Supreme Court Number S232946

SUPREME COURT
FILED

DEC 14 2016

Jorge Navarrete Clerk

Deputy

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT, DIVISION FOUR**

---

**SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,**

*Plaintiff and Respondent,*

*vs.*

**J-M MANUFACTURING CO. INC.,**

*Defendant and Appellant.*

---

Review of the Opinion of the Court of Appeal of the State of California,
(No. B256314)
Los Angeles County Superior Court, Case No. YC067332

---

# APPLICATION OF THE ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF

---

Samuel Bellicini
(SBN 152191)
President, Association of
Disciplinary Defense Counsel
Samuel C. Bellicini, Lawyer
1005 Northgate Dr., # 240
San Rafael, CA 94903
(415) 298-7284
Fax: (628) 888-0704

Jerome Fishkin
(SBN 47798)
Fishkin & Slatter LLP
1575 Treat Blvd., Ste 215
Walnut Creek, CA 94598
(925) 944-5600
Fax: (925) 944-5432

Merri A. Baldwin
(SBN 141957)
Rogers Joseph O'Donnell
311 California St., 10th Fl.
San Francisco, CA 94104
(415) 956-2828
Fax: (415) 956-6457

Attorneys for THE ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL
Amicus Curiae on Behalf of Plaintiff and Respondent,
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP.

**Supreme Court Number S232946**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT, DIVISION FOUR**

---

**SHEPPARD, MULLIN, RICHTER & HAMPTON LLP,**

*Plaintiff and Respondent,*

*vs.*

**J-M MANUFACTURING CO. INC.,**

*Defendant and Appellant.*

---

Review of the Opinion of the Court of Appeal of the State of California,
(No. B256314)
Los Angeles County Superior Court, Case No. YC067332

---

# APPLICATION OF THE ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF; PROPOSED AMICUS CURIAE BRIEF

---


Samuel Bellicini
(SBN 152191)
President, Association of
Disciplinary Defense Counsel
Samuel C. Bellicini, Lawyer
1005 Northgate Dr., # 240
San Rafael, CA 94903
(415) 298-7284
Fax: (628) 888-0704

Jerome Fishkin
(SBN 47798)
Fishkin & Slatter LLP
1575 Treat Blvd., Ste 215
Walnut Creek, CA 94598
(925) 944-5600
Fax: (925) 944-5432

Merri A. Baldwin
(SBN 141957)
Rogers Joseph O'Donnell
311 California St., 10th Fl.
San Francisco, CA 94104
(415) 956-2828
Fax: (415) 956-6457

Attorneys for THE ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL
Amicus Curiae on Behalf of Plaintiff and Respondent,
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP.

## TABLE OF CONTENTS

Page(s)

**TABLE OF CONTENTS**
**(Continued)**

Page(s)

## TABLE OF AUTHORITIES

**Page(s)**

### Federal Cases



### California Cases

**TABLE OF AUTHORITIES**
**(Continued)**

Page(s)

## TABLE OF AUTHORITIES
## (Continued)

Page(s)

## TABLE OF AUTHORITIES
## (Continued)

Page(s)

**California Statutes**



**Other Authorities**

## APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Association of Discipline Defense Counsel (ADDC) requests leave to file an *amicus curiae* brief in this matter in accord with Rule 8.520(f) of the California Rules of Court. This amicus brief supports the outcome sought by petitioner Sheppard Mullin, though not for the same reasons.

ADDC is an unincorporated association of attorneys who specialize in representing other attorneys in State Bar disciplinary and admissions matters. Most of our members also represent and advise clients about professional responsibility matters, from conflicts of interest to trust accounts to attorney client fee agreements. Most of our members represent clients in attorney client fee disputes, legal malpractice cases, and matters concerning the admission of law students to practice law. Many of our members are also experienced expert witnesses in matters involving attorney professional responsibility. ADDC has previously appeared as amicus before this court in the *quantum meruit* case of *Huskinson & Brown LLP v. Wolf* (2004) 32 Cal. 4th 453. In that case, ADDC argued the *quantum meruit* position.

ADDC members have special expertise in the issues before this court. Our members are attorneys who regularly advise attorneys and law firms about conflicts of interest, conflict consents and waivers, and attorney fees. Our members regularly draft those conflict consents for themselves and for their clients. Our members also frequently advise attorneys about the issues of disgorgement, entitlement to fees and the determination of reasonable fees or *quantum meruit*.

We believe that there are relevant cases and other authorities relevant to the issues in this matter that have not been cited by either of the parties. We cite and discuss them in our proposed brief. We also propose to this Court standards that we request this Court set forth to determine whether and in what circumstances disgorgement and fee forfeiture may be appropriate, and when attorneys are otherwise entitled to fees, whether contractual fees or reasonable fees as determined by a court.

## DISCLOSURE OF AUTHORSHIP OR MONETARY CONTRIBUTION

No party or counsel for any party authored any portion of this brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: December 1, 2016 Respectfully submitted,

ROGERS JOSEPH O'DONNELL, PC

By: _____
MERRI A. BALDWIN

Samuel C. Bellicini
SAMUEL C. BELLICINI, LAWYER

Jerome Fishkin
FISHKIN & SLATTER LLP

Attorneys for The Association of Discipline Defense Counsel

## AMICUS CURIAE BRIEF

## INTRODUCTION

The Association of Disciplinary Defense Counsel ("ADDC") submit this amicus brief on two of the three issues identified in the Court's briefing order of March 9, 2016: whether a sophisticated consumer of legal services can give its informed consent to an advance waiver of conflicts; and whether a conflict of interest that causes no damage to the client and did not affect the value or quality of the attorney's work nonetheless automatically requires the attorney to disgorge all legal fees and preclude the attorney from receiving the reasonable value of the unpaid work.

Based on its members' experience advising and defending attorneys in civil as well as disciplinary matters, the ADDC requests this Court to set forth a standard concerning the enforceability of advance waivers that includes consideration of the relative sophistication of the client who agreed to the waiver, including whether it had the advice of independent counsel, as part of the determination of informed consent. Such a standard would be consistent with California law concerning the enforceability of attorney-client fee agreements, and would allow clients greater choice and flexibility in choosing counsel, in part because by giving lawyers a greater certainty that client waivers will likely be enforced, the universe of attorneys available to clients will expand.

On the issue of the disgorgement of fees, the ADDC requests this Court decline to adopt a rule of automatic disgorgement of fees in all situations involving an attorney's conflict of interest, but instead adopt a standard for determining reasonable attorney's fees

that includes consideration of the value of the services provided because a rule of automatic disgorgement is contrary to established California law and risks creating a disincentive for lawyers to represent multiple parties, as well as increasing the risk of fee disputes among lawyers and clients.

## I. A SOPHISTICATED CONSUMER OF LEGAL SERVICES, REPRESENTED BY COUNSEL, CAN GIVE ITS INFORMED CONSENT TO AN ADVANCE WAIVER OF CONFLICTS OF INTEREST WHERE SUCH A CLIENT IS IN A SUFFICIENTLY EQUAL BARGAINING POSITION WITH THE ATTORNEY TO CONCLUDE THAT THE CLIENT FAIRLY CONSENTED TO THE WAIVER.

While this Court has not yet had the opportunity to determine whether a sophisticated client who is represented by counsel can give informed consent to an advance waiver of a conflict of interest, California law has enforced attorney fee agreements against sophisticated clients who were represented by counsel in negotiating those agreements. These cases, while applying a different rule of professional conduct than is at issue here, are instructive because they recognize the principle that certain clients are likely to be in a position of equal bargaining power with the law firms that represent them, and thus the agreements those clients make with their chosen counsel should be enforced. The sophistication of a client is but one factor that merits consideration by a court when determining the enforceability of a consent and waiver of conflicts, just as it is when a court determines the enforceability of an attorney-client fee agreement. Enforcing such agreements allows both attorneys and clients greater certainty in entering into attorney-client representation

agreements, which in turn gives clients greater flexibility and choice of counsel.

### A. California Courts Have Considered and Relied Upon the Sophistication of Clients in Enforcing Fee Agreements Between Lawyers and Clients.

A client's level of sophistication is a familiar consideration courts weigh when determining the enforceability of attorney-client fee agreements under the unconscionability rule of Rule of Professional Conduct 4-200. "Unconscionability" for purposes of Rule of Professional Conduct 4-200(b), and general contract law, depends on factors similar to those raised in briefing of this case: equal bargaining power in the form of client sophistication and representation by counsel (procedural unconscionability) versus the harshness or one-sidedness of the agreement (substantive unconscionability).

> [A] contract is largely an allocation of risks between the parties, and therefore [ ] a contractual term is substantively suspect if it reallocates the risks of the bargain in an objectively unreasonable or unexpected manner. [Citations.] But not all unreasonable risk allocations are unconscionable; rather enforceability of the clause is tied to the procedural aspects of unconscionability . . . such that the greater the unfair surprise or inequality of bargaining power, the less unreasonable the risk allocation which will be tolerated.

*Cotchett, Pitre & McCarthy v. Universal Paragon Corp.* (2010) 187 Cal. App. 4th 1405, 1419-20 [internal citations omitted].

On facts that raise certain issues similar to those raised in this case, the Court of Appeal in *Cotchett* refused to permit a client, Universal Paragon Corp. (UPC), to avoid its fee agreement with the Cotchett law firm, in large part because it found that UPC was a sophisticated client who was represented by counsel at the time the fee agreement was executed. *Cotchett* was decided under Rule of Professional Conduct 4-200(b), which provides, among other enumerated factors for determining the conscionability of a fee, the "relative sophistication of the member and the client." Rule 4-200(b)(2).

In *Cotchett*, the client, UPC, was a property developer who wanted to sue Ingersoll-Rand in order to take control over contaminated property owned by Ingersoll-Rand, which abutted UPC's property. UPC wanted to control the environmental clean-up of the polluted Ingersoll-Rand property, and then develop both properties for a new project. 187 Cal. App. 4th at 1409. UPC hired separate outside counsel to negotiate a fee agreement with the Cotchett firm. The final fee agreement provided for a hybrid contingency/hourly fee agreement whereby Cotchett would be entitled to a contingency fee that was to be based on the total monetary recovery and competing valuations of any real property UPC might be awarded, which would operate as a partial credit against Cotchett's hourly fee. *Id.* at 1410-12.

Cotchett successfully settled the UPC/Ingersoll-Rand case, and almost immediately, UPC balked at paying the firm the

agreed-upon fee. The parties attended non-binding fee arbitration under the Mandatory Fee Arbitration Act (Bus. & Prof Code sections 6200, et seq.), and then attended private JAMS arbitration. UPC then contended that the Cotchett fee agreement was unconscionable. *Id.* at 1414.

As noted in the Court of Appeal opinion, the JAMS arbitrator specifically rejected UPC's argument that the contingency fee agreement was unconscionable.

> She noted that there had been no disparity in bargaining power between UPC and CP & M; that UPC was a very sophisticated client represented by independent counsel in the negotiation of the fee arrangement; that UPC and its attorney had the opportunity to review the retainer agreement before it was signed; and that CP & M had done an excellent job for UPC, reaching what Hanson had characterized as a "stupendous" result. Contingency fees, in Judge Westerfeld's experience, typically range from 33 percent to 40 percent of a settlement amount, and a contingency of 50 percent is not unconscionable.

187 Cal. App. 4th at 1415.

The Court of Appeal agreed, and held that UPC negotiated the *Cotchett* fee agreement on a level bargaining field, again emphasizing that UPC's level of sophistication and representation by counsel were determinative of this issue.

> On the issue of procedural unconscionability, UPC is a sophisticated corporate client that initiated the Ingersoll–

> Rand litigation to acquire real property it intended to develop as part of a larger project. It employed outside counsel to negotiate the fee agreement with CP & M, and wielded equal bargaining power during those negotiations. The fee agreement was not a contract of adhesion; if UPC had not been satisfied with its terms, it could have employed any of a number of law firms in lieu of CP & M. This was a private business transaction between equally matched parties, pure and simple. (*Ramirez v. Sturdevant* (1994) 21 Cal. App. 4th 904, 913, 26 Cal.Rptr.2d 554 [negotiation of fee agreement is, in general, an arm's length transaction].)

*Cotchett*, 187 Cal. App. 4th at 1420-21.

Similarly, in *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal. App. 4th 866, the Court of Appeal enforced an arbitration clause in an attorney-client fee agreement against clients who "were the president of a corporation well-known for its prominence in the billboard industry, as well as another businessman." *Id.* at 874. The *Desert Outdoor* Court correctly recited that, "[t]he scope of a fiduciary's obligations depends on the specific facts of the case. Such factors may include, for example, the relative sophistication and experience of the vulnerable party." *Id.* at 873 (citations and internal notations omitted).

In *Ferguson v. Yaspan* (2014) 233 Cal. App. 4th 676, the attorney Yaspan entered into a business agreement with his client Ferguson, to purchase fifty percent of a trust Ferguson owned. Yaspan did not comply with the written consent requirement of Rule

of Professional Conduct 3-300. Nevertheless, in a lawsuit brought by Ferguson's heir to avoid the agreement, the Court of Appeal enforced the agreement in part because Ferguson had hired independent counsel to review the draft agreement with Yaspan. 233 Cal. App. 4th at 687-89.

