EDWARD J. MCINTYRE, State Bar No. 80402
Symphony Towers
750 B Street, Suite 2100
San Diego, California 92101
Telephone: (619) 992-9038
edwardmcintyre1789@gmail.com

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. Defendant.	CASE NO.: Hon. M. James Lorenz Courtroom 5B Date: November 10, 2016 Time: 9:00 a.m. **DECLARATION OF EDWARD J. McINTYRE RELATED TO ISSUES OF PROFESSIONAL RESPONSIBILITY AND LEGAL ETHICS**

Edward J. McIntyre declares:

Expert Engagement.

1. The lawyers for engaged me to serve as an expert witness in this matter, primarily to consider, as they may arise in this case, issues of legal ethics, professional responsibility and standard of care, as well as the Rules of Professional Conduct that govern the conduct of lawyers who practice before this Court.

Professional Background.

2. I am, and since 1978 have been, a member of the Bar of this Court and the State Bar of California. I was first admitted to practice in Pennsylvania in 1974.

3. I am also admitted to practice before the United States Supreme Court, the United States Courts of Appeal for the Third, Fifth, Ninth, Tenth and Federal Circuits; the United States District Courts for the Southern, Central and Northern Districts of California and the Eastern District of Pennsylvania.

4. I currently focus my practice exclusively on issues of legal ethics, professional responsibility—including standard of care—and risk mitigation. In that capacity, I counsel lawyers and their firms and serve as an expert witness.

5. I was a trial lawyer for forty years, most recently as a partner at Solomon Ward, before that at Gray Cary, and initially as an associate at Dechert in its Philadelphia office.

6. My practice focused on complex business, securities and intellectual property litigation in federal and state court and litigation-related counseling publicly held and privately owned companies. In addition, I am recognized for my practice of First Amendment and journalism law.

7. I attach as exhibit 1, my *curriculum vitae*. I attach as exhibit 2, a list of cases in which I have been engaged and testified as an expert witness.

8. In addition to counseling lawyers and serving as an expert witness, I write and lecture on issues of professional responsibility and risk mitigation. For example, among other publications, I have for several years authored the ethics column in *San Diego Lawyer*, a San

Diego County Bar Association publication, of which I am now co-editor. I also regularly author the Bar Association's *Ethics in Brief* and *For the Record* columns and I co-author and co-edit *Ethics Quarterly*, another Bar Association publication.

9. I am, and for more than 20 years have been, a member of the San Diego County Bar Association Legal Ethics Committee—an invitation-only committee. I have served several times as its chair and on its executive committee.

10. I served my three-year term (2008-2011) on the California State Bar's Standing Committee on Professional Responsibility and Conduct (COPRAC), the ethics advisors to the State Bar Board of Trustees.

11. The State Bar has appointed me a Special Deputy Trial Counsel to investigate and, as appropriate, prosecute cases involving alleged violations of the standards of professional conduct in circumstances when the Office of Chief Trial Counsel has recused itself. I am currently Special Deputy in several pending State Bar matters

12. I was lead counsel on the *amicus curiae* brief in the California Supreme Court on behalf of the San Diego County Bar Association in *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, a case that raised significant professional responsibility issues.

13. I am also a member of the American Bar Association's Center for Professional Responsibility and the Association of Professional Responsibility Lawyers. On October 1, 2016, I received a State Bar of California presidential recognition award for *pro bono* contributions to the State Bar.

14. I served as Solomon Ward's general counsel and its professional responsibility partner, as well as chair of its litigation department. I joined Solomon Ward as a litigation partner and chair of its litigation department in 1995.

15. From 1978 to 1995, I was an associate (1978-1980) and partner (1980-1995) at Gray Cary Ames & Frye and Gray Cary Ware & Freidenrich. I was an associate at Dechert Price & Rhoads (now Dechert) from 1974 to 1978.

16. My formal education includes:

1970-1974	J.D.	Temple University, Pennsylvania
1968-1969	Ph.D. Cand.	Fordham University, New York
1965-1966	Ph.L.	Woodstock University, Maryland
1965-1966	M.A.	Fordham University
1961-1965	A.B.	Fordham University
1966-1969		Lecturer in philosophy at Georgetown University and Fordham University

17. As a consequence of my training and experience in legal ethics, professional responsibility and professional integrity; and the cases in which I have been engaged and testified as an expert; and my role as both the chair of Solomon Ward's litigation department and its general counsel, I am familiar with the ethical and professional responsibility standards governing lawyers—and in particular in this case, the professional responsibility standards governing the conduct of lawyers who practice in this Court.

Role As An Expert

18. I am conscious that, as an expert witness, opinions or conclusions on ultimate issues, whether of fact or law, are beyond the scope of my engagement. Consequently, I have studiously made sure that none of my analyses, conclusions or opinions addresses any ultimate issue of fact or law.

19. In this case, however, several other, preliminary issues fall precisely within the scope of my expertise that may bear on the ultimate issues that the Court must decide.

20. I believe expert testimony on these issues may assist the Court in reaching the ultimate issues, and have limited my analyses, conclusions and opinions to these preliminary, but perhaps essential, issues. I believe they form an important pattern of stepping-stones in reaching the some of the ultimate issues the case presents.

21. I have cited to authority throughout my declaration in order to give the Court some of the foundation on which I base my analysis, conclusions and opinions.

Materials From the Case on Which I Relied

22. As is my practice, I have relied almost exclusively on contemporary documents, the authenticity of which I understand not to be in dispute.

23. I have also relied on a few testimonial facts that I understand are not in dispute, many of which provide background information. Where I have relied on such facts, I have identified them.

24. I recognize that certain facts are, or may be disputed. I do not rely on any disputed fact. Where, however, a disputed fact may be relevant in relation to my analysis, I have pointed that out.

25. I have read the transcript of the September 22, 2016 evidentiary hearing, which I also attended.

The Professional Responsibility Standards That Apply in This Court.

26. A fundamental issue is *what* ethics rules apply to the lawyers who practice in this court. The Court's Local Rules answer, definitively, the question.

27. Local Rule 83.4 (Professionalism) provides:

> Standards of Professional Conduct. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the *standards of professional conduct required of members of the State Bar of California*, which are now adopted as standards of professional conduct of this court. No attorney permitted to practice before this court will engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice within the Court. [CIVLR 83.4.b, emphasis added.]

28. The California Rules of Professional Conduct, Rule 1-100(A) states:

> The following rules are intended *to regulate professional conduct of members of the State Bar* through discipline. They have been adopted by the Board of Governors of the State Bar of California and approved by the Supreme Court of California pursuant to [the State Bar Act] Business and Professions Code sections

6076 and 6077 to protect the public and to promote respect and confidence in the legal profession. These rules together with any standards adopted by the Board of Governors pursuant to these rules *shall be binding upon all members of the State Bar*. [Emphasis added.]

29. This District is not unique. The District Court for the Central District of California has done the same:

> [E]ach attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. These statutes, rules and decisions are hereby adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline. [Local Rule 83-3.1.2]

30. The Northern and Eastern Districts have also adopted the California Rules of Professional Conduct and the State Bar Act as their professional responsibility standards. [Local Rule 11-4(a)(1) and Local Rule 180 (Fed. R. Civ. P. 83) (e), respectively.]

31. But this is not just a California phenomenon. The United States District Courts across the country have adopