.

THE COURT: Thank you very much.

So I did an agenda late yesterday. Hopefully everybody has that. I thought that might facilitate where we were going here today.

I don't know if you have any questions about logistics. We are still in our CourtCall mode, so we still have to speak into microphones.

I got some of the disinfectant spray. So I'm seeing, Mr. Boucher, for example -- I see you don't have a microphone in front of you, but you have a lot of papers out. If you want to go to the center, that would be fine.

MR. BOUCHER: Thank you, your Honor.

THE COURT: Then if everybody sort of sprays down after they use the microphone, since as best we know it is our little particles that come out of our mouths that are the real concern with the COVID.

MR. PANISH: May I ask a question, your Honor?

THE COURT: Of course.

MR. PANISH: When I go to the podium, can I walk in the well to social distance from these other people?

THE COURT: Yes. I think that would be a good idea.

Any other questions about logistics?

MR. SCHRADER: No, your Honor.

THE COURT: Okay. There is one thing that is not on the agenda. Perhaps there will be more. But I think the clerk I think gave each side a list of five cases that appear not to have been coordinated as yet.

And I'm sort of wondering about that because four of them were filed in 2019. So I think with regard to that, could I just ask you within ten days to file a stipulation to coordinate or not?

MR. BOUCHER: Yes, your Honor.

We'll undertake to draft a stipulation. We'll work with defense counsel and get it filed with the Court.

THE COURT: Okay. Thank you very much. I appreciate that.

Okay. So I think we'll go ahead with the motions unless anybody has something else that needs to be handled as a preliminary matter.

And we'll start with -- I know we have a lot to cover today. We're doing catch-up for three months. We'll just get through it.

So we'll have a hearing on motion to compel production of document from Intrinsik.

It's plaintiffs' motion. So I will hear from plaintiff. You have a lengthy tentative.

MS. OLIVER: Good morning, your Honor. Patricia Oliver on behalf of plaintiffs. I'll do the argument on Intrinsik. I appreciate the accommodation to allow us to be heard

remotely.

I hope I can be heard okay. If there are any problems, let me know.

THE COURT: I can hear you just fine, Ms. Oliver. Good morning.

MS. OLIVER: Good morning. Your Honor, we just wanted clarification on two items in the order.

We otherwise would stand on the tentative.

On page 4 of the tentative, there is the statement that the plaintiffs designated Intrinsik personnel as expert witnesses.

We didn't intend to make that suggestion in our briefs, and we apologize if we did.

What we were trying to argue is that Dr. Mc Daniel had already been designated as an expert and had actually testified by a sworn declaration exhibit on March 7th, 2016 in response to opposing a motion by the Department of Public Health.

So our argument was based on that concept, which was that she's already been designated by defendants.

We don't know if that will change your Honor's opinion, but we wanted to make it clear because Dr. Mc Daniel hadn't been retained by counsel. She had been retained by SoCalGas. So she was in a unique capacity.

I think part of our concern with Intrinsik communications generally is this very unique role where she is a State Bar lawyer and a doctor meeting with victims and then communicating with defense counsel.

So what we were trying to argue was that if she's playing the position of being a doctor who is presenting evidence to the Court, then any privilege would have been waived.

That would have been the intent of our argument.

THE COURT: Ms. Oliver, could you tell me, if you have it, what was the motion that she testified in opposition to or in response to?

MS. OLIVER: Sure.

THE COURT: And where can I find her declaration in the record?

MS. OLIVER: It was submitted on March 7th, 2016 in opposition to the entry of a preliminary injunction in response to a motion filed by the Department of Public Health.

Most recently it was in the record in response to the motion that the plaintiffs had filed to force some type of evidentiary damages -- pardon me, evidentiary rulings because Dr. Mc Daniel claimed the dual role of being a doctor and a lawyer.

Yardena Zwang-Weissman put that as Exhibit I to her declaration submitted on January 15th, 2020.

So it shows up in a couple places, but that's the most recent submission.

THE COURT: And those others beyond the March 7 filing, those were in opposition to discovery motions; is that correct?

MS. OLIVER: Yes, that's correct, your Honor.

THE COURT: I understand. Okay.

Go ahead.

MS. OLIVER: And Ms. Weissman was putting it in her declaration, the March 7th, 2016 declaration. That's the reason I referred to it there.

THE COURT: Okay.

MS. OLIVER: So that's our big picture question on the order. I just wanted clarification so that we didn't create any confusion on that front.

The only other thing we just wanted to clarify would be that we wanted to make sure that everything had been produced by Intrinsik so the court order could make clear that the Court and private plaintiffs are expecting at this point Intrinsik's productions are done.

That would close this out.

THE COURT: Do you have language that you wanted?

MS. OLIVER: Yes, your Honor. Let's go back to the tentative.

At the end of the order, I believe, if we can just say, you know, the Court further orders that any documents not yet produced be produced by Intrinsik and Geo -- well, no, I'm sorry. Intrinsik. We're talking about Intrinsik.

THE COURT: All right. Thanks very much.

I'll hear from the defense on the tentative.

MS. MILLER: Thank you, your Honor. Deanne Miller for the defendants.

I don't believe that either of Ms. Oliver's comments change the analysis or should change the analysis in the tentative.

Dr. Mc Daniel submitted a declaration during the preliminary injunction hearings related to the relocation program and DPH's challenges to when that program could end during the week.

That does not change the analysis that we believe the Court got right with respect to the privileged nature of certain communications between counsel and Dr. Mc Daniel or others at the Intrinsik law firm.

THE COURT: I'm sorry. Tell me again what she talked about in her 2016 declaration.

MS. MILLER: Her 2016 declaration is not before the Court on this motion, but from recollection and from the descriptions that are in the privilege log, what it would indicate is that during the time that DPH contended that relocation should continue and was looking at air sample results and environmental science that they believe supported continuing relocation, Dr. Mc Daniel was among the witnesses who submitted a declaration in opposition to that briefing to provide explanation as to why relocation should end, as was called for in the program itself.

So that was a contested issue early in the process.

To Ms. Oliver's second point, your Honor may recall during the time of your interim order on the Intrinsik logs one of the requirements was that a representative of Intrinsik provide a verification that their document collection and production in response to the subpoena was complete.

Dr. Mc Daniel did comply with that order and provided on behalf of Intrinsik a verification, so that has been done.

I just wanted to note that for the record.

Otherwise, your Honor, we are willing to submit on the tentative.

We understand your Honor's direction with respect to 20 documents only on the list. I'm sorry. I should say 20 documents from the privilege log and the tentative's direction to take a look at those and redact only if there is work product reflected and otherwise produce those. We will do that.

Some of those documents were produced in redacted form. Some of them were withheld, and there may be minor redactions. Otherwise, they can be produced.

I understand the Court's direction on the log and how we do those redactions.

THE COURT: Okay. Very good.

MS. MILLER: Thank you.

THE COURT: So I probably should put a time in here, then, right?

What is a reasonable time, 20 days?

MS. MILLER: That would be fine.

Thank you, your Honor.

Anything further, Ms. Oliver?

MS. OLIVER: No, your Honor. That's fine.

THE COURT: Okay. So what I'm going to do is I'll take this under submission.

I will go back and look at this issue about Ms. Mc Daniel's-- excuse me, Dr. McDaniel's prior declaration, and I should be able to get something out today or tomorrow on

this, okay?

That's under submission.

So can we turn to the plaintiffs' motion to compel production of Geosyntec documents?

MS. OLIVER: Yes, your Honor. Patricia Oliver again on behalf of the private plaintiffs.

We submit on the tentative, your Honor.

THE COURT: Okay. Thank you, Ms. Oliver.

MR. DRAGNA: As do we, your Honor.

THE COURT: All right. So the Court's tentative will stand on that.

I guess, again, I need to address the issue of time of production. No. The 24 documents that still remain at issue, there's nothing that needs to be produced at this time?

MR. DRAGNA: Correct.

THE COURT: So the Court's tentative will stand, then.

MR. DRAGNA: Thank you, your Honor.

THE COURT: Okay. So let's turn to plaintiffs' motion for issue evidence and monetary sanctions and other remedies.

I did manage to get a tentative out to you yesterday on that, so I'll hear from plaintiffs.

MR. PANISH: Good morning, your Honor. Brian Panish.

The Court has repeatedly stated that counsel should preserve their credibility. So I want to start with the misrepresentations the defendants made in their opposition that because of the volume of stuff the Court accepted it, and it was a false statement.

So if you look at your tentative order on page 13, the

Court wrote, "Though defendants stood before this Court and defended the accuracy of the February 2020 logs" -- do you see that paragraph, your Honor?

THE COURT: No, I'm not seeing it this second.

MR. PANISH: It's on page --

THE COURT: 13?

MR. PANISH: Yes. Let me get my order.

MR. BOUCHER: The last paragraph.

MR. PANISH: The last paragraph. It says "Instance of privilege log noncompliance."

THE COURT: Okay.

MR. PANISH: Are you with me?

THE COURT: I am.

MR. PANISH: So the Court wrote:

> "Though defendants stood before this Court and defended the accuracy of the February 2020 logs, after further court order review and after trial counsel was asked to yet again submit declarations as to the good faith assertion of privilege, defendants produced 34,530 documents listed on the February 2020 log."

That is false.

Defendants produced 41,561 documents, about 20 percent more than they've represented to the Court.

How do we know that? It's very clear.

Paragraph 3 of Mr. Creed's March 26 declaration did a complete accounting.

Oh, and by the way, none of those documents were attachments.

Their declarant, Ms. Tess Blair, who has never appeared in this Court, agrees with Creed's number. See her declaration, paragraph 49 and 50.

But, again, the half-truths and misrepresentations got the Court to accept that. That is a false statement again, and the Court has repeatedly said false statements are offensive to the Court and to counsel.

The Court made some comment about what they were going to do about false statements, but that has yet to occur.

Then they go on to point out how defendants -- they sought to mislead us, because those entries, some of them dealt with thousands of entries, those documents.

So for them to say -- and none of those are attachments, so that's a false statement, a false representation. And their own papers prove it.

They don't either read or know what their own declarant said verifying the accuracy of Mr. Creed's declaration.

So let's just start with that.

Now, this Court has 43 years' experience. I have 36. Mr. Boucher has 36 and Mr. Praglin and Kelly, the ones involved in this, have 39 years. Together that's almost 200 years. I've never ever seen anything like this, nor has the Court. And the Court has repeatedly said -- I'll quote the Court.

"These discovery abuses are unprecedented. This is uncharted waters. There have been more violations of court

orders and more prejudice in this case than any case the Court has ever seen in its entire career."

And this Court has been an advocate for the civil justice system, devoted part of your career to serving in this County, where I have practiced for 36 years and all of us have practiced.

What is not mentioned in the order is the 35,000 victims that are residents of this County who can't get justice from this Court.

I know it's not the Court's doing, but the defendants have no respect for the Court or us, nor the Court orders. And because of their lack of respect, the Court has lost all control of discovery in this case, and the Court has admitted it. The only time in your entire career. Yet they want to attack us, attack me and abuse and abuse and abuse.

But what has happened. Let's go back and look.

The Court -- now, defense counsel is going to go to their clients and say we won again. And I continue to tell the Court they win, they win, they win.

The Court says, well, I sanctioned them $550,000, Mr. Panish.

Your Honor, this is a multi-billion-dollar exposure case. These defendants, the preliminary injunction was granted. That shows they -- I forgot the standard -- of the likelihood of success on the merits.

So what do they have to lose? They just don't give us the evidence, the critical evidence in this case.

The Court just keeps giving them redo after redo after

redo.

The Court could have awarded one issue sanction here to incentivize the defendants, but they haven't obeyed a single order yet.

They're not incentivized because they have nothing to lose. If you lose 500,000, a million, 2 million -- and I'll get to that later -- in a multi-billion-dollar exposure case, you've won. You've abused the civil discovery system. The residents of this County have not got the justice that this civil justice system is supposed to provide, and that's clear.

The Court goes on to say -- let me back up.

What do I tell the clients? They wanted to be here today, your Honor. They can't come here. What do I tell them why it's been five years and nothing -- we've gotten no closer.

You've been on the case nearly a year and half in, and in that time what's happened? Discovery is out of control. The abuses are out of control. That's what's happened in the last year and a half in this case.

Those victims, 35,000 of them that were sitting in their homes doing nothing wrong when this largest natural gas uncontrolled release in the history of the world occurred, and from that moment forward it was nothing but obstructions and misrepresentations by the defendant.

And what did they withhold? Critical evidence, documents that show they had notice of the problem, because of money they chose not to undertake the repairs. These are punitive damage documents.

Also health documents, PR misrepresentations to the health department, misrepresents to AQMD, misrepresents to the PUC. They're litigating in the PUC. They're violating all kind of privilege problems there.

It doesn't stop. This utility, the largest, with 20,000 employees, with one of the largest law firms in America, this is not a mistake. This is not a mistake.

But what do the plaintiffs have to do? Answer 600-page questionnaires -- 600 questions. A hundred of them sat for deposition, signed medical authorizations, signed employment authorizations, give the medical authorizations after the discovery cutoff.

Have they been in here saying they didn't answer the questionnaires, they didn't do the depositions? No issue, none.

But I think back to the Court taking that board out and writing down those three maxims. We followed them. They haven't ever. But nothing has happened. They're winning.

So let me continue on to talk a little more about what's happened.

On page 19 of the order, the Court states:

> "The Court agrees that defendants' discovery abuse has caused significant prejudice to the plaintiffs.
>
> "Plaintiffs' case preparation has been needlessly delayed, and in a certain sense will never be what it might have been had defendants met their most basic discovery

obligations."

These risk registries were asked in the beginning. Every witness testified they knew nothing about it. They recalled nothing about risk registries, every one.

Then motion after motion, we get the documents. And you read, I'm sure, my declaration where the witness gives a deposition. The person that's the owner of the risk, the catastrophic well failure from corrosion in charge of the underground storage. That's the person.

He testified in his deposition on December, 2019:

"Q. Did you ever do any risk analysis, risk registry?

"A. Only for when I was at San Diego Gas & Electric for wildfires.

"Q. Anything else?

"A. I don't recall anything else."

January, signs his deposition under oath.

February -- excuse me -- March or April he testifies after meeting with counsel who is not admitted in California, who's practicing by a privilege, a pro hac vice who's been obstructing depositions, shows him documents.

We ask him:

"Q. Did that refresh your recollection?"

He says:

"A. Oh, no."

Eventually we get him to maybe say one.

Well, how did you remember this, that you testified here you didn't know?

"I had a revelation."

We asked for the documents. Counsel eventually gives us one. But that's obstructionism.

Your order tried to level the playing field. It's not even close. It's getting worse.

And let me get into that.

In September of 2019, after you've been on the case for a few months, we kept raising these privilege issues. You wouldn't let us file motions. You said, oh, no, oh, no, we're going to have a meeting. You come down here on Wednesday.

This is what you said. You said, "I'm going to tell you right now, we're going to get it right or I'm going to unleash the plaintiffs."

This is September, 2019, almost a year ago.

Then you said -- the Court said:

> "If you don't get it right, next Wednesday, a week from today, we're going to come down here. I want you to bring all your documents with you and we're going to go through that privilege claim that you claim, complete review on the data group. And bring them in and we'll take a look and we'll see if you're going to do something else. If I'm not satisfied, I'll turn the plaintiffs loose and you can bring a motion."

We weren't even allowed to bring a motion. What happened? They came to court. They almost passed the smell

test. When they had the heart test, they failed.

What does the Court say?

Okay, plaintiffs. Go file your motions.

Then in February, 2020 the court issues another warning. These repeated warnings.

The Court again tells them:

"The sanctions imposed are made under the assumption that defendants will keep their promise that plaintiffs have received or will receive by the deadline, September 20 -- the January 14th order every document to which they're entitled."

That still hasn't happened.

You gave them a warning. Did they heed your warning? No. Because they're tone deaf. They're entitled, this utility. They have nothing to lose. They don't care about the victims. They just care about saving the money and trying to make the ratepayers pay.

Then what happens, your Honor?

You say at that hearing and you write:

> "If defendants fail to keep their promise to abide by this January 2020 order, then the Court will allow further briefing and consider stricter evidentiary and issue sanctions as well as jury instructions under Code Section 413. The Court also may permit private plaintiffs to seek additional sanctions based on information about withheld documents that only recently

have been disclosed."

Plaintiffs told the Court at this hearing that is not going to deter them. I stood here and looked you right in the eye and told you it's not going to stop them.

You said, Mr. Panish, this is significant. Let's see. We have to give them an opportunity. I'm giving them another chance. That's what you said.

But you called me up there and you told me, Mr. Panish, it's your job, I hold you to make sure every lawyer is prepared for every deposition. I don't want any issues.

Do you remember that? I do, because I took it seriously. I take my obligations as a lawyer in this Court, as an officer of the Court, seriously.

That hasn't happened on the other side, your Honor. They don't respect your orders.

But let's continue on.

Then we get to March 20th, another order.

The Court issues its fourth warning:

> "Therefore" -- this is what you wrote, "the Court may be forced to impose" -- may be -- "may be forced to impose issue or evidentiary sanctions or draft an appropriate jury instruction regarding effective spoliation. But that determination can't be made until further briefing, to which both sides are entitled, on those aspects of plaintiffs' current motion for sanctions.

"Defendants' compliance or lack thereof with this Court's current order will bear upon whether or not the Court imposes issue or evidentiary sanctions and the nature of any such sanctions."

Again, I told you -- that was on the phone -- it's not going to do anything. They're not going to comply, but you gave them another chance.

Then you tell them if they don't comply, it's $50,000 a day.

The Court has found they didn't comply. They admitted it, buried in page 28 of their brief. Human error.

This law firm -- and by the way, they claim 6,400 hours they billed. That's 2-point -- at $400, that's 2.4 billion and 3 billion. They're profiting on this to review the documents, which helps them get prepared for trial, which helps them coach their witnesses and come up with their stories.

So you're giving them a benefit at our expense.

That's what they said, 6,400 documents just -- or excuse me, 6,400 hours just to review for privilege.

How many hours is it going to take us to review them for content?

Then at that time the Court found noncompliance. And they knew that trial counsels' entries weren't compliant.

One example, one macro description that was in that applied to 12,000 entries, 12,000.

This is not a mistake. This is one of the largest

firms in the United States with smart lawyers. They're carrying out direction from some of those lawyers back there and some of the lawyers on the phone who the Court doesn't even know.

The counsel from Sempra and SoCalGas are controlling this, and the lawyers are going along.

But then that doesn't stop, your Honor. They committed fraud on the Court many times, and nothing has happened.

Then I want to tell the clients that the Court -- what do I tell them? Do I tell them the Court is warning them; they warned them if you do it again I might do something?

I think what the Court said is you would consider, but I think the code requires it.

The Bentley case overturned an order with less severe sanctions than this, or less severe conduct. But what do I tell the clients, that we're going to have to be down here every day for ex parte motions when they stop the depositions and they obstruct?

Remember, for this last three months we had no relief, so they just abused it to death.

We've had, since the order, four months, about 14 depositions. Then, of course, none for two weeks. Then they put three on the same day and there's not another one until July 17.

I mean, come on, Judge. This is -- and they just dribble out the dates.

Then they say, oh, your order says you can redepose the people. Then I find all these new witnesses and all these

documents.

This is how it works, Judge, to do the deposition.

You have to go through the documents. We haven't been able to review them all, 1.9 million. We have to go cull through them and find what we can use with this witness that we haven't seen, and there are many for every witness.

Then it takes about a day, because I've been doing it, to prepare for the deposition.

Then it takes a day to take the deposition.

Then on Zoom you get probably 30 percent less content because of all the delays, which is that is what it is.

So we have to fight to get the days. Many of these essential employees like Arriola, they go "he's essential."

They go "he's essential." I write to Mr. Schrader. Give me a declaration, show me why he's essential. He's a communications guy at Sempra, but he was the CEO and directly involved in all of this. Thousands of documents from him were withheld.

Mr. Schrader doesn't even tell me. I find out he's leaving the company, this essential employee.

Mr. Schrader, he says the State of California found Sempra to be an essential company. That's the response. It's in the letter attached to his declaration.

This guy was so essential he left the company.

Then they say you have got to do his depo on June 30th. That's the only day we can do it. I said I already told you I can't depose him that day.

Then he says, well, you can do it in mid July, when he

never could do it any other day. Come on.

Debbie Reed, the CEO, is involved. Seven thousand documents withheld relating to her. I couldn't even get another day. I finally get a day. They cancel it the first time.

Then two weeks ago Mr. Creed and I are spending two days on Zoom going through documents, preparing for the deposition.

While we're doing that, at 2:00 o'clock in the afternoon Ms. Miller sends me a threatening email and says if you don't agree to restrict your time and be done at the end of this day, we're pulling the depo.

I don't even get the email because I'm preparing to take the deposition.

At 6:00 o'clock I finish. I look at my emails. They've already canceled the deposition.

Then I have to go around and round and round.

So first you have to get the deposition. Then when you get there, what happens? Then you get there, the most evasive witnesses you've ever seen, the most coaching and cueing all the time, showing them documents, them saying they don't refresh their recollection and the witness not answering the question.

Then the deposition is over and they say there's a seven-hour limit.

Number 1, it doesn't apply in complex.

Number 2, it wasn't part of your order.

They said we resist -- Mr. Lotterman, we resist all

future attempts to depose this witness.

Then they come in and they say we're filing a motion right after the second depo. They write a letter. This is improper.

Judge, the witness gets in and lies. You'll have to use another doctor to impeach him.

Remember, Arriola, all these guys are leaving. We are going to have to rely on videos which are non-responsive, evasive answers. How do we get a fair trial and level playing field? How does that happen when the witness won't answer.

I have no way of doing it. I can't come down here.

Are you going to be available every day for us, because I'm going to be down here every day because these abuses are not stopping.

Let me continue on.

THE COURT: Can I just ask you a question?

If I granted all of the issue sanctions you're requesting, you would still need all of these depositions and you would still need to use all of these documents, would you not?

MR. PANISH: I wouldn't need all the depositions.

THE COURT: Let me finish a minute. And I know it's hard because we're wearing masks.

But your case is a punitive damages case.

MR. PANISH: Well, first of all, we have to prove liability, okay?

They're defending it. They're saying we've complied with every statute. The PUC cited them for 400 violations,

but they keep saying we complied with every applicable state, federal, local ordinance. That's false.

And they keep going on. So I have to prove liability first. Then I have to prove damages.

Many of these documents that have been withheld go directly to the damages that they misrepresented to the Public Health, to the AQMD, to the plaintiffs on their posts, on their websites. That goes directly to damages.

It never stops. It's not going to stop.

They're going to get up here and say, oh, we get the message. The minute we walk out of here, it will be back to what the Court has -- I don't want to say allowed, but what has occurred is hand to hand combat on every question, to get a deposition, to get a document.

We start the depositions. Mr. McMahon, I'm taking his deposition. The man is just very evasive, very hostile, wrote discriminatory emails. I'll leave it at that. Denies that he wrote it, when you see it's him, relating to telling people to put attorneys' names on the documents to create, fabricate, manufacture privilege.

Then I see these documents. There are ten other witnesses. I've never heard of them. And he's testified they're critical.

I'm trying to notice depositions.

Mr. Schrader writes me back. Oh, no, we're not giving you any new depositions because that's not in the court order.

Now, are you telling me that the spirit of your order was you can only redepose witnesses you deposed?

What about all the ones we didn't know about from the documents they withheld?

Then, what about when we get in the deposition last week, two depositions, Mr. Van Houten and Mr. Healy. They say there are other documents relating to this that they don't know where they are and they haven't been produced.

As this continues on every time there's a deposition. We send letters, where are these documents. They don't respond. They just blow us off.

Mr. Schrader and Dragna, they haven't been in any depositions.

It is repeated obstructionism. How does the playing field get level when they won't let us take depositions of people we didn't know about?

Did I misunderstand your order, Judge? Was that the spirit to level the playing field if they've withheld a document and a witness, we don't get that deposition?

Is it the spirit of your order that there's a limit on how long you can go?

Then it just goes on and on.

Then let's go to how do we get a fair trial? We're going to talk about that later. But I had to email Mr. Schrader 12 times to get a single deposition date. Then we go to this whole Zoom protocol. It's such a waste of time.

Remember the last time we were here when you sanctioned them 500 grand? What did Mr. Dragna say? It's a bunch of rubbish. That's how they view your orders.

Now, then we have all these other people that have been

deposed, Jimmy Cho, COO, Brent Lane, the one who made the decisions, Alexander, all of them they won't produce. Essential, essential.

Come on, Judge. How can that happen in 2020? How can a case like this get into this posture?

How can that happen in the Los Angeles Superior Court, complex division, the largest trial court in the world, with a judge that's been a presiding judge, assistant presiding judge, complex presiding judge, civil presiding judge? How does that happen in 2020, today?

Never seen it in 42 years. I haven't seen it in 36 years. How do we get here?

There is only one reason, because the defendant and their counsel are engaged in improper conduct, and nothing is happening.