In all of these cases, the Court found that the sophistication of the client, and particularly the involvement of outside independent counsel in the negotiation of the agreement at issue, to be determinative in establishing the fairness and validity of the fee agreement. The courts expressly recognized that client sophistication materially affected the relative position of the client versus the lawyer in the negotiation process of the parties' representation agreement. With the involvement of outside independent counsel on behalf of the client in the negotiation process, any perceived advantage or superior position the contracting lawyer might otherwise have had was substantially mitigated, resulting in both parties having equal bargaining power.

### B. A Client's Sophistication is One Factor That Should Weigh in Favor of Enforcing an Advance Waiver

For similar reasons as those that underlie preceding courts' determinations of the enforceability of fee agreements, courts should weigh a client's sophistication when considering the enforceability of advance waivers, particularly the participation of separate counsel. Where clients are experienced and sophisticated legal consumers, represented by separate counsel, and those clients understand the meaning of a conflict waiver, those factors should

weigh in favor of finding the waiver valid and enforceable. Moreover, important policy reasons exist to support the enforcement of advance waivers circumstances such as this, including fostering the goal of promoting greater certainty and reliability of such waivers and allowing larger law firms to take on the representation of a greater range of clients, thereby fostering an expanded choice of counsel for sophisticated clients who often demand a wide range of counsel to assist on a wide range different matters. Therefore, courts should weigh the relative sophistication of clients when determining whether a particular client's consent was informed under Rule 3-310.

A client's informed consent is required in order for an attorney to undertake any representation that may potentially or actually conflict with the interests of other clients of that attorney. Rule 3-310(C). Accordingly, without informed consent, a law firm may not accept clients whose interests might conflict with other clients, even if on unrelated matters. For large law firms, with a diverse and extensive book of clients involved in different industries and sectors, such potential and actual conflicts would effectively limit the diversity of clients they represent unless each of those clients consents to the conflicts that exist and may exist. In turn, certain large corporate clients who need or require employment of a number of law firms recognize that they need to agree to advance waivers in order to retain certain of the law firms they want to represent them, and, as was the case here, routinely provide such consents. *See, e.g., Galderma Laboratories, L.P. v. Actavis Mid-Atlantic LLC* (2013) 927 F.Supp. 2d 390, 406.

Rule 3-310 states that "informed written consent" means "the client's or former client's written agreement to the representation following written disclosure." Rule 3-310(A)(2). "Disclosure" means "informing the client or former client of the relevant circumstances and of the actual or reasonably foreseeable adverse consequences to the client or former client." Rule 3-310(A)(1). The purpose of the rule, then, is to ensure that a client's consent is informed by the client's awareness of what the client is actually agreeing to by providing such consent.

In this context, there is no sound reason not to consider a client's level of sophistication among the factors to be considered when weighing the validity and enforceability of the consent, and in particular whether it was represented by independent counsel in connection with the waiver. A corporate client, represented by counsel, experienced in litigation and familiar with conflict waivers and the rules governing conflicts, should be held to a higher level of understanding of the contents of such agreements than other clients should be. "When a client has their own lawyer who reviews the wavier, the client does not need the same type of explanation from the lawyer seeking a waiver because the client's own lawyer can review what the language of the waiver plainly says and advise the client accordingly." *Galderma Laboratories L.P.*, 927 F. Supp. 2d at 405. The California State Bar recognized this in its Formal Ethics Opinion 1989-115, when it stated that "it is possible in appropriate circumstances and with knowledgeable and sophisticated clients to clarify obligations and responsibilities by agreements of [advance waivers]." Cal. Formal Opin. 1989-115.

Lawyers must necessarily rely upon the validity and enforceability of waivers in taking on clients whose interests may conflict with other clients of the lawyer or law firm. Clients, too, have an interest in seeing these agreements enforced, since that predictability ensures the availability of the largest number of potential lawyers and law firms available for representation in a given matter. When facts demonstrate that a sophisticated client knowingly entered into a conflict waiver, freely provided consent, and understood the terms and meaning of that consent, there are significant reasons to find such a consent valid and enforceable, and that determination is entirely consistent with Rule 3-310.

In the present case, the Court of Appeal did not consider the relative sophistication of the client, J-M Manufacturing Co. ("J-M"), in finding that the conflict waiver was unenforceable. Rather, the court's analysis focused almost entirely on the fact that Sheppard Mullin had not specifically disclosed the "potential or actual conflict" with South Lake Tahoe, and did not obtain J-M's informed written consent to continued representation once the law firm began advising South Lake Tahoe after the J-M representation began. 244 Cal. App. 4th at 613.

However, by omitting consideration of the relative sophistication of the client, and the fact of involvement of the client's in-house counsel, the Court of Appeal's analysis elevates one factor – the specific identification of South Lake Tahoe as a client or former client of the firm's with interests that conflict with J-M's interests – over all other factors that are undeniably relevant to a determination of whether the client's consent was informed. This approach thus

imposes on Rule 3-310 a bright-line test that is not present in the rule itself. The terms of the waiver that J-M signed specifically provided, in part, that "We may currently or in the future represent one or more other clients (including current, former and future clients) in matters involving [J-M]." 244 Cal. App. 4th at 599. (Emphasis omitted.) The waiver goes on to specify that, pursuant to this waiver, the law firm:

> . . . may represent another client in a matter in which we do not represent [J-M], even if the interests of the other client are adverse to [J-M] (including appearance on behalf of another client adverse to [J-M] in litigation or arbitration) and can also, if necessary, cross-examine [J-M] personnel on behalf of the other client in such proceedings . . . provided the other matter is not substantially related to our representation of [J-M] and in the course of representing [J-M] we have not obtained confidential information of [J-M] material to representation of the other client.

244 Cal. App. 4th at 599. (Emphasis omitted.)

Thus, the plain language of the waiver that J-M negotiated through its separate counsel and signed, specifically included an express agreement by the client that Sheppard Mullin could not only represent other clients whose interests are adverse to J-M's in the *qui tam* matter, but also clients in a far more directly adverse circumstance: representing clients in litigation against J-M. In consenting to that potential conflict, arguably a far more significant and directly adverse conflict than was present here, J-M was represented by experienced in-house counsel; had the opportunity to and did negotiate the agreement with the law firm (although apparently raised no questions concerning the waiver) and agreed to

the terms of this waiver.[1] In that context, it is hard to understand why Sheppard Mullin's failure to specifically disclose its South Lake Tahoe representation created grounds upon which to void the waiver. The Court of Appeal did not explain why the failure to disclose the prior representation of South Lake Tahoe either at the time the representation began or later was such a material fact that it rendered J-M's consent invalid. When J-M's experience, sophistication and representation by independent counsel is considered, the fact that the law firm failed to specifically disclose that South Lake Tahoe had been or was a client for purposes of an unrelated employment advice matter does not, by itself, provide an obvious basis upon which to conclude that J-M did not understand what it was waiving when it provided the consent at issue.

California law recognizes the general principle that a representation agreement between a lawyer and a client is a contract that must be enforced by its terms, in accordance with the plain meaning of those terms. *M'Guinness v. Johnson* (2015) 243 Cal. App. 4th 602, 617. By failing to consider the sophistication of the client and particularly the participation of independent counsel in connection with a conflict consent and waiver, the Court of Appeal improperly tilted the balance between client and lawyer, and created a situation in which the only relevant factor is whether or not specific

[1] The Court in *Galderma Laboratories L.P.* noted that in-house counsel, while employed by the company, "is still [a] lawyer *independent* from [the law firm], advising Galderma on whether or not Galderma should give its consent." 927 F. Supp. 2d at 403. *See also* Restatement (Third) of Law Governing Lawyers, §122, comment c(i) (2000).

conflicts were disclosed. In light of the specific terms of the waiver J-M knowingly agreed to, applying that bright-line test unfairly penalizes the law firm, particularly where a sophisticated client accepted the specific risks plainly set forth in that waiver.

## II. A CONFLICT OF INTEREST THAT UNDISPUTEDLY CAUSED NO DAMAGE TO THE CLIENT AND DID NOT AFFECT THE VALUE OR QUALITY OF AN ATTORNEY'S WORK SHOULD NOT AUTOMATICALLY (I) REQUIRE THE ATTORNEY TO DISGORGE ALL PREVIOUSLY PAID FEES, AND (II) PRECLUDE THE ATTORNEY FROM RECOVERING THE REASONABLE VALUE OF THE UNPAID WORK

Under present law established by this Court, the existence of a conflict of interest or any other attorney breach of duty does not provide grounds for automatic disgorgement of previously paid fees. Rather, each case is considered separately, on its facts. There is no policy reason to change that principle. The body of case law that concerns the determination of attorney fees by analyzing the reasonable value of that work, the *quantum meruit test*, includes standards that allow a court to evaluate and possibly decrease fees as a result of an attorney's conflict of interest or breach of any other attorney duty.

Rather than establish a rule that would create a risk of inconsistent (and unfair) application through an automatic disgorgement standard, this Court should instead establish standards for disgorgement that are similar to the standards used in determining reasonable value of fees.

The standards that are most consistent with current case law and principle of fairness would be (1) each case has to be

determined on its own facts; (2) any penalty must be proportional to the harm caused; and (3) all other relevant facts be taken into consideration, as in all other cases in equity and as in *quantum meruit* cases.

### A. California Cases Ordering Disgorgement of Attorney Fees as a Remedy Do So On a Case by Case Basis

The first California Supreme Court case to consider disgorgement of attorney fees was *Clark v. Millsap* (1926) 197 Cal. 765. Attorney Millsap defrauded the client Clark, who demanded damages for the value of property taken by Millsap. The client had paid $7500 in fees and denied that she owed any more to the attorney. The attorney claimed $20,000 in fees based on a promissory note he had prepared, and the client had signed, and thus alleged it as a set off. Held, due to fraud by the attorney, the promissory note was unenforceable. As recognized in Respondent's opening brief herein at page 45, the *Clark* opinion stated that a court "may" refuse to allow attorney fees if the relationship with the client is tainted by fraud. In many reported opinions, the holding in *Clark* is erroneously reported as mandatory.

The *Clark* opinion cited 6 Corpus Juris 722, 723, which states that fraud or unfairness "will prevent" fees. Some Court of Appeal cases cite the Corpus Juris statement as the holding in *Clark*, construe it as mandatory, and automatically deny fees in conflict cases.[2] However, this is an incorrect application of that liability:

---

[2] *Goldstein v. Lees* (1975) 46 Cal. App. 3d 618, discussed below. The Court of Appeal in this case cited *Goldstein* as setting forth a mandatory standard based on *Clark*. 244 Cal. App. 4th at 617. *See also Jeffry v.*

*Clark* says only that fraud by an attorney "may" support a disgorgement of fees: "It is to be observed in this connection that a court may refuse to allow an attorney any sum as an attorney's fee if his relations with the client are tainted with fraud." 197 Cal. at 786. This Court has not departed from that holding in any case since then.

The next disgorgement case in this court was *Calvert v. Stoner* (1948) 33 Cal. 2d 97. *Calvert* is not cited in either party's briefs, nor cited in the papers seeking or opposing review.[3] This court held in *Calvert* that "recoupment" may be ordered if there is "fraud" or "bad faith" by the attorney. *Id.* at 105. The client Calvert had sought to recover previously paid attorney fees. She argued that because the attorney client fee agreement had a clause that prohibited settlement without attorney approval, it was an illegal contract and should not be enforced. This court pointed out that the clause had never been invoked, so even if it was an illegal clause, no recoupment was indicated.

The first reported case that actually ordered disgorgement was also not cited in the petition or responsive papers: *In Re Fountain* (1977) 74 Cal. App. 3d 715. The Court ordered disgorgement of attorney fees without any discussion of the criteria the Court applied to reach that determination. The attorney had accepted $500 down

---

*Pounds* (1975) 67 Cal. App. 3d 6 ,9, which extended *Goldstein* to apply to reasonable value cases. *Accord, Blecher & Collins, P.C. v. Northwest Airlines* (C.D. Cal. 1994) 858 F. Supp. 1442, 1457.

[3] *Calvert* was cited by this Court in *Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal. 4th 453, a reasonable value case.

payment on a fee to file a habeas corpus action. He did not file a protective petition, so the time for filing expired. The attorney then filed a late petition. The Attorney General argued that the acts of the attorney should be attributed to the client and the filing dismissed. The attorney argued that he had no duty to file the original petition because his whole fee had not been paid. The Court permitted the filing of the late habeas petition and ordered disgorgement of the fees. The rationale is not stated but can be inferred. The attorney took a position in the litigation directly adverse to his client's interest while purporting to excuse the attorney's own misconduct, with the result that the client suffered damages; the court labeled the behavior as a "conflict of interest." *Id.* at 719.