Let me go on. I talked about the witnesses. It's a joke, really, Judge. In the depositions, the coaching. Remember, there is a prior order on coaching or cueing, non-stop, non-stop.

Depositions, hundreds of objections. I calculated them out for you in my declaration.

Then they object and then the witness thinks and he says can you repeat the question? I don't remember.

You should allow all the objections to be played so the jury can see what happened. That should be another sanction.

Then, which to me is one of the most outrageous things, the first thing is Mr. Lotterman, who is practicing here -- it's hard -- on a pro hac vice, which is a privilege, he

shouldn't be allowed to do this.

He's only admitted in the District of Columbia. They don't allow this. I've litigated there. Lawyers don't behave like that.

How can a lawyer say I don't authorize you to testify about that and then a witness say I'm not authorized to testify about a critical issue in a case.

Have you ever heard that objection before, Judge? I haven't. What is that? How can that be allowed.

Then Mr. Lotterman, who claims he's a law professor expert, cites Rule 771. It's section 771, number 1.

Number 2, it doesn't say what he says.

Number 3, by the way, Judge, on page 19 of our brief, we did cite that case. Is it Monsanto?

THE COURT: Montrose, I believe.

MR. PANISH: The Montrose case. We did cite it. You noted it in your order. Plaintiffs didn't bring that up, but we did cite it on page 19.

Just like we're the ones that brought to the Court's attention, the Siry case regarding the discretion and prejudice in discovery sanctions.

So what happens? Mr. Lotterman coaches this witness, the key witness. We don't get the testimony on the Creed punitive damage issue.

Then he comes in and attacks us, says he's right, this is proper. He doesn't even know the rule. He continues to do this repeatedly in the depositions.

I write to Mr. Schrader. At times I can communicate

with him. At times. I say, Mr. Schrader, these people are abusing the deposition process.

You know what he writes back? I've reviewed it. They're all appropriate.

This Mr. Lotterman pulling that nonsense and coaching that witness at the highest level and claiming this Rule 771, the Court should strike his pro hac. He shouldn't be allowed to practice in this Court.

You are allowing a lawyer that swore that he would follow the rules and know the rules to practice in this Court. He has never passed the bar in this state. That's not right that you can bring an out-of-state lawyer to abuse the discovery process with no accountability. How can that happen?

I'll bring every deposition and show you. And I'll defend every question because, you know, their version is, well, that document was produced before.

Well, yeah, we wouldn't have to use the Code of Conduct if your witness wasn't lying to get him to admit what the Code of Conduct was. Yeah, it was produced.

When the witness says, yeah, that never happened, we have to bring out another document to impeach them because we don't even know if we're going to have them to show up for trial, because that's another issue.

I mean, it's non-stop every day, realtime.

I would like to have -- since we're getting nowhere here, I'd like to have a hearing every day at 4:00 o'clock down here because there are so many issues. You're only

seeing the iceberg above the ocean.

Let me give you another example, Judge. I'm in there deposing this Mr. Healy and Ms. Miller is obstructing the deposition. During the deposition -- we started at a quarter to 9:00. At 3:15 she says to me, by the way, Mr. Panish, did you see the email we sent you?

I said, well, I've been in a deposition.

Oh, there are some documents there. They involve this witness. They may not be relevant, but you should look at them. Six hours into the deposition.

The gamesmanship, the brinksmanship, the trial by word. It's unbelievable.

And then in the middle of the deposition, at 3:15 in the afternoon, we get two more letters. This is two days ago.

I'm trying to depose the witness. We have another deposition going on. I don't even see these until after.

One comes from Mr. Dragna and one comes from Ms. Weissman. Uncovering a bunch more documents. I'd like to lodge those with the Court. I gave counsel a copy of that.

Can I do that, your Honor? I already gave them a copy of that.

Well, look at this. This is two days ago.

In one of them, there are 1,300 documents, and they're claiming, oh, it's just some minor thing.

This is ongoing every single day. Then they don't tell us where the documents came from, were they responsive.

Just like this trial counsel alleged review. They didn't say what documents they reviewed. They were too busy

working on the clawback.

Do we even have to have a hearing on that, Judge?

We've spent hours opposing the clawback, but I thought -- did I miss something? Did the appellate court -- supreme court appellate division rule? Now they're saying inadvertently they produced documents.

That is ridiculous. That is a frivolous motion.

I mean, come on, Judge. We have to spend the time to do it.

Then because we follow our obligations, we're concerned. We can't use these documents in the depositions. They're going to try to disqualify us.

How is that making it a level playing field?

This clawback, multiple clawbacks. Then they have a motion going, oh, you're not getting any more depositions. We're cutting off the deposition process. That's it. We're filing a motion on that.

Hand to hand combat on every issue. If you can't see it by now, Judge -- I mean, you see it, but nothing is happening and it's not leveling the playing field.

Let me go on. There's more.

Then the April 20 log that they did produce, these lawyers -- you saw it. Instead of working on reviewing documents, 43 documents a day they reviewed. Instead of that, they're working on clawback motions. They're doing other stuff.

They used 6,400 hours. How much are we going to need? Three times that to review for substance?

But then on the 20th they claim 55,785 documents, which means they removed 104,000 -- excuse me, 100,400 documents from their November 19. Again, multiple violations, that's according to Ms. Blair, paragraph 55.

In other words, even though the Court ordered them on September 18, 2019 that they produce all non-privileged documents by November 1st, 2019 -- the defendants produce all non-privileged documents by November 1st -- their 2020 log shows that they've now produced two-thirds of the documents off the November log that they were ordered many times to do and they still didn't do.

All right. I'm upset, Judge. Yeah, I cussed at a deposition because what I said is true. It's nonsense. I'll take whatever penalty I get, because I did it. I'm accountable. But no one over there is accountable. That's the problem. When they are all accountable, no one is accountable. I told you -- you told me to be -- I'm accountable for everything I do. I've never done it again. I haven't done it, but that's how frustrating this obstructionism is.

To put it in the pandemic, look, the Court knows. You were displaced. I had to be in the jury room doing depositions. How many cases do you have like that going on?

We're in the jury room doing depositions. The Court's displaced. It's a stressful situation. You've experienced it yourself. Put on it these people five years later. Nothing, nothing.

The coaching, I already told you about it.

The documents not being produced. The seven-hour limit.

I cussed, so be it.

This 771 -- by the way, we did cite that Montrose case.

THE COURT: Yes, thank you.

MR. PANISH: Okay. But what am I going to tell my clients? All the clients that call me constantly. They want the trial. What happened with the Court? I did what the Court told me I had to do. Why aren't they doing it? What do I tell them?

Why is the Court not awarding 50,000 a day? They didn't comply. You admit it. They admit it. You said if they don't comply, that's another warning. No enforcement.

We've proved it.

Now, you don't believe them. You even said you questioned their credibility. I seriously question it. I don't believe a lot of what they say because I've seen other documents that impeach them.

But there's more there. I guarantee you this is not the end of it.

I've told you that every single time, and I've been right. We've been back here again every time.

Everything we allege in the motion you found was true. Four of the five factors, severe prejudice, you found all of that and easily the fifth factor is applied.

It's just a game of brinksmanship, Rambo litigation -- you read about it. The ABA and all these big firm Rambo litigators, et cetera. That's what it is. And they don't

care.

They're not accountable, none of them.

They could have been reviewing all those documents still, but they didn't. They said, well, we need 120 days. They had six months.

So it's been four months since your order. Not a lot has happened.

So I could go on for hours. It's a realtime thing, Judge. So the playing field is not leveled. It's only getting much more steep.

THE COURT: Let me just ask you --

MR. PANISH: Yes, go ahead.

THE COURT: -- with regard to the issue sanctions, okay?

If you got all of those issues sanctions, you would still have to be asking about all of these late-produced documents and having these depositions -- wait a minute -- and having these depositions because this is a punitive damages case, which is what you said in your declaration.

MR. PANISH: That's part of it.

THE COURT: Let me finish.

Remember the admonition, keep your on the ball? Remember that one?

MR. PANISH: How do I do that with them doing this conduct?

THE COURT: I think you're being distracted by it, quite honestly.

If you got all those issue sanctions, you would still

need all these depositions.

MR. PANISH: No, I wouldn't.

THE COURT: Well, tell me about that. How can you -- these are punitive damages documents.

MR. PANISH: Right.

But if I have negligence -- a lot of these are for negligence. These are well integrity corrosion people. Why the well blew out. They're not admitting that.

I say to you here, res ipsa loquitur, was it a terrorist that did it? Was it a Scud missile? No. The people who lived there, the thing blew out. But they still won't admit any of that.

Then you asked me -- oh, shoot, I forgot your last question, because I did have an answer and then I interrupted you.

THE COURT: So punitive damages.

MR. PANISH: No, there was one before that.

THE COURT: Well, let's get to punitive damages.

Your case is about punitive damages, right?

MR. PANISH: No. Our case is about liability, causation, damages -- because punitive damages are tied to non-economic or economic loss.

So every document cuts across every aspect of the case. Not if the Court makes these findings. I've had other cases. This is exactly what happened, published decisions cited. I've been here.

This is a billion-plus-dollar exposure case. That's what they say with their filings with the SEC.

500,000 is peanuts in a world of elephants.

Obviously -- and the Court knows this -- it hasn't done one thing. It hasn't done one thing. It's gotten worse.

They're just emboldened in their conduct, and entitled -- hold on one second, Mr. Creed. I don't know. Am I allowed to go over there?

Here, why don't you just throw it over here.

THE COURT: Just write it.

MR. PANISH: I know what you said about texting, but the text doesn't work here.

THE COURT: Let's do notes, then. I just want everybody to be safe.

MR. PANISH: Well, one point, we still don't know how many documents we don't have.

Keep your eye on the ball. Have they kept their eye on the ball, when you said give them the depositions and they don't give us dates?

THE COURT: Mr. Panish, do you want the discovery referee option -- not with regard to the depositions. We'll get to that.

They said they would pay for a discovery referee to review every single outstanding document. If you wanted that, I would grant that. It would cause further delay.

MR. PANISH: Yeah, of course. But I wanted to talk about that. I have a plan on that, on multiple levels.

THE COURT: Okay. Not the depositions.

MR. PANISH: I know, but this goes glove and fist -- glove and hand with that. I spent a lot of time thinking

about it.

Judge, I have all this time. At 2:00 o'clock I'm co-lead counsel on the Thomas Fire cases. You were on one of the depos. There's no problem in that case. But I'm going to get a trial date.

I could have done all these depositions. I normally don't have to get involved in these kinds of fights because this isn't normal.

Ask the Kirkland & Ellis lawyers if what they've seen in this case -- they're on big complex cases -- ask them if that is what is normal that they've seen since they've been on the case.

I have to wait another how much time for the referee to look at these documents that you had ordered produced four months ago?

THE COURT: That's my concern. That's my concern.

But if you want that, I will grant it.

MR. PANISH: Well, let me consider that.

But on the other referee thing, we're going to talk about it at the appropriate time.

THE COURT: We'll talk about it at an appropriate time.

MR. PANISH: So I'm not going to bring that up.

I want to make sure I'm answering your question about the punitive damages.

But this is not just a punitive damage case. There are 35,000 people, your Honor, 717 that have been affected.

This is about people.

And they have all the information, the health studies.

There is a three-mile, the eight-mile -- they have the same issue with the methane release down in Alabama. We're trying to get that discovery. They're resisting that. We had to go to Alabama and file a motion. It goes to the health effects.

This cuts across the entire case, the misrepresentation. We have summary judgment motions. We don't have documents to oppose. They say we're not going to give you an extension. Just file your opposition and request more time.

I mean, we want dates. We're going to start filing motions to compel, motions on the conduct.

My goal, my duty to all these people is to try to get the case to trial, a fair trial, and that's what we've been trying to do.

I have been keeping my eye on the ball. They give me deposition dates every time, except for one. I accept the date, every date.

We haven't had any depositions for two weeks. They put three on the same day.

Then no more for two weeks.

You need to make an order right now. We need all the dates in ten days. If they haven't been deposed, we need to get them deposed.

If they're not a redepo -- we found out we need to have them, but we're going to have to litigate all of that. So let's get the motions. It's never going to get worked out.

Can we get dates to set all those motions?

This Court needs to get more involved because they're

not respecting your orders.

Have you ever had a case where the lawyers disrespect your orders this many times? I think you've told us the answer is no.

THE COURT: I agree that I need to get involved. I've been precluded from doing that in the past three months.

The problems with the depositions were certainly exacerbated by the lack of my ability to --

MR. PANISH: Well, you read my deposition that you were refereeing part of it, Mansdorfer. You overruled 99 percent of the objections. The questions are appropriate.