In *Ball v. Posey* (1986) 176 Cal. App. 3d 1209, 1212, attorney Posey was found to have wrongfully converted nearly $40,000 of client property. He was permitted to retain $1,135 as reasonable fees for work done. The Court ordered the remainder of the fees he had been paid disgorged based on his charging an excessive fee. The disgorgement was not for the full amount paid, but for the excessive portion. The jury also awarded the client punitive damages as a result of the attorney's use of undue influence on an elderly, ill widow.[4]

---

[4] *Ball* points out an issue not discussed in any of the cases – disgorgement is a remedy that is sometimes ordered by courts as a refund of fees to a client, and other times ordered for punitive purposes. The implication of the stated issue in this case is that this Court is looking at punitive disgorgement. In the opinion below, the Court of Appeal notes that disgorgement is sometimes sought as a tort remedy, which "may" require proof of damages, and at other times for serious ethical breaches, which it

The next reported disgorgement case was *Pringle v. La Chappelle* (1999) 73 Cal. App. 4th 1000, in which the Court upheld a trial court judgment that there were properly waived conflicts of interest, and therefore declined to order disgorgement. It went on to recite that there is no basis for disgorgement unless there is '"[f]raud,"' '"unfairness,"' (cf. *Calvert supra*) or "acts in violation or excess of authority." *Id.* at 1006. It also recited that there was no automatic forfeiture of fees for a violation of a rule of professional conduct, even Rule 3-310 or Rule 3-600. *Id.*

In *Olson v. Cohen* (2003) 106 Cal. App. 4th 1209, Attorney Cohen did not register his professional corporation with the State Bar. His former client Olson filed an unfair competition case under Bus. & Prof. Code section 17200 and sought disgorgement of all fees paid by all clients over the previous four years. The court held that unfair competition is an equitable cause of action, and that disgorgement of fees would be improper because it would be disproportionate to the wrongdoing. There was no evidence of any client damage, no evidence of unfair competition, and no evidence that any client actually employed Cohen due to his company's corporate status.

The principle of *Olson* was followed by this Court in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal. 4th 23. Tenderloin Housing Clinic was a nonprofit agency that represented tenants but did not register as a professional corporation. This Court

---

says does not. 244 Cal. App. 4th at 620, fn. 10. As discussed below, proof of damages should be a factor to consider in all cases.

refused to order disgorgement of fees because, as in *Olson,* such would be disproportionate to the wrong where there was no damage to the client, and no evidence of concealment nor misrepresentation. Thus, the court refused to apply an automatic disgorgement remedy, consistent with this Court's ruling in *Clark* and *Calvert.*

In *Slovensky v. Friedman* (2006) 142 Cal. App. 4th 1518, 1522, the client was denied disgorgement due to lack of damages. There, the attorney obtained a monetary settlement in a case that was barred by the statute of limitations. The Court looked at all the facts and determined that an alleged violation of a Rule of Professional Conduct should automatically result in disgorgement. In that case, breach of fiduciary duties was assumed.

In discussing disgorgement, *Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal. App. 4th 1050, 1064-65, indicated that disgorgement was a discretionary remedy, even in a conflict of interest setting. The Court held that there had to be evidence of wrongdoing that affects the value of attorney services before a Court could order disgorgement of fees. The Court went on to say that the attorney's breach had to be egregious.

The unifying theme in the foregoing cases is that disgorgement of fees is not an automatic remedy but may be ordered only after the Court makes a careful assessment of the equities involved. Violation of a rule, duty or statute by itself will not ordinarily support disgorgement. The Court should also consider whether the client suffered damage, and the seriousness of the attorney's misconduct.

### B. Quantum Meruit Cases Involving Alleged Effective Breaches: Courts Analyze Specific Facts

There is a considerable body of case law involving *quantum meruit* claims in matters where the attorney had allegedly breached duty to the client. Perhaps the most oft-cited conflict of interest case is this court's opinion in *Anderson v. Eaton*, (1930) 211 Cal. 113. Attorney Anderson represented Mrs. Eaton on a one-third contingency fee contract against Benson Lumber, arising out of the death of her husband. He also represented the husband's employer against Mrs. Eaton in the workers compensation case. She fired him and settled her claim against Benson in *pro per*. The lawyer then sued for his contractual one-third fee. The Court ruled the contract was void and denied him recovery. The Court specifically noted that Anderson offered no evidence to support his *quantum meruit* claim and therefore the *quantum meruit* count was dismissed for lack of evidence. 21 Cal. at 114.

*Anderson*, like this case, involved simultaneous representation of conflicting interests. It has been cited as authority for denial of *quantum meruit* due to the conflict of interest without recognition that *quantum meruit* was not at issue before the Court or addressed in the opinion.[5]

In *Huskinson & Brown v. Wolf* (2004) 32 Cal. 4th 453, this Court denied enforcement of a fee sharing contract between two attorneys who had not obtained written client consent. The defendant attorney had the money and argued that the plaintiff attorney should

[5] *See, e.g., Goldstein* and *Jeffry, supra.*

not get any. This Court approved an award of *quantum meruit*. In its discussion, this Court evaluated several criteria to determine when *quantum meruit* would be permitted in the face of a violation of a rule of professional conduct. First, it looked to the purpose of the rule, in that case Rule 2-200, to determine whether allowing a *quantum meruit* fee recovery would be consistent with that purpose. *Id.* at 458-59. If so, the Court examined whether allowing *quantum meruit* compensation would undermine compliance with the rule. *Id.* at 459. *Huskinson* recites several earlier cases in which *quantum meruit* was permitted when attorney client fee agreements were otherwise unenforceable or invalid. *Id.* at 461.[6]

The only two cases *Huskinson* cited for disallowance of *quantum meruit* were two cases involving violations of the predecessor to Rule 3-310, addressing conflicts of interest. *Jeffry,* (1977) 67 Cal. App. 3d 6; and *Goldstein v. Lees* (1975) 46 Cal. App. 3d 614. This Court in *Huskinson* did not make such disallowance mandatory. However, some subsequent cases have incorrectly continued to cite *Jeffry* and *Goldstein* as setting forth a mandatory rule of disgorgement when conflicts of interest are present, as was done in the within case by the trial court and Court of Appeal.[7]

---

[6] *Calvert* (attorney reserved right to veto settlement); *Rosenberg v. Lawrence* (1938) 10 Cal. 2d 590 (attorneys agreed to kick back a portion of fees to client; *Wiley v. Silsbee* (1934) 1 Cal. App. 2d 520 (attorney represented divorce client on a contingent fee).

[7] *See, e.g., Asbestos Claims Facility v. Berry & Berry* (1990) 219 Cal. App. 3d 9, 26-27; *Rodriguez v. Disner* (2012) 688 F. 3d 645, 654 (discussing California law); *Blecher,* 858 F. Supp. at 1457.

In fact, the case law in the Courts of Appeal is mixed on the issue of whether an attorney's conflict of interest should result in automatic denial of the reasonable value of attorney fees, or whether the client should obtain relief only if there are damages.

In *Sloan v. Stearns* (1955) 137 Cal. App. 2d 289, Stearns hired attorney Light to obtain financing for a commercial building project. Light was secretly one of the lenders. Thus, he had an adverse relationship to his client, a clear violation of former Rule 4, predecessor to current Rule 3-300. One issue before the Court was whether this adverse relationship should result in a fee forfeiture. The minority wanted the rule enforced in the form of a fee denial in the civil case. 137 Cal. App. 2d at 304-305. The majority refused, pointing out that in the civil case, the attorney could defend by showing client consent and an absence of damage. Thus, there was no automatic denial of reasonable value fees.

*Conservatorship of Chilton* (1970) 8 Cal. App. 3d 34 was a case where Mrs. Chilton was under a conservatorship. One Stevens, using undue influence, obtained her signature on a contract to employ attorney Arditto. Arditto sought attorney fees for services rendered to Mrs. Chilton. The Court held that Arditto had actually served Stevens and not Mrs. Chilton, and was acting pursuant to a conflict of interest. The Court denied him fees due to the conflict of interest. *Chilton* determined that the client received no benefit; therefore the reasonable value of the services rendered was zero. That determination was made on the facts, and was not the result of an automatic rule of fee forfeiture.

In *Goldstein*, counsel represented dissident shareholders in a proxy battle. The Court denied the attorney fees because of the conflict of interest between the attorney's current clients, the shareholders, and the corporation, his former client, whose confidential information the attorney possessed. *Goldstein* held that the conflict present there required denial of fees, and that the Court could raise the issue itself. The holding in *Goldstein* begins with a misreading of *Clark v. Millsap,* by citing the Corpus Juris quote prohibiting recovery instead of the Court's statement recognizing that a court may allow no fees. 46 Cal. App. 3d at 618. Similarly, at the same page, *Goldstein* also cites *Anderson v. Eaton,* but did not note that *Anderson* did not make a reasonable value determination. *Id.*

*Goldstein* acknowledges that there was no evidence that the attorney's representation was adverse to the company. *Id.* at 619, n. 3. *Goldstein* fails to recognize the distinction between fees on the contract and fees calculated on the basis of *quantum meruit* or reasonable value. Overall, then, *Goldstein* is based on several flaws, but it becomes the basic cited case for automatic forfeiture.

In *Jeffry*, the law firm was allowed a partial share of Mr. Pounds' personal injury recovery. It was denied any share of the fees that accrued after an actual conflict arise, when the firm began representing Mrs. Pounds in her divorce against Mr. Pounds. *Jeffry* cites *Goldsdtein, Clark v. Millsap* and *Anderson v. Eaton*, making the same error that was made in *Goldstein. Jeffry's* sort of facts may very well lead a court to deny attorney fees after a conflict arises. After all, the clients were lay persons, the conflict was clear, and there was no evidence of an attempt to seek a waiver. We do not argue that there

should never be a disgorgement or a denial of fees. We argue that each case should be decided on its facts.

*Day v. Rosenthal* (1985) 170 Cal. App. 3d 1125 was a long case, analyzing decades of work by attorney Rosenthal for actress Doris Day. One portion of the appeal concerned the allegation that there had been no finding in the proceedings below as to the reasonable value of the attorney's bond transaction services. The Court of Appeal responded, "First, the trial court did make an express finding that none of Rosenthal's services had any value (Finding No. 12)." 170 Cal. App. 3d at 1162. However, the *Day* Court continued in dicta, "Second, no finding was necessary. His conflicts of interest rendered his services valueless and required no finding on the reasonable value of his fees." 170 Cal. App. 3d at 1162, citing *Conservatorship of Chilton,* 8 Cal. App. 3d at 43. This dicta in *Day* misinterpreted *Chilton.* In reality, the trial court in *Chilton* made a finding of fact, not a finding of law.

In *Ramirez v. Sturdevant* (1994) 21 Cal. App. 4th 904, the attorney negotiated a settlement of both the gross client recovery and the attorney fees as separate amounts, with $150,000 inuring to the client and $215,000 in attorney fees inuring to the attorney. The Court noted that a contract which permits the attorney to negotiate a lump sum settlement or bifurcate it constitutes a potential conflict of interest. *Id.* at 916. When the attorney is negotiating a bifurcated settlement, there is an actual conflict of interest inherent in the situation. *Id.* at 922. However, in determining entitlement to fees, the Court held that the trial court should consider whether the ultimate result properly balanced the rights of client and attorney. *Id.* at 925.

As relevant here, the Court did not hold that there should be an automatic denial of contract fees or reasonable fees to the attorney because of an actual conflict of interest. Rather, the case was remanded to the trial court to determine if the conflict of interest actually resulted in client damage.

In *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal. App. 4th 1, the attorney offered to sell out his class client for a multi-million dollar payment from the opposing side; the class would receive nothing. The trial court eventually disqualified that lawyer, and prohibited him '"from receiving any fees (directly or indirectly) in connection with his representation in this case."' *Id.* at 8. On appeal, the court reversed as premature the part of the order precluding the attorney from recovering attorney's fees for services rendered before the breach occurred. *Id.* at 17.

In *Pringle v. La Chappelle* (1999) 73 Cal. App. 4th 1000, the attorney represented both the company and its chief executive officer ("CEO"). Because the clients had an actual conflict of interest, the attorney provided a conflict waiver. However, the CEO signed the conflict waiver for both parties, rendering it ineffective. Nevertheless, the Court of Appeal upheld the trial court's award of reasonable value fees to the attorney. The Court held that fee forfeiture is not automatic. The court stated that the test is whether the violation was serious, if the attorney acted inconsistently with the character of the profession, or if there was an irreconcilable conflict. *Id.* at 1006-07. *Pringle* acknowledged that the lack of a valid conflict waiver was a factor to consider, not a requirement of automatic disgorgement.

*A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal. App. 4th 1072, is heavily relied upon by J-M in this case, but *A.I. Credit* is similarly flawed. First, it relies on *Goldstein*, then it misconstrues *Cal Pak* as supporting automatic forfeiture. *Id.* at 1076. Second, it holds that a ruling of conflict in the client matter is collateral estoppel against the attorney in a fee dispute, without acknowledging long standing authority to the contrary. *See Younan v. Caruso* (1996) 51 Cal. App. 4th 401, 409; *Loube v. Loube* (1998) 64 Cal. App. 4th 421; *Dawson v. Toledano* (2003) 109 Cal. App. 4th 387. *A. I. Credit* elevates mandatory conclusive presumptions from substantial relationship cases into mandatory conclusive presumptions for a fee dispute. *See* 113 Cal. App. 4th at 1078 and n. 4.