We have experienced lawyers. There are five lawyers doing all these depositions. We're not -- we don't want to just go waste time and keeping our eye on the ball. We want to get to trial.

Why do we want to go track down and spend three days on one witness we can't even finish? Why do we want to do that, Judge? That's what they're accusing us of.

I'm lead counsel in other case, Woolsey. That's going to be going to trial right across the hall. I'm trying to be efficient and get the work done. That's what I do, and that's what I've been doing for 36 years practicing. I'm not wasting time in depositions.

But what do I tell the 35,717 clients why they can't have a fair trial, a level playing field? When are they going to get the discovery that they're entitled? What do I tell them? Because when I read the order, you find everything we said, factor of five, which usually can be found, but

everything we allege you found is true.

You found you don't believe their logs.

Because I write a letter to Mr. Schrader. Your logs are deficient. Oh, tell us how.

We have to point it out to them when we're preparing for depositions. Is that what an officer of the court does? Is that what we're going to allow to happen in the complex court here in Los Angeles County?

It has been and it hasn't stopped, and it's only getting worse. And we're not getting any relief and it's frustrating. It's turned to lawlessness.

I don't want to have to respond. And it's very hard for me, but I've kept my cool except for once when I cussed.

But I know how to deal with lawyers like this, Judge. And we don't want to go there, but I know how to do it.

This lawlessness has to stop, and this prejudice that you found has to stop.

I'm here to answer any questions. You haven't asked me any questions other than how does getting these issue sanctions prevent punitive damages. Well, you have to try punitive damages. You can't assess it against somebody without evidence. That would be improper.

THE COURT: You have to try punitive damages, and you need all these documents and the depositions in order to do that.

MR. PANISH: But I'm not getting them.

THE COURT: And you haven't asked for terminating sanctions, which would turn over the damage determinations to

the Court. And I don't think you probably want that either.

MR. PANISH: Well, you haven't given us any relief. Why would I move for terminating sanctions?

My read of you, with all due respect, you think 500,000 was a big deal, okay? It wasn't.

THE COURT: Excuse me, Mr. Panish. I never said it was a big deal.

MR. PANISH: Well, you said you've already done it and look at what I've done.

That was two, three motions ago. And do you think, based on what you wrote, that things got better as a result of that? I don't think anyone could say that, but they will.

Then when I get done, they will come up here and say we've done everything and we're complying. It was human error.

How about that, Judge? Human error. Have you ever heard that before? Or you're not authorized to answer the question with in-house counsel sitting right there?

These are all new things to me. I've never seen in the Evidence Code the objection you're not authorized.

I know the Court hasn't seen it. And I know the Court has spent a lot of your life trying to preserve the civil justice system. And we've lost it here. We've lost it in this case in this Court.

That's all I've got, Judge.

I'm happy to answer any questions.

THE COURT: I'm going to need an answer about the discovery referee offer with respect to review of documents.

I need to know.

MR. PANISH: Well, let me tell you.

I proposed a discovery referee in the depositions, but they won't pay.

THE COURT: Okay. I'm not talking about that. I'm talking about the privilege issue and the documents, okay?

MR. PANISH: Okay.

THE COURT: So in their brief they said that they would pay for a discovery referee to review every document that remains on the privilege log. They said they would pay for that.

MR. PANISH: Right, right. And how long is that going to take? Let's see, it took them 6,400 hours to review for privilege.

THE COURT: May I finish, Mr. Panish?

MR. PANISH: I'm sorry, your Honor. I'm very upset. I've never had it happen in 36 years, ever.

THE COURT: Are you finished so that I can continue?

MR. PANISH: Yes. I'm sorry.

THE COURT: In your brief you did not address their offer.

So I said in my tentative I'm not going to impose that on you because it's going to take time. But if you are truly at this point -- and, you know, Mr. Creed has done work like I've never seen in this case in terms of ferreting out the problems.

If you feel that you still have important documents that are on the privilege log that you don't have, then you

need to tell me that you need that discovery referee. But you have to decide. Your side has to decide.

MR. PANISH: Can you give me a minute on that?

THE COURT: Yes. Okay. Let me just finish, Mr. Panish.

MR. PANISH: Sure. I'm sorry. I thought you finished. I can't tell.

THE COURT: I understand.

Your side has to decide if it's worth the delay. I'm very concerned about the delay.

You don't have to tell me even right now, okay? But I need to know that, because their offer puts them in a place where they can say to an appellate court some day, you know, we shouldn't have to write a check on this case because the Court entered issue sanctions when we offered to have every document reviewed by a discovery referee, because we aren't hiding anything.

That's where we are, you see.

MR. PANISH: Well, I harken back to their statement, 6,400 hours. I don't even know. There are 24 hours in a day. Let's see, how long is that for one referee?

I think we need like three referees. If we get four or five referees, maybe we can get it done faster. I would agree to that, multiple referees properly instructed by the Court splitting up the documents and starting with certain ones that we identify that they're paying for.

Because just like the depositions and all this, they created the whole problem. They don't ever admit that.

The only reason we're taking these depositions is because they withheld all these documents.

THE COURT: I completely agree that they created the whole problem.

MR. PANISH: Then they want us to pay for the referee.

Then they file a motion on the clawback, Judge. Can we just get that resolved?

We can't use the documents. So now we have to go back and depose other people because they're claiming clawback on documents that have been two courts -- I have to consult with ethics counsel and find out what I should do.

THE COURT: So that motion or OSC, whatever it is, is set for July 8. If you want to hear it more quickly --

MR. PANISH: Let's hear it right now.

THE COURT: -- I'll hear it on at briefing schedule.

MR. PANISH: It's all been briefed.

THE COURT: It must be briefed.

Have all sides have filed their briefs?

MR. DRAGNA: We have not filed our reply, your Honor.

THE COURT: I will hear it as soon as you want.

MR. PANISH: They're just going to keep filing frivolous motions.

Then they're going out and doing all their discovery, Judge.

You make that look at me. I don't know if it's your mask or what, but it is frivolous. You know.

The Court of Appeal and Supreme Court already affirmed the order and now they say they inadvertently turned over

documents. Come on.

I mean, there is so much, Judge. It's a nonstop, every day, real time event. It's never going to stop. I'll be back again, like I've told you before four other times. They misrepresent, half-truths. They're going to come up and say how compliant they are.

So let's hear it and then I would like to respond.

Thank you.

THE COURT: Thank you.

Okay. I'll hear from defense, please.

MS. ELIZABETH: Your Honor, if I may, just briefly, on behalf of the developer plaintiffs?

THE COURT: Yes. This would be an appropriate time. Okay.

Spray the microphone.

MS. ELIZABETH: It will be very brief, your Honor. We respect the Court's tentative regarding --

THE COURT: By the way, welcome. Sorry I can't see your faces.

MS. ELIZABETH: Thank you very much, your Honor.

THE COURT: Kirkland & Ellis here. You're welcome.

MS. ELIZABETH: We're excited to be a part of the party.

We do respect the Court's tentative regarding Toll's joinder. We would just reserve the right to file an amended joinder at a later time that details the relevant legal authority as well as the specific prejudice to Toll specifically.

So we would reserve that right, your Honor.

I just also would note that we have received permission from the other developer plaintiffs, Kirkland has, to become liaison counsel for developer plaintiffs.

So if there is a procedure in which we need to comply in order to make that happen, we would love to do that.

Thank you, your Honor.

THE COURT: I think it's enough for you to be stating on the record that you're taking over the liaison counsel role. We'll put that in the minute order today.

Thank you for that.

What you all need to focus on is getting up to speed.

As you acknowledge in the joint statement, there was discovery on your side that needed to be done, as well.

MS. ELIZABETH: Absolutely. I'm prepared to speak about that later, your Honor.

THE COURT: All right. We will talk about it later, but yes.

MS. ELIZABETH: Thank you.

THE COURT: Okay. Thank you.

All right. I'll hear from defense.

MR. SCHRADER: Thank you, your Honor. David Schrader.

Your Honor, Mr. Panish has stood up and made a number of allegations and personal attacks against counsel in this case, including me, which are not only not unsupported by the record here, they're false.

The idea that Mr. Panish has to contact me 12 times to get a deposition date in this case is false. It's a false

attack on a member of the bar.

I would be pleased to present to this Court every communication between myself and Mr. Panish. And your Honor will see I respond promptly and professionally, and the same is not true on the other side.

The types of personal attacks that we are subject to for simple communication is inappropriate and unlike anything that I have seen in 30 years practicing here.

The idea that I would risk 30 years of my career at the direction of a client to do something in violation of this Court's order is false and it's offensive.

My clients have never directed me to violate a court order, nor would I follow such a direction.

To give you an example, Mr. Panish stood up here and said four times that the clawback motion is based on a claim of inadvertent produced documents. It absolutely is not. That's not what the motion is about.

The motion acknowledges that it was a compulsory production of documents. It was a misstatement to say that that is our argument. It is not.

THE COURT: Well, we'll hear that in due course.

MR. SCHRADER: I know, your Honor, but it was claimed multiple times that that was what that motion was about. It is not.

THE COURT: That's what clawback usually is about.

MR. SCHRADER: Usually is about.

THE COURT: Well, we are not going to argue that motion right now.

MR. SCHRADER: Your Honor, I've read the Court's tentative several times, the Court's tentative for today. It stings each time I read it, but I have taken it very seriously. I'm not going to try to convince the Court to change its tentative in any way, but there are a couple things that I would like to address to clear up any misconception.

The first, I want the Court to know that myself, my team, my client are committed to complying with this Court's order. There is no higher priority.

This is not business as usual. We understand the Court's dissatisfaction with our discovery responses and privilege logs, in particular, to date.

And in particular, between -- I have to take a moment, your Honor. It's hard to breathe through this thing.

In particular, your Honor, with respect to the period between March and April 20th, there was no higher priority that I or a member of my team had in complying with this Court's order.

I spent every single day during that 30-day period working on complying with and meeting this Court's order.

I went back and looked. One of those days was Easter Sunday. I spent multiple hours that day reviewing documents to get it done.

I'm not asking sympathy from the Court. I just want the Court to know that I and everyone on my team and my client have taken that obligation seriously.

THE COURT: Mr. Schrader, it's still not a pretty picture. Because at the same time that you and your team were

supposed to be devoting your efforts to making sure that your representations with respect to whether claimed privileged documents were properly claimed in protection of the plaintiffs' interest, in protection of the interests of justice, you were also reviewing documents to protect -- to try to protect your client where your team determined that things were supposed to be produced.

So you're reviewing -- you're taking your time to review those as well to protect your client.

So it was not the effort I would have expected.

MR. SCHRADER: Your Honor, let me address that.

The purpose of addressing those small percentage of documents coming off the log was to get an overall picture of how the team was performing its work.

As I said in my declaration, I almost never overruled the team with respect to those calls and said you have to bring those documents back. That was not the purpose.

The purpose was to ensure that the team was following the guidelines and the protocol appropriately, and seeing what they were removing, at least a small sample of those seemed like an appropriate thing to do to confirm the validity of the team's work.

There was also in the Court's tentative a concern that we were spending time with respect to the clawback motion. I did not spend a single hour reviewing documents with respect to that motion. I don't believe a member of the trial team did either. That was done by an entirely different team.

This trial team's work was not distracted or diverted

for purposes of that motion.

THE COURT: I believe the motion was signed by Mr. Dragna.

MR. SCHRADER: I'm talking about reviewing the documents, your Honor. I said I did not spend a single hour and I don't believe a member of the trial team reviewed those documents.

And I didn't spend time actually working on the motion. I know Mr. Dragna spent some time discussing the motion and whether we were ethically obligated to file it. So my personal time was zero with respect to that issue.

THE COURT: Counsel on the phone, please mute your phones.

MR. SCHRADER: We have been providing deposition dates. We have not taken the position that we are barring all depositions, that we're stopping the deposition process.

There are some depositions, new depositions, where we have received notice of recently that we don't believe are appropriate under the Court's order, and we are going to identify those for the plaintiffs. And we would like to come up with a process for the Court to decide if those depositions are appropriate or not.

With respect to the others, we are producing the witnesses on dates as they become available.

Let me give you an example.

Mr. Arriola. Mr. Arriola's job responsibilities were increased as a result of COVID-19-related activities.

We found out he was going to be leaving the company. I

offered June 30th as a deposition date for Mr. Arriola.

Mr. Panish told me that he was unavailable on that date. He said any date in mid July.

I went back. I got July 15th. I haven't heard back whether that's an acceptable date yet or not.

So the idea that I am stonewalling or not responding and interfering with the scheduling of these depositions, or that anybody on my team is, is not accurate.

With respect to resolving these deposition issues going forward, there are two things that I would request.

One is a process to address the number of depositions that we think are not within the scope of the Court's order. And we can either do that either by motion or by a conference with the Court after we identify them and talk to the plaintiffs about them.

The second -- and I understand this is a subject for later discussion -- is the discovery referee. We absolutely need that to keep these depositions on track with respect to scope and conduct at the depositions.

Let me respond to a few of the comments that Mr. Panish made.

He said that we're winning. It does not feel like winning on our side, at all.

We are devoting substantial efforts to get things right, to comply with this Court's order.

The Court has imposed monetary sanctions which are significant.

I think I mentioned to the Court before I've been

practicing for 30 years. One time in the 1990s I was sanctioned for $250 and that was reversed. Never before.

THE COURT: Well, in terms of winning or losing, it does appear that these late-produced documents are of some considerable importance to the plaintiffs' case -- some of them.

MR. SCHRADER: Well, so the ones that have been identified, your Honor, that we've talked about them, the fact that somebody sent something to the in-house lawyer and said I'm sending it to the in-house lawyer for his review --

THE COURT: Counsel on the phone -- do we have counsel that are appearing for the 10:30 motion for preliminary approval?

Okay. Everybody, please mute your phones.

Go ahead.

MR. SCHRADER: This Court has imposed a remedy to level the playing field with respect to these depositions. It's being done at considerable expense to our client and to the people who are being redeposed.

I'm not complaining. I'm just noting that that is a remedy this Court has proposed. And we want to get those on track.

As I said, we'll talk about this later, but we think a discovery referee is the best way to do it.

I think I'll just end there, your Honor, unless your Honor has any questions of me at this time.

THE COURT: All right. Thank you.

MR. DRAGNA: Your Honor, can I just make a couple

comments before he starts, please?

THE COURT: Is there any objection hearing from Mr. Dragna as well?

Go ahead, Mr. Dragna.

MR. DRAGNA: Just very quickly, your Honor, and I won't repeat what Mr. Schrader said.

There are a couple things that Mr. Panish said that I would like to clarify for the record.

There was some talk -- I'm not sure if it was sarcasm or if it was real, but the talk about and the ridicule of essential employees at Southern California Gas Company.

We are in an unprecedented pandemic. There are tens of thousands of SoCalGas employees that are locked out the office that are working from home. They have to provide gas for hundreds of thousands of customers. They have to make sure that people have uninterrupted service that can't pay for their service.

And there are dozens of senior executives who the company has decided and who the State has decided need to be at their posts, need to be working, and are honestly not available on an immediate schedule on an immediate notice for deposition.

We are trying to work with the plaintiffs, but we need to have some understanding that this is a serious lifetime event, that SoCalGas needs to have these essential people focusing, working on what they're supposed to do.

THE COURT: Then the depositions, some of them, will have to be on the weekends. I'm sure that all the lawyers

here work on weekends anyway.

MR. DRAGNA: Your Honor, we are working with the plaintiffs to make these people available. My only point is it's not fair to say that for some reason essentialness is an excuse here.

Second, with respect to Ms. Reed, there was some suggestion about Ms. Reed --

THE COURT: I've read as much as I want to read about Ms. Reed.

Thank you very much.

MR. DRAGNA: That's fine, your Honor.

Finally, with respect to the clawback, I did sign the motion, but I, like Mr. Schrader, did not dedicate any time reviewing the clawback documents.

In fact, one doesn't need to review the clawback documents in any detail. There was a team who did that in large part because these are legal briefs, draft briefs, these are legal memoranda from clients -- for clients from law firms. These are not documents that require intensive review to determine their privileged status.

Thank you, your Honor.

MR. SCHRADER: Sorry, Mr. Panish, one last comment.

MR. PANISH: How many lawyers do they have now? At least a hundred we know of.

MR. DRAGNA: 89 law firms. And this kind of attack --

MR. PANISH: Mr. Dragna --

THE COURT: Mr. Dragna, sit down, please.

MR. PANISH: Mr. Dragna --

THE COURT: Mr. Panish.

MR. PANISH: This is where we've gotten, Judge.

THE COURT: Mr. Panish, trust me, I have read the transcripts of the depositions. It's not a pretty picture. And there is fault on both sides. I'm sorry, Mr. Panish. In the Mansdorfer deposition you said you were bigger than Mr. Lotterman and he was older.

MR. PANISH: Right. So because of that you're going to let them off all the penalties? You're going to criticize me.

I had to come to the jury room. I couldn't get answers to the questions because there was obstruction. I said that.

So sanction me. I'm happy to be sanctioned if that's what you think.

THE COURT: Mr. Panish, we'll go in the order that I choose, all right?

Mr. Schrader. Anything else?

MR. SCHRADER: I'm sorry. I got a note, as your Honor had suggested, if I may just add something with respect to the documents.

Your Honor made a comment about the documents being of some importance.

As we laid out in our opposition brief with respect to the documents that the plaintiffs identified, there was one that was suggesting that I'm sending this to the lawyer. He's going to review it for us. There was a redaction of that.

We determined -- we agreed that was not an appropriate redaction. There is a communication about a lawyer. That's of no significance, at all.

The issue that the plaintiffs have talked about that has some significance, the risk registries, as we've shown in our papers, the exact same text has been produced dating back to 2017.

So I did want to just make that point, your Honor. Thank you.

MR. PANISH: That is absolutely false.

THE COURT: We're going to take a break.

MR. PANISH: Can I respond after the break?

THE COURT: Of course you may.

MR. PANISH: Okay.

THE COURT: We have a 10:30 matter that I may take during the break. We will see if they're ready.

And we'll see you all back here at, let's say ten minutes to 11:00.

MR. PANISH: Can we leave our stuff here?

THE COURT: Yes, you may.

Be sure to be careful if you're going to into the hallways and to the restrooms to socially distance. This is probably the biggest group we had on this floor this week and we're feeling our way.

Thank you very much. We are in recess.

(Recess.)

THE COURT: All right. Counsel are present as before.

We're still hearing argument on the motion for sanctions.

Mr. Panish.

MR. PANISH: Yes, thank you, your Honor.

Do you know what day today is, your Honor? It's the day the trial was supposed to begin.

I went back and I talked to Mr. Creed and I looked at the depositions, because I have a list so far but I continue to find more names.

If the Court were to grant the issue sanctions on the evidence relating to negligence and relating to Sempra, I believe 15 or 20 depositions, max, we'll be able to complete for the case to do the punitive damage trial. That's all.

Now there's probably 70 or more.

Every day -- and your order, Mr. Schrader has objected to anyone that wasn't deposed before. But documents, as I read them for the depos and I ask about them, there are all these other people of the 20,000 employees that we don't even know who they -- we never heard of them ever.

So now we have to go through that whole process.

So 15 to 20 targeted depositions if you were to give us those sanctions.

But if you're not, you need to impose some kind of monetary sanction.

You found they violated the order. We showed it to them. They kind of admitted, but nothing has been done, nothing.

Mr. Schrader, the first thing he gets up here and he tells you that 100 percent of his trial team, these five lawyers who put in declarations, did nothing but work on these documents. He even worked on Easter. Well, I was working on Easter too preparing for depositions. But we know that's not

true.

Mr. Dragna wrote letters to us about the clawback. He signed them.

Mr. Dragna put in a motion during the same period of time. So did he sign a motion he didn't read?

We know that Mr. Schrader is working 24 hours a day, he says, reviewed 43 documents a day. That's what he did.

Now, I made a mistake. That June 22nd letter that I just put up to the Court, there are 3,700 other documents that weren't produced that they just sent us two days ago.

In those documents many of them have speaker comments and changes that are critical for impeachment.

For them to say this argument, oh, you already had the information, that's ridiculous and that's false and that's not true.

So you said if they didn't comply, it's $50,000 a day. And they didn't comply. But you said you were going to incentivize them to comply.

On the referee we have proposed in our motions four separate times to have the Court appoint a referee on the review of the privilege matters. The defendants objected to it every single time. Too little. Too late.

Now what are we going to do, wait six months for the referee to review the documents and then learn there is another thousand documents and we have to go back and re-take these depositions? That's not an adequate remedy.

They fought it since last September. They could have agreed and it all would have been over, but no, they fought

it, fought it, fought it.

Now when it's convenient they make that suggestion and the Court throws it back at us.

That doesn't solve anything. It just delays it more.

THE COURT: I'm sorry, Mr. Panish. I really don't recall the plaintiffs having earlier proposed a referee.

MR. PANISH: Yes.

MR. CREED: In camera review.

MR. PANISH: In camera review of all the documents. We proposed that on three occasions and they opposed it.

That is when I said referee. I meant in camera review of these alleged privileged documents. To me that's the same thing as a referee if you looked at them.

I don't know how you would have the time to look at them. You have a case load here.

But how did we get to this point?

You know, Judge, you said I said I'm bigger or younger. That's just some cherry-picked quotes out of tens of thousands of pages of depositions.

Yeah, the only reason we're doing these depositions is because they withheld all this evidence.

THE COURT: That has nothing to do with the ruling on the motion. It's neither here nor there except that we do have issues with regard to conduct at depositions, which we're going to get to.

MR. PANISH: Okay. You singled me out, just like in the deposition when they were obstructing me and you were upset and you threw your papers down and started yelling at

me.

I was asking appropriate questions, and you overruled the objections that you reviewed.

Does the Court not remember that? You're looking at me like you don't remember that. It was right there in the jury room when I was deposing Mr. Mansdorfer and your dog was here in chambers and you were displaced from your home.

THE COURT: I'm sorry, Mr. Panish. I'm not going to take the bait on that, okay?

MR. PANISH: I'm just asking you.

Sir -- or your Honor, excuse me.

On this I don't respond. I responded to Mr. Dragna and Mr. Schrader about Ms. Reed and the depositions that at the end of the day today I would tell them.

I didn't tell them this, but I have to go to Judge Buckley at 2:00 o'clock. He's setting up dates for the Thomas trial and the discovery in key depositions. So when that's decided, I will respond.

But Mr. Schrader writes to me a week ago you need to do it on the 30th. That's the only day he can do it. He's leaving the company.

I said I can't do it. I already told Mr. Dragna I couldn't do Ms. Reed.

Then he says -- I said that's unfair. Then he comes back with another date. But he told me the only date at first was the 30th. They're trying to jam us up. It's gamesmanship.

Now, Mr. Schrader says, well, I understand, your Honor.

But he basically doesn't accept responsibility. They say it looks bad, but they haven't done anything to correct it.

They attacked me. They attacked the plaintiffs. We want too many depositions. We want too many documents.

They created this situation, Judge.

Then for Mr. Dragna to get up and blame the pandemic and that Mr. Arriola is leaving the company and can't give a deposition -- they don't respond to any request for these depositions. They say they're essential. He said the State of California ordered these individuals essential. That's false. They didn't order them essential.

Then we have a summary judgment on Sempra, but we can't even get the depositions.

They read 43 documents a day. We have to read about -- it's going to take us eight months to do it.

And you heard Mr. Schrader. They're not really going to agree on the depos. Now we have to have a whole protocol. We have to decide can we take this depo, can we not take that depo. Now we're back to hand-to-hand combat on every depo.

Then it will be every document and it's every objection at the deposition. That's not leveling the playing field at all.

Now, those documents yesterday, the letters we got two days ago that I submitted to the Court, they knew that three months ago, if you look at the letters, but they didn't give it to us until right before the hearing after the time to file briefing was done.

If you look at the letter, why did they wait till then

to give it to us? It's all gamesmanship.

They are winning, because the way they win when you're liable is your client pays less money. And they are winning, Judge. They're making more money reviewing the documents, and they paid a little sanctions.

That's all I have, your Honor.

I mean, I am losing confidence in the civil justice system as a result of this case. And there's --

THE COURT: Okay.

MR. PANISH: All I'm trying to do is represent clients and do what you told me to do, make sure everyone is prepared and do this. That is what I've been doing.

Yeah, I get upset with the lawyers.

THE COURT: With regret, I have to take a break. Judge Buckley is on the phone, and I need to speak with him about a court matter.

We'll resume. It shouldn't be more than three or four minutes. So if you will just remain. Thank you.

(Recess.)

THE COURT: I apologize for the interruption.

Mr. Panish, anything else?

MR. PANISH: Yes, your Honor, I know you want to get on to the agenda, so two quick points.

The first one is where do we start off with. The misrepresentations on the documents produced, not 34,000 but 41,000.

That continues to happen. And it worked on you. You were misled. Think how it's going for us every day dealing

with that.