Lastly, in *Sullivan v. Dorsa* (2005) 128 Cal. App. 4th 947, multiple owners of real estate agreed to partition, and they nominated a partition referee to handle the sale. The sale fell through. The referee then sought attorney fees for his first lawyers, Silicon Valley Law Group ("SVLG"). The owners alleged that the law firm had a conflict of interest, due to a concurrent relationship with the prospective buyer, and thus asked the court to deny attorney fees. After pointing out the possible lack of standing, the Court went on to state that fee forfeiture is not automatic. Rather, "the owners make no attempt to establish that SVLG's alleged misconduct was so incompatible with the faithful performance of its duties as to require disallowance of fees." *Id.* at 965 (citing *Pringle* and *Clark*).

Thus, this Court has never held that disgorgement or denial of fees was automatic. Nor has this Court actually upheld a disgorgement of attorney fees. The Courts of Appeal have sometimes

upheld reasonable value of fees and sometimes denied reasonable value in cases involving alleged breaches by attorneys. In that latter situation, two cases have decreed the denial of reasonable value as automatic; others have analyzed the specific facts of the case to determine the reasonable value of the attorney services.[8]

## III. AUTOMATIC FORFEITURE OF FEES FOR A BREACH OF A PROFESSIONAL RULE TRANSFORMS A DISCIPLINARY RULE INTO A MEANS TO IMPOSE PUNITIVE DAMAGES WITHOUT THE PROCEDURAL SAFEGUARDS AVAILABLE IN THE DISCIPLINARY SYSTEM

Automatic forfeiture of fees based upon an attorney's violation of a disciplinary rule improperly renders that disciplinary rule into the basis for determining civil damages without the procedural safeguards that exist in the disciplinary system, where the standard of proof required to find a violation is higher, and mitigating circumstances are considered. Allowing automatic disgorgement would therefore contradicts the principles that the disciplinary rules are not intended to serve as the basis of civil claims against attorneys, and that attorney discipline and civil litigation have different purposes. *Most v. State Bar* (1967) 67 Cal. 2d 589, n.5.

Rule of Professional Conduct 1-100 itself states that the Rules are not intended to create a civil cause of action. As stated in

---

[8] The Court of Appeal in this case cites *Dorsa, Slovensky,* and *Mardirossian & Assoc., Inc. v. Ersoff* (2007) 153 Cal. App. 4th 257, in support of its conclusion, stating that none of them involved actual conflict of interest. 244 Cal. App. 4th 590, n.9. The Court below did not discuss those cases that did involve actual conflicts.

*Klemm v. Superior Court* (1977) 75 Cal. App. 3d 893, 901, the attorney's civil liability is to the client "who suffers loss," not the client who can show a breach with no damage. In civil cases, the rules of professional conduct may be used as one part of the test of a duty to the client, but may not serve as the basis of liability. *Mirabito v. Liccardo* (1992) 4 Cal. App. 4th 41, 45. But if an automatic disgorgement rule were applied, the sole test would be whether there has been a violation of a rule of professional conduct, with no analysis of the relative equities, extenuating circumstances, intent, or any other ameliorating circumstance.

The risk of an automatic disgorgement rule is that every alleged breach of a professional rule will become grounds for a client to seek disgorgement or fee forfeiture, even in cases where there has been no material breach, and no damage to the client.[9]

A further risk of an automatic disgorgement rule could be a decrease in the number of attorneys willing to accept the representation of multiple clients in a single matter, due to the possibility that the clients' waiver may be found defective, particularly where there is no opportunity for attorneys to demonstrate extenuating circumstances.

---

[9] Our members have seen an increase in cases in which the client alleges a breach of the rules and claims therefore that no fees are owed. In Arbitration Advisory 2012-03, "Handling Legal Malpractice Claims and ethical issues during Arbitration," §C, page 4, the State Bar Committee on Mandatory Fee Arbitration has notified clients that it can reduce claimed fees for ethical breaches by the attorney. Our members are seeing this issue more often, thus effectively turning fee arbitrations into a form of discipline cases, without procedural safeguards.

The best way to maintain a clear distinction between civil litigation damages and punitive sanctions or discipline is to eliminate the principle that a breach of the rules of professional conduct should ever result in an automatic disgorgement of fees. The principle should be that the client may be entitled to relief from the attorney's fee claim based on all of the circumstances, including whether the client has suffered damages. If the attorney's conduct is egregious enough for punishment, that punishment should be in a punitive damage cause of action (or through the discipline system). As this court stated in the recent case of *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal. 4th 363, 371:

> In our judicial system, "[a]lthough compensatory damages and punitive damages are typically awarded at the same time by the same decision maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. [Citations.] The latter ... operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 121 S.Ct. 1678, 149 L.Ed.2d 674 (*Cooper Industries* ).)

In the Restatement (Third) of Law Governing Lawyers (2000) §37 the principle is stated thus:

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's

> compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

Comment c to that section shows that some states view a conflict of interest as grounds for a total forfeiture while others do not. Those that do are oriented towards punishment of the attorney, something best left to the disciplinary process. Two Texas writers compared their state's principles to those across the country. J. Webb & B. Stribling, "Ten Years After *Burrow v. Arce*; the Current State of Attorney Fee Forfeiture," 40 *St. Mary's Law Journal* 967 (2009).. The writers note that a minority of jurisdictions use disgorgement for punitive purposes, while a majority analyze various factors to determine if the breach was sufficiently serious to warrant disgorgement. *Id.* at pg. 1023. Proportionality is a constitutional requirement for punitive damages; *BMW of North America v. Gore* (1996) 517 US 559, 576. Similarly, proportionality should be a requirement for disgorgement or any forfeiture of fees.

This Court should not approve a rule of automatic disgorgement or forfeiture of fees for a breach of a rule of professional conduct by an attorney. Instead, consistent with the case law determining quantum meruit fee recovery, this Court should create standards to guide the trial courts in determining appropriate fees in such circumstances. Further, consistent with principles of

fairness, these standards should seek proportionality between client harm and the amount of disgorgement or reduction in the reasonable value of fees.

## CONCLUSION

As stated in *Nickerson*, "To determine whether a jury's award of punitive damages is grossly excessive, reviewing courts must consider, among other factors, whether the 'measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff' by comparing the amount of compensatory damages to the amount of punitive damages." 63 Cal. 4th at 367. Furthermore, under Cal. Civil Code §3294(a), punitive damages can be awarded only when there is "oppression, fraud, or malice" proven by clear and convincing evidence.

The determination of an attorney's entitlement to fees in a situation where there has existed an alleged conflict of interest (or other ethical breach) should be consistent with existing law as well as principles of fairness. The current case law does not provide clear standards for courts to determine whether disgorgement is appropriate.

A rule of automatic disgorgement would operate as a rule of punishment, which risks unfairness and inconsistency. We request that this court expressly reject an automatic punishment, and set forth standards to determine entitlement to attorney fees where an alleged conflict has occurred that recognizes: (1) each case should be determined on its own facts; (2) any penalty imposed on the lawyer

must be proportional to the harm caused; and (3) all other relevant facts must be taken into consideration as in all other cases in equity.

Dated: December 1, 2016 Respectfully submitted,

ROGERS JOSEPH O'DONNELL PC

By: _____
MERRI A. BALDWIN

Samuel C. Bellicini
SAMUEL C. BELLICINI, LAWYER

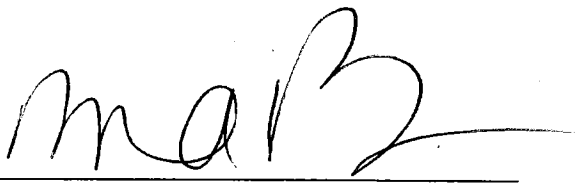
Jerome Fishkin
FISHKIN & SLATTER LLP

Attorneys for The Association of Discipline Defense Counsel

**CERTIFICATE OF WORD COUNT**
**Cal. Rules of Court, rule 8.204(c)(1).)**

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the total word count of the Amicus Brief, excluding covers, table of contents, table of authorities, and certificate of compliance is 7,951. In making this certification, I have relied on the computer program, Microsoft Word, for this word count.

Dated: December 1, 2016



MERRI A. BALDWIN

## CERTIFICATE OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

I, the undersigned, declare as follows:

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 311 California Street, San Francisco, CA 94104.

On December 2, 2016, I served the following document described as **APPLICATION OF THE ASSOCIATION OF DISCIPLINE DEFENSE COUNSEL FOR LEAVE TO FILE AMICI CURIAE BRIEF; PROPOSED BRIEF** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

| | |
|---|---|
| X | **BY U.S. MAIL**: By placing a true and correct copy thereof enclosed in a sealed envelope addressed as above or on the attached service list, with postage thereon fully prepaid, in the U.S. Mail at San Francisco, California. I am readily familiar with my employer's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on the same day with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing as stated in the affidavit. |
| X | **BY FEDERAL EXPRESS**: I am readily familiar with my employer's practice of the collection and processing of FedEx packages. Under that practice, packages should be deposited with FedEx that same day, with overnight (next business day) delivery charges thereon fully prepaid, in the ordinary course of business. I caused such envelope(s) to be delivered by overnight mail to the addressees listed on the attached service list. |

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

Executed on December 2, 2016, at San Francisco, California.

Tamora Horen

**SERVICE LIST**

***SHEPPARD MULLIN RICHTER & HAMPTON LLP v. J-M MANUFACTURING CO,. INC.***

**Case No. S232946**

| | |
|---|---|
| Kent L. Richland<br>Jeffrey E. Raskin<br>Greines, Martin, Stein & Richland LLP<br>5900 Wilshire Blvd., 12th Floor<br>Los Angeles, CA 90036-3697<br><br>Attorneys for Defendant and Appellant<br>**J-M MANUFACTURING CO. INC. dba J-M EAGLE** | Kinh-Luan Tran<br>Lee Tran & Liang APLC<br>601 S. Figueroa Street<br>Suite 3900<br>Los Angeles, CA 90017<br><br>Attorneys for Defendant and Appellant<br>**J-M MANUFACTURING CO. INC. Dba J-M EAGLE** |
| Kevin S. Rosen<br>Gibson, Dunn & Crutcher<br>333 South Grand Avenue, Ste. 4700<br>Los Angeles, CA 90071-3197<br><br>Attorneys for Plaintiff and Respondent<br>**SHEPPARD MULLIN RICHTER & HAMPTON** | James Francis McShane<br>Shepard Mullin Richter & Hampton, LLP<br>333 S Hope Street, 48th Floor<br>Los Angeles, CA 90017-1448<br><br>Attorneys for Plaintiff and Respondent<br>**SHEPPARD MULLIN RICHTER & HAMPTON** |
| Michael K. Collins<br>Hill, Farrer & Burrill LLP<br>One California Plaza<br>300 South Grand Ave., 37th Fl.<br>Los Angeles, CA 90071<br><br>Attorneys for Pub/Depublication Requestor<br>**INSURANCE MUTUAL RISK RETENTION GROUP, INC.** | Mark E. Haddad<br>Sidley & Austin LLP<br>555 West Fifth Street<br>Los Angeles, CA 90013<br><br>Attorneys for Pub/Depublication Requestors **AF BEAZLEY SYNDICATE AT LLOYDS; CNA FINANCIAL CORP., ENDURANCE SPECIALTY HOLDINGS LTD., W.R. BERKELEY, ARNOLD & PORTER LLP** |
| Sean Selegue<br>Arnold & Porter LLP<br>Three Embarcadero Center, 10th Fl.<br>San Francisco, CA 94111<br><br>Attorneys for Pub/Depublication Requestors<br>**ARNOLD & PORTER LLP; FINNEGAN, HENDERSON, et al. LLP** | |

| | |
|---|---|
| Peter R. Jarvis<br>Holland & Knight<br>50 California St., Ste. 2800<br>San Francisco, CA 94111<br><br>Attorneys for Pub/Depublication Requestors<br>**ALSTON & BIRD LLP; BRYAN CAVE LLP; CARLSMITH BALL LLP; DAVIS WRIGHT TREMAINE LLP; DLA PIPER LLP (US); DKEMA GOSSETT PLLC; FAEGRE BAKER DANIELS LLP; FISH & RICHARDSON P.C.; GOODWIN PROCTER LLP; GRENBERG TRAURIG LLP; HOLLAND & KNIGHT LLP;** | **HUGHES HUBBARD & REED LLP; IRELL & MANELLA LLP; KIRKLAND ELLIS LLP; KNOBBE MARTENS OLSON & BEAR LLP;LATHAM & WATKINS; LOWENSTEIN SANDLER LLP; MANATT PHELLPS & PHILLIPS LLP; MORGAN, LEWIS & BOCKIUS LLP; MUNGER, TOLLES & OLSON LLPL O'MELVENY & MEYERS LLP; PERKINS COIE LLP; PROSKAUER ROSE LLP; REED SMITH LLP; SEYFARTH SHAW LLP; SIDLEY AUSTIN LLP; UMBERG SIPSER LLP; WOMBLE CARLYLE SANDRIDGE & RICE LLP and VENABLE LLP** |
| California Court of Appeal<br>Second District, Division Four<br>Ronald Reagan State Building<br>300 S. Spring Street<br>2nd Floor, North Tower<br>Los Angeles, CA 90013<br>**Mail Only** | Honorable Stuart M. Rice<br>Los Angeles Superior Court<br>Torrance Courthouse<br>825 Maple Ave.<br>Torrance, CA 90503<br>**Mail Only** |