Second point, how would discovery look differently if the Court granted the relief that we're seeking? I think you kind of keep asking me that indirectly. And here's the answer.

If the Court -- first of all, Sempra, then we wouldn't have to deal with that motion or any depos and negligence. All we would need would be 15, maybe 20 targeted depositions on punitive damages and we would be to trial.

That's my goal, to get a fair trial as fast as possible, keeping my eye on the ball, doing it once and doing it right -- that's what we've done, they haven't -- and preserving our credibility, which we've done.

You've commented on their credibility.

And for them to say all my team worked on this 24 hours and they're doing clawbacks? Come on. It doesn't pass the test.

So I know you want to know how it's going to move the case. I think that's how it's going to move the case.

But monetary sanctions, they didn't comply with the order, and all the warnings haven't done any good.

Thank you, your Honor.

THE COURT: Thank you, Mr. Panish.

I want to see that argument. I'm looking at Mr. Creed there, because I think it's probably his idea about how to cut the depositions. Maybe it's yours. I'm sorry.

MR. PANISH: No, it's both of us. It's actually both of us.

I have a list.

THE COURT: Please be seated. I want to see that argument in writing. Just be seated, Mr. Panish. It's not in the motion, and I can't consider it.

MR. PANISH: How would -- sorry, I can't tell --

THE COURT: May I finish, please. I'll let you know when I'm finished.

MR. PANISH: Okay.

THE COURT: So it also goes to a showing of prejudice.

I told you that prejudice really wasn't linked to a particular proof aspect of the case.

But, you know, the goal here is to get this case tried on the merits. You know, if it takes all these depositions to do it, we can do that. But if the prejudice goes to a particular issue -- I mean, I'll take a look at that. I haven't had a chance to think about that argument because it hasn't been presented.

I will give you ten days to put that argument in writing.

So let's set a date for that, the supplemental brief.

Okay. File that on July 6th.

MR. PANISH: I'm sorry, that's the day we file?

THE COURT: That's the day you file. Is that acceptable?

MR. CREED: Yes.

MR. PANISH: Sure.

THE COURT: Okay.

And then defendants can respond on the 13th, okay?

And I'll re-hear the motion. We'll set a date for that.

MR. PANISH: Just to respond to your comment, we didn't raise it in the motion because we didn't know that was the issue.

And on the tethering or closely tailored, I think the Siry case handles that issue.

So anyway. Thank you.

THE COURT: Okay. Supplemental briefing.

MR. CREED: Page limit, your Honor?

THE COURT: And I really don't want to hear anything about conduct in the depositions in this motion.

MR. PANISH: Page limit?

THE COURT: Do we need a page limit, counsel?

MR. CREED: No, I don't think so.

THE COURT: Neither side says we need a page limit.

What I need to do, then, we have to figure out when that will be argued. And the last brief is -- what did I say, the 13th?

MR. PANISH: Yes.

THE COURT: And we'll have to set an argument date.

Mr. Schrader, did you want to be heard?

MR. SCHRADER: Yes, very briefly, your Honor.

Counsel mentioned that they had requested some new depositions of people who have not been deposed.

THE COURT: We're not there yet.

MR. SCHRADER: I was responding to that.

You wanted to focus on the supplemental brief, your

Honor?

THE COURT: I do.

MR. SCHRADER: I apologize.

THE COURT: We'll set a hearing date.

MR. PANISH: Is there a reply to that, your Honor?

THE COURT: No. This is your supplemental brief.

MR. PANISH: Okay.

THE COURT: And they get to oppose it.

MR. PANISH: Okay. No problem.

THE COURT: All right. We are probably going to have to adjust our future dates because hopefully we'll be using L.A. Court Connect. You probably heard about that. It's going to be a video conference, something like Zoom, that will be available for a very reasonable price. So probably you've already signed up. If you haven't, please do.

I assume you will want video appearances at least for some of you in the future after July 6th, right?

MR. PANISH: Yes, your Honor.

THE COURT: So they have asked us to have the hearings in the afternoon because of concern about overtaxing the system.

We have lots of lawyers appearing. And this is being used in probate and other places when they have their calendars in the morning, so we're going to need to move our hearings to the afternoon. I know that's hard with depositions.

Will you be able to do that?

MR. PANISH: It just depends on what the date is.

You know, when they're trying to triple set and we have to work on that, there are probably some that the Court is going to have to take control of.

We're not really able to work much out at this time.

THE COURT: Okay. Well, the clerk will send out -- we'll look at the future hearing dates, and the clerk will send out revised notices to when -- we'll try to keep it on the same day but move it to the afternoon, all right?

I realize that's inconvenient. It's inconvenient for me as well, but we just have to see how things go.

Okay. Point six, I had several dates of hearings that are there.

Are all of those correct?

MR. CREED: Yes.

THE COURT: Okay. Thank you.

MR. SCHRADER: They are, your Honor.

MR. CREED: They are, your Honor.

THE COURT: So we will work with those and try to keep the same day and move them to the afternoon.

Maybe you can start your depositions earlier or something. We just have to move the time around within the day.

Defendants have a discovery motion that they say they want to bring at the bottom of page 2.

If I haven't been clear about the essential nature of conducting the reopened depositions and the broad leeway that I'm giving the plaintiffs on that, let me say it now, okay? If you still want to bring a motion, file the motion and --

you know, I can't stop you from filing a motion. If I were you, I'd re-think that one.

The one to compel sampling and testing data, have you all finished whatever discussion you can have about that? I assume that this is testing that was done for plaintiffs who were not in phase one; is that correct?

MR. SCHRADER: It could be phase one and outside and in addition to phase one plaintiffs.

So it's broader than the phase one plaintiffs. We're looking for the data so that's the issue.

THE COURT: Okay. Plaintiffs are aware of this issue and you're going to oppose the motion?

MR. PANISH: Yeah.

THE COURT: This is an issue where you're at loggerheads; is that correct?

MR. PANISH: Yes, your Honor. Can I go back to a prior agenda item?

THE COURT: Yes.

MR. PANISH: Number 6.

First, Mr. Creed had something to say on this and then I had something.

MR. CREED: Number 6, your Honor.

MR. PANISH: Speak up. I can't hear you.

MR. CREED: As Mr. Panish mentioned in the argument, your Honor, for number 8 we would like to get that set as quickly as possible.

THE COURT: Okay. When is the reply currently due?

MR. DRAGNA: June 30th, your Honor, next week.

THE COURT: Next week, the 30th.

I'll tell you what. I had another issue on here about a pretrial conference -- a trial setting conference. I had mentioned it in the April order about COVID, but there was a reference to it and it wasn't really set.

So we have to figure out when it is we're going to discuss trial setting, quite honestly, and whatever ideas the plaintiffs have about this.

MR. PANISH: Yeah, we have a lot of ideas about it. But we can talk about it later in the agenda.

THE COURT: That's fine. Do you want to talk about it -- you all have appearances this afternoon, and I have a meeting at noon. So we're going to have to move this along here.

MR. PANISH: I think I'm the only one that has the appearance.

THE COURT: Okay.

MR. PANISH: With Judge Buckley.

MR. CREED: How does this relate to the scheduling of that motion?

THE COURT: The question is when are we going to discuss trial setting? Are we going to have an informal discussion of that or are we going to have a discussion on the record, informal first and then a record discussion?

And the timing of that means that maybe I can hear the OSC motion on that date.

MR. PANISH: I would weigh in on that.

Number 1, you could hear the OSC on July 1st. We are

not ready to do that at this time -- the trial setting, I'm sorry. We can do the motion on July 1.

I believe July 1 would be premature for the trial setting.

First of all, we have no idea. But we want to visit the parameters of the trial in light of the pandemic and everything else.

What I will propose is that we'll prepare a written proposal on how we think the trial should look, and we'll give it to the defendants. And I'm sure it won't be worked out, but at least they'll know.

Each side can make their positions and brief it for the Court, and then we'll have to get a ruling from the Court. So I think that is the way we should proceed.

We want to obviously -- is it okay to talk about this whole subject now?

THE COURT: Sure.

MR. PANISH: I know we have a time limit.

THE COURT: It's the most important one.

MR. PANISH: Okay. Well, we're looking at, what are we going to have 500 trials, a thousand? We're looking at how to consolidate, how to get this moving faster. There are a lot of adjustments we can maybe make. If we get this trial done, maybe we have to put more people in.

Then we have to go to other trials. Are we going to have to re-video people's testimony to give out to different courts? You've talked about this before.

The case is going to trial. I've been in litigation

with this company on many occasions. I know their strategies. So we need to figure out how we're going to try as many of these cases as efficiently as we can. So that's what we'll give them, a written proposal.

They'll respond, and then you'll have to make decisions.

MR. SCHRADER: That sounds fine. I don't know what the proposal is. I have some thoughts myself. We'll exchange those.

MR. PANISH: Fair enough.

THE COURT: All right. That's fine. You're going to do what you're going to do.

MR. PANISH: What number are we on, your Honor?

THE COURT: Well, I think you jumped ahead.

So you're not going to be prepared by, let's say, July 1 to talk about trial, right?

Quite honestly, if the reply brief is filed on June 30, I'm not going to be prepared on July 1 to hear the matter.

And the 3rd is a holiday. So quite honestly, I'm just going to have to leave that motion on for July 8, I'm afraid.

MR. PANISH: Okay.

THE COURT: Will you be ready by July 8 to talk about trial, do you think?

MR. PANISH: Mr. Boucher says yes, so we'll be ready.

THE COURT: Okay. Very good.

MR. PANISH: Well, wait a minute. I might have a deposition on -- no. There is no depo set.

I have to find out what happens today at 2:00 o'clock,

your Honor. It's a very important hearing on the trial in Thomas.

As you know, that's a large, multi-plaintiff proceeding. I just have to juggle that and the Woolsey case.

THE COURT: Okay. So we'll plan on July 8 for discussion about trial.

You give me whatever you can about that subject sooner than the day before. Let's put it that way, okay?

MR. PANISH: Okay. Fair enough.

THE COURT: So I have time to think about it. All right?

So for my staff, July 8 is already the hearing on the OSC. It also becomes -- I'm going to call it a trial setting conference. Counsel to file their views informally at this point by close of business on July 6th, okay?

MR. PANISH: Okay.

THE COURT: So that's very important.

MR. DRAGNA: Your Honor, is there a sense of backup in terms of timing, jury selection? That will help.

THE COURT: Judge Brazile has expressed his best understanding of what's going to happen, which as he's talked to the bar about is that preference cases might be able to begin the end of April -- excuse me, the end of August. No jury trial before August 22 is still the date.

We might be able to begin before the end of August.

August 22, if we can keep that date, we'll start with a preference trial.

Judge Brazile has said informally to the bar that we

might be able to start jury trials in other cases end of September, early October. I frankly doubt that because it's just a big logistical problem.

What we do not know now is what kind of a response rate we're going to get with respect to jurors.

They have summoned for criminal trials in July. That's going to tell us a lot.

We ordinarily, if you want to know, get a little bit north of a 20 percent response rate to jury subpoenas, so that can tell you it's going to be tough to get people in.

MR. PANISH: So I was on the committee with Judge Brazile and Taylor and Judge Jessner ran it. We had discussed all of these issues. There are so many myriad of issues to be dealt with.

I kind of agree with the Court. August is very, very optimistic in light of everything, in light of the criminal background and then the UD backlog. And then the last day cases I heard it was over a thousand for the criminal.

But we're not going to be ready. I mean, we haven't even completed discovery of getting documents in depositions.

THE COURT: Well, that's important. Okay?

MR. PANISH: How many times are we going to be able to do this trial. We have to talk about that.

THE COURT: Right. So let's talk about getting ready for trial.

Protocol for remote video depositions. Do you have something in writing?

MR. PANISH: No. But we have no problem.

The only problem, a couple times the Morgan Lewis lawyers because of security apparently --

THE COURT: You have nothing in writing?

MR. PANISH: No.

THE COURT: I would like you to have something in writing. The reason is because you can't just assume that it's all going to be fine.

The witness might have somebody in the room with them prompting them. Okay. We have to have a rule against that.

MR. PANISH: We covered that with questions.

We have covered all of that. There hasn't been an issue.

MR. SCHRADER: Your Honor, we exchanged versions of a protocol. I thought it was agreed on. It had exactly the issue you identified in it, among other things.

THE COURT: I want it because I'm going to have to enforce it, okay?

MR. SCHRADER: Understood.

THE COURT: I want your agreements as to how you're going to handle it, because I'm going to have to enforce it, okay?

So I want that by the next time we get together, which it sounds like it's going to be July 8. I want an agreement on what the parameters are.

MR. PANISH: First of all, neither of them have been at any of the depositions, but how they've proceeded has not been an issue of somebody being in the room or documents.

There have been other issues, but those haven't been

the issues.

MR. SCHRADER: Your Honor, if you want a protocol, we will get you a protocol. We had one I thought that we had exchanged and all the terms have been agreed upon, but we'll get it to you by next time.

THE COURT: Whatever it is, I want a protocol because it has to be enforced.

If something goes wrong, I want to know what you believe are the appropriate parameters for a video.

Have you been using Zoom? Is that what you've been using?

MR. PANISH: Yes, your Honor. We have a special -- I don't want to get into all of that.

THE COURT: I did view a deposition on Steno which was one being handled in Judge Buckley's case because he and I wanted to know what it looked like because we're going to be regulating it. It was on Steno.

MR. PANISH: I was involved in that. The protocol there was drafted with Judge Buckley. We were able to access Judge Buckley, and we were able to have a separate platform on that one.

But this one is the same. And it's a different provider, but that's been no problem on that either.

THE COURT: Okay. So let's jump ahead to number 10, potential referee for deposition supervision.

At this point I'm supervising the depositions. I will Zoom in when you need me. If I have to be -- so you let me know and I'll Zoom in.

Just so you know, my first statement will be ask your next question, okay?

I don't want to hear about what's gone on before. I don't want to hear the argument. When I come into the deposition -- when I come into the deposition, I want to see a deposition conducted, okay?

So it will be ask your next question. Make sure you get an answer. Objection to the form only, not coaching. We're going to go from there.

That's the way it's going to be, all right?

MR. PANISH: On that issue.

THE COURT: Yes, sir.

MR. PANISH: One of the biggest problems, and there are many, is the witnesses refusing to answer the questions, the evasiveness and the non-responsiveness and the volunteering.

So what we're going to need from you, I guess, is rulings right then to get the witnesses to answer the questions.

THE COURT: We were able to do that with Mr. Mansdorfer, for example, when there was the issue of his retirement, okay?

MR. PANISH: Well, there were many, yes. But that's what it's going to be.

We'll give you a list we'll send to the Court of all the Zooms. We'll be ready to go.

THE COURT: I will be there. I'll supervise it.

MR. PANISH: But then every time we have to stop --

THE COURT: And that's right. That's what you're going

to have to do.

Mr. Panish, otherwise what would happen in my judgment is that you would have to be working with the referee's schedule, which is going to slow it down, number 1.

Number 2, you have an appeal to me, so it's another lawyer in between.

So we'll see how it works, but I want to make sure that this case is under control and moving forward.

With respect to deposition scheduling, by the time you come back on the 8th, I want all of the depositions scheduled.

Let's make sure we start with the ones that plaintiffs' side says are going to be necessary even if I issue sanctions, okay? Let's make sure we get those locked down because those, I gather, are the most important ones.

Let's get dates on calendar for everything.

What we're going to -- and in terms of time limits, based on what I saw in a Zoom-type deposition, it does take longer, no question about it. So I'm not -- we'll just deal with the time situation.

You start the deposition. You'll do the best you can. You'll invite me to come in if you need me.

We'll have each deposition scheduled for one day, but there's not going to be any ruling by me that it has to be done in one day. And we're not going to argue over that.

Does defense understand that?

MR. SCHRADER: Understood, your Honor.

THE COURT: You're going schedule the deposition and you're not going to have a predetermined demand with respect

to whether the deposition is going to be done or not, okay? I'll take care of that after the fact.

MR. PANISH: Your Honor --

THE COURT: With regard to Ms. Reed and the seven hours, schedule Ms. Reed, get going on it. I'll regulate the timing after the fact.

I know I said seven hours. It may take longer on Zoom. We just have to do the best we can.

MR. PANISH: Well, first of all -- can I speak now?

THE COURT: Yes, you may.

MR. PANISH: First of all, on the time, I put in my declarations. I went and looked at the depositions I took before and after, and there is a significant difference, number 1.

THE COURT: I said that, Mr. Panish. Do you have to argue with me on things that I agree with you on?

MR. PANISH: I'm getting to the next point. That was foundational.

The problem also is the witness taking up to 20 minutes to review the documents. I try to say that shouldn't count.

Now, look, the deposition should go from 9:00 to 6:00, okay? That's fine. If it's at seven hours, it doesn't mean we're done. We can stop for the day. I'm fine with that.

But what has been imposed on us is taking our time away when there's been 20 minutes or more to review a document.

Now, you said in a court proceeding, in the transcript -- if you want me to pull it out I could -- that that time should be deducted.

Now, it's not a formal order, and I said it to the counsel that you said that. They say, no, it's not true. It doesn't count.

So that's one issue.

The time that --

THE COURT: Mr. Panish, I've already taken care of that. You're going to get your deposition. You're going to from 9:00 to 6:00. You're going to do the best you can.

Defendants are not going to be able to demand that the deposition be done in one day. It's in everybody's interest to get this done as rapidly as possible. If it can't be done, for whatever reason, then we'll have whatever discussion we need to about whether there needs to be another day, okay?

MR. PANISH: Well, there is about seven right now that are not complete. Do we get to resume those depositions or are we going to have to have motion practice on those?

THE COURT: I'm not sure, but let's get a schedule for the remaining depositions. I told you I want one day for each deposition scheduled.

MR. PANISH: Do they have to give us dates for some that are not completed is my question.

THE COURT: Not at this time.

MR. PANISH: Well, some of those are the essential witnesses that go to the issue that we talked about.

THE COURT: Well, we're going to have to have some time to talk about that, and unfortunately I don't have that time today.

MR. PANISH: I understand.

And the next question is with your order, and I was arguing and I thought you'd give me some clarity.

Your order, if we didn't know of a witness, we didn't have these documents, and now we learned of a witness and they refuse to produce them, what do we do?

THE COURT: So my order did not cover additional witnesses. I don't think it was a subject of prior discussion.

It would seem to me, as I sit here right now, that it's well within the scope of my prior order of attempting to correct the prejudice that plaintiffs have had from late discovered documents that plaintiffs should be able to have depositions of new people, okay?

MR. PANISH: I understand completely. Thank you.

MR. SCHRADER: Your Honor, just for clarification, if those new people, their depositions are based on newly produced documents, right? Like the other depositions.

THE COURT: It would be like the other depositions.

But, first of all, you know, I've seen the argument that, well, but you had this document in a different form earlier and/or it wasn't very different earlier. You had it earlier and you should have used it earlier.

Well, defendants haven't been able to control the production of documents, so why should you expect plaintiffs to have total control of the production and mastery of the documents?

So if they have a document that was late-produced, even if there is some version of it later, it's a late-produced

document and they get to go forward on it.

They also get to go -- they also get to discuss issues within the parameter of that document, okay?

So it may lead them to go back over something they've already asked with regard to other documents.

I am giving them broad leeway. You need to understand that. Defendants need to understand that.

If you think I won't pull the trigger on issue sanctions or terminating sanctions, you may just be wrong, okay?

We have to fix the problem. That's my goal. And it's going to take a lot of deposition time to do that because it's been a lot of documents. And I can't believe we're still seeing, oh, there was a technical difficulty and now there's more.

So they get the broadest possible leeway. I don't know how I can express that to you better. It's not normal time here. It's not a normal circumstance where, you know, a plaintiff would say, well, you know, there's another subject that came up later that we forgot to cover and we need to re-open the deposition.

No. It's defendants' conduct that has caused the problem. So plaintiffs get more leeway on this. All right?

MR. SCHRADER: Understood, your Honor.

MR. PANISH: Can I ask that -- because these two gentlemen, they haven't been at any deposition. Could all the lawyers that show up be told these things and they don't object that that's beyond the scope?

That is almost every question an objection, beyond the scope, or that document was produced on this date. That's just obstructionism.

THE COURT: All right. I think that I have explained my position, which was not expressed earlier because the issue hadn't arisen.

So, Mr. Schrader, you'll see to it that that's communicated to the team, yes?

MR. SCHRADER: I believe most of them are on the telephone, but I will make sure --

MR. PANISH: Actually Colin West is not on the phone. He's been one of the worst offenders.

MR. SCHRADER: Come on. Your Honor, I just said I believe most of them are on the telephone.

Just the relentlessness personal attacks are hard to take.

I asked the question. I understand the Court's direction. I get it. I understand, your Honor.

THE COURT: Okay. Very good.

MR. PANISH: I'm personally attacked in every single deposition. I've been at every single deposition, your Honor.

THE COURT: Mr. Panish, we're trying to move along so you get the discover you're entitled to.

MR. PANISH: Well, it's not really happening.

THE COURT: So we've covered deposition scheduling and what my expectations are with regard to the appropriate breadth of the depositions.

Let me just ask to wrap up the discovery referee thing

and my intervening in the depositions. How are you going to let me know?

MR. PANISH: I'm going to file with the Court a list of the depositions and when they're set with the Zoom information. I'll have it provided to the Court for each day.

And then we'll have a procedure where we notify. As you know, when we're here we just came and asked the clerk and when the Court was free, the Court was able to join.

THE COURT: So you'll call court staff.

MR. PANISH: Right. And we're going to let them know. We'll let them know ahead of time. I know which ones are going to be problems.

And I'm going to say, if we have a problem, I'll put you on notice. Is the judge going to be available today? What's the best time, when is the judge not available, so I don't have to keep calling and try to bother you.

THE COURT: You're going to set the depositions in order to get them done.

If you have a problem in the course of the deposition, you will call the clerk and I'll get on if I can.

If I can't at that moment, I'll say whether I can get on a bit later.

If I can't get on, maybe we'll terminate the deposition and start another day. I don't know.

Third-party discovery, item 12. There are a lot of names listed. Are those re-depositions based on late-produced documents or is that part of the third-party discovery that didn't get done?

MR. SCHRADER: There is one that is a re-deposition out of that list. That's Dr. Mc Daniel.

The others have been identified for a long time.

THE COURT: All right. Plaintiffs' counsel, it's a long list. I want you to take a look at it and see if you need all those people.

MR. PANISH: We'll do that.

THE COURT: Okay. And if you do, then let's schedule those, okay?

I want as comprehensive as possible of a list by July 8. That's because we're going to try to figure out when this case can be ready for trial.

So the IMEs and the depositions of the first phase plaintiffs' treating physicians, should we go ahead and schedule those?

I didn't know what plaintiffs' side was saying in terms of if you wanted a different trial plan.

MR. PANISH: Well, we do, but some of them, I guess, they can take.

But then again, we're not getting our discovery and they've been getting all theirs.

So, yes, there are some they can take, but I think we should wait until we have our meeting on the trial plan.

THE COURT: Mr. Schrader.

MR. SCHRADER: My understanding is that we have been working cooperatively on that issue with Ms. Mc Connell primarily and that there has been progress made with respect to scheduling those IMEs.

Some of those depositions -- we can start that process over again, but I --

THE COURT: I would encourage you to get on with it, quite honestly, because I think this is a time when doctors aren't as busy as they usually are.

MR. PANISH: The problem is a lot of people don't want to go to a doctor's office right now. If they can't do it by Telehealth, it's kind of a problem.

THE COURT: I understand that's true with regard to the IMEs, but the treating physician depositions ought to be more available than they otherwise would be.

MR. PANISH: That's fine.

MR. SCHRADER: I believe we are making accommodations for the IMEs as well to address that issue.

My understanding is there has been discussions about holding them in some sort of a neutral site, not a doctor's office, but that issue has been addressed.

THE COURT: Okay. So expert designations, I want you to sit down -- again, there are lots of these experts. You know, we're not going to have a trial with every single one of them used at trial. It's just not going to happen that way.

Both sides have a lot, so let's sit down, figure out where there are redundancies and see if we can reduce that list, and then hopefully we'll be ready to go when we finish.

MR. PANISH: Can we set a date for a motion on that, your Honor?

Mr. Boucher and Mr. Schrader have been corresponding, but just in case we don't resolve it, I would like to -- I

don't really see it being resolved, but I would like to have a date set. It can be far enough in the future. It doesn't have to be in a month, but it's a big issue. I'm not sure it's going to get worked out.

THE COURT: I will give you prompt dates for your motions.

The summary judgments, let's take that up on July 8, but I will tell you my view on that.

My view is as follows. Based on what plaintiffs have said in motions and status reports and everything, it's my view that the plaintiffs believe they have enough information currently to oppose those motions.

I would like to schedule them at a relatively early date to see whether they're going to be granted or denied.

If the plaintiffs say they need more discovery, which you may well, but if I'm not in a position to deny the motion, then we'll let you file supplementation and rehear it.

The defendants are not going to be in any position to discuss settlement until we resolve those motions. That's just reality.

MR. PANISH: But what day are they going to be heard on? Are we going to have to file an opposition then without the documents and then say we need more documents?

THE COURT: That's correct.

MR. PANISH: We can't come in ex parte and get a continuance of the motion?

THE COURT: Correct.

MR. PANISH: So what is the date set for the motion

now?

THE COURT: You should confer and find something in September or thereabouts and let me know on July 8.

Okay. With regard to the developer plaintiffs, I did want to put on the record that there is no objection to leave to file the second-amended complaint. So that may be filed.

And I did read the issues you're having with discovery, but I was glad to see you wanted to work on a joint discovery plan.

Both sides need things here, so I'll wait until next time on that.

MR. SCHRADER: Thank you, your Honor.

THE COURT: Unless there's some guidance I can give you at the moment.

MS. ELIZABETH: Can I be heard, your Honor?

THE COURT: Yes.

MS. ELIZABETH: So just briefly on that, your Honor.

The parties have at this time agreed to a mutual fact discovery cutoff of October 31st, 2020. But the main dispute is about the scope of that discovery.

Toll's position is very simple, your Honor. We want to be able to serve written discovery and notice depositions just like defendants have.

Defendants have currently noticed 21 Toll-related witnesses. We have given them multiple dates for those witnesses. We will continue to give them additional dates and we will put those witnesses up for deposition.

I don't believe we will have as many as 20 depositions

to take, but we do respectfully, your Honor, want to take the depositions that are important to us and important to Toll's claims, including the very important special relationship between Toll and SoCalGas which has frankly existed over the past three decades with respect to the Porter Ranch development and specifically involves SoCalGas' daily use of easements granted by Toll to SoCalGas in order to effectuate construction and maintenance on its gas infrastructure as well as get access to Aliso Canyon by way of Toll-built roads.

So that is a very important issue to us, your Honor. We want to be able to take depositions on that.

We want to be able to take depositions on our physical harm to our property that resulted from the blowout which resulted in release of crude oil and other physical contaminants that resulted in harm to not only our land but also our past and present purchasers, as well as other allegations that we are adding to our complaint, including the 330 violations identified in the CPUC's 2019 investigation of SoCalGas.

THE COURT: If you could just tie this together a little bit for me at this point.

How does the special relationship affect your theories of recovery?

MS. ELIZABETH: So, your Honor, we believe that there is a special relationship between Toll and SoCalGas that does not require us to show any physical harm to our property.

We believe that there are particular remedies that are available to us if we are able to prove special relationship,

and therefore we want to be able to serve very targeted written discovery and take depositions of additional witnesses on that issue.

THE COURT: Go ahead, Mr. Dragna.

MR. DRAGNA: Yes, your Honor.

THE COURT: Do you have a list of the witnesses the developers want to take?

MR. DRAGNA: No. We've asked for that. We've never received the list. Let me just -- I'm sorry.

THE COURT: Go ahead. I'm sorry. I've forgotten your name.

MS. ELIZABETH: Sierra Elizabeth. No problem, your Honor.

MR. DRAGNA: I'm happy to wait until she finishes.

THE COURT: Go ahead.

MS. ELIZABETH: I think I was nearly finished, your Honor.

I would just say that we do need a bit of flexibility in this process in order to be able to identify additional relevant witnesses that may come up through discovered facts and through the additional document productions that the defendants continue to serve in this case.

So to give us limits when the defendants have no limits, whether it relates to scope or topic or, you know, number of depositions I think is, you know, unjust. We just want a fair, mutual scope of discovery until the October 31st agreed upon cutoff.

THE COURT: Okay. So you need to give defense counsel

a list and help them understand the type of discovery that you need and why it's not duplicative of discovery that has been taken, okay?

MS. ELIZABETH: One point of clarification, your Honor.

When you say list, do you mean of the deponents, of the written discovery that we want to serve?

THE COURT: I thought we were dealing with depositions. So, yes, of depositions of witnesses.

Then give them an idea of the kind of discovery, written discovery, that you need.

Because all of that -- you say you've agreed on an October 31 deadline, and all that bears on the reasonableness of that deadline.

I would like a joint discovery plan, in short.

MR. DRAGNA: We're trying.

A couple issues.

First of all, the special relationship issue is an issue that is created by virtue of a Supreme Court's decision on the economic loss rule.

Absent a special relationship, there are no claims.

So our position is there is no such special relationship, and hence the claims that are driven by the economic loss rule are barred.

With respect to discovery, I think it's important to keep in mind some perspective here. We had a January 31st discovery deadline of defendants -- of defendants' witnesses.

Toll has participated and the developers have participated in over 120 depositions. They've appeared in all

of them. They've been given the opportunity to ask questions, and they've had an opportunity to identify witnesses.

Nevertheless, we wanted to work with new counsel to see if there were a number of witnesses. We had just a couple of conditions. One is we wanted the number to be small.

Tell us who you would like to depose, and we'll see if we can cabin that number.

We proposed six. If six wasn't enough, then we would come back to the Court for discussions.

THE COURT: I don't think that's the best way to do it.

I think you need to know what they need and who they are.

MR. DRAGNA: That's fine.

THE COURT: Then work with that. See if you can reach agreement.

If it's 40 -- you need to understand what the issues are and how they intend to proceed on those issues.

MR. DRAGNA: The second point of guidance, your Honor, that would be extremely helpful, we don't want to re-open depositions. We don't want a situation where Bill Smith, who was deposed by the plaintiffs and Toll, is now re-opened for different purposes. We want them to be --

THE COURT: Well, see if they want to, okay?

MR. DRAGNA: That's what we're trying to work out. If we get the list, we'll be able to work through it.

THE COURT: If they have a new issue that's specific to them and they didn't ask questions at the prior deposition, that raises a different point than if they did ask questions

on that point in prior depositions.

MR. DRAGNA: Well, they had the opportunity to ask those questions.

THE COURT: I understand.

MR. DRAGNA: Thank you, your Honor.

THE COURT: All right. See if you can come up with a joint discovery plan.

And if you're ready, we'll take that up at the July 8 status conference.

I'll need you to file something probably the Friday before, if you can, if there is any detail to it, but you may not be finished with your discussions. So just tell me.

MR. DRAGNA: Well, our ability to have those -- we've had discussions. Counsel and I have communicated actively over the last week or so.

We're at a nadir because we don't know who the witnesses are they'd like to depose.

THE COURT: I think they'll tell you.

MR. DRAGNA: So that will be helpful, your Honor. Thank you.

MS. ELIZABETH: Thank you, your Honor.

THE COURT: Just give it to me on July 6. You have a lot to do on this. Get as far as you can by July 6. Give me a joint report just between Toll -- not Toll, but developer liaison counsel and defendants, okay?

MS. ELIZABETH: Will do.

Thank you, your Honor.

THE COURT: Okay. We can discuss the authenticity

stipulations and so forth and how you would like me to memorialize the objections, my rulings on the depositions. You can talk about that next time.

When is the last time you talked with a mediator?

MR. PANISH: Well, I would like to address that subject, because last time we were on the phone with the Court when I was in Africa Mr. Dragna told the Court that the mediators had to move the dates because of the pandemic.

That's just not true. And that's not what happened and what he told you. So that was not true.

The mediators can tell you all about it.

MR. DRAGNA: I'm not even going to reduce that to a response.

Your Honor, let me answer your question without getting into invective.

We have had multiple sessions with the mediators. We have -- we were presented a position by the plaintiffs. We responded with a position to the plaintiffs.

We had separate, we call them shuttle diplomacy meetings with the mediators. We had one last week. We exchanged offers.

We are -- I would say on a scale of one to ten in terms of timing, we're probably at two, but we're moving. We're moving.

We are working in good faith. Mr. Boucher on behalf of the plaintiffs, myself, we're working in good faith to try to move these things forward.

The mediators are actively involved.

We're resuming on mediation sessions. So I can't tell you --

THE COURT: I think you answered my question, which I gather the answer is the last time you talked to the mediator was last week, and you're having ongoing discussions; is that correct?

MR. BOUCHER: Our team is having ongoing discussions with the mediators. SoCalGas is having ongoing discussions with the mediators.

It has been a slow process.

What I understand at this point is that the mediators would like to meet, and SoCal has indicated that they can't do that until the middle of August.

So we're trying to work through that issue and process.

THE COURT: You mean meet with both sides?

MR. BOUCHER: Potentially, if we are able to gain any narrowing of the parameters that we currently exist within in terms of the sides.

MR. DRAGNA: Just to be clear, your Honor, the August schedule is a week.

The plan of the mediators is to do shuttle diplomacy between the initial joint meeting we had via Zoom, shuttle diplomacy on particular issues. We're in the middle of that process.

They want a full week to actually roll up their sleeves and see if we can make a run at it.

Now we've given them dates. We don't have a week yet we've picked, but that's the process.

THE COURT: I wanted you to be in touch with someone who was a neutral who can talk to you about ongoing activity in the case and the input of the -- and the effect of the pandemic on strategies for both sides, because I think there are effects.

Anyway, you've answered my question.

MR. DRAGNA: Would you like to know who they are, your Honor?

THE COURT: You said it was Judge -- Retired Judge Meisinger.

MR. DRAGNA: And Judge Gordon.

THE COURT: Oh, Judge Gordon.

MR. DRAGNA: So they're double teamed.

THE COURT: Got it. Very good. You've answered my question. I'm glad you're in discussions with the mediator.

Obviously, I don't want to know your discussions, but it's important.

MR. DRAGNA: We're winning, your Honor.

MR. BOUCHER: Pardon?

MR. PANISH: There you go.

MR. DRAGNA: Oh, come on.

MR. PANISH: It's all a joke. That's what we deal with here.

THE COURT: Okay. I'm sorry we don't have more time. But I think we're at a place where we know what we're going to do next time at least.

And you do have depositions between now and July 8, correct?

MR. PANISH: No, not until July 17.

We have none -- we had three set on one day this week. None for two more weeks.

Can I ask on that issue, can we have a date by which -- you said they have to give us a date by July 8th. What is the end date when they have to get the depos done? Because they're already setting dates, you know, months.

Can you say, like, by October all these have to be done or something like that? Otherwise, they'll start giving us more further and further out deposition dates.

THE COURT: I'll see what the dates look like when I see them in July and whether there is a realistic date that I can give you as a deadline at that time.

MR. PANISH: And one more on that issue.

THE COURT: Yes.

MR. PANISH: There are basically five, maybe six of the lawyers that are taking the depositions. Because you said we have to be prepared, and I've clamped down and am involved on everything. We can't just do two and three a day.

One a day, and you have to have a little time to prepare.

As I told you, it's three days. One to read the documents, one to prepare, one to do the depo.

THE COURT: It depends on what your goals are for the case.

If your goals are for the case that you have 60 witnesses before we get to experts and you have to do them one at a time, then your goal for the case is that the case is not

ready for trial for quite a while.

I would strongly urge double tracking and getting it done, but if you're unwilling to do that, I'm taking a cue from the plaintiffs, quite honestly.

MR. PANISH: We were doing that. We have been doing triple. We were triple set.

I'm just saying it's a big burden on a lawyer to spend -- you know, we're trying to get this ready for trial. This is supposed to be pretrial discovery. We're five years in the case. We're still getting documents two days ago.

THE COURT: Let me just put it this way.

If you can't agree on dates for these depositions, I will tell you what ultimately will happen. The Court will set a date, and it will not be moved, okay?

So that creates an incentive to agree.

I don't know whether plaintiffs' side can double track. I would urge you to double track because I think that's the way to get things ready for trial. But if your position is that you can't double track, I'll take that up next time.

MR. PANISH: No, I'm not saying that. I'm saying if you give us three depos in three weeks and you put them all on the same day, that's not right.

THE COURT: Okay. Plaintiffs to give notice, okay?

MR. PANISH: Yes, your Honor.

MR. SCHRADER: Thank you, your Honor.

THE COURT: Thank you.

(End of proceedings.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SSC 12 HON. CAROLYN B. KUHL, JUDGE

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| SOUTHERN CALIFORNIA GAS LEAK CASES. | SUPERIOR COURT CASE NO. JCCP4861 |

I, DAVID A. SALYER, Official Pro Tem Reporter of the Superior Court of the State of California, for the County of Los Angeles, do hereby certify that the foregoing pages, 1 through 100, inclusive, comprise a true and correct transcript of the proceedings taken in the above-entitled matter reported by me on June 25, 2020.

DATED June 25, 2020.

DAVID A. SALYER, CSR, RMR, CRR
Official Pro Tem Court Reporter
CSR No. 4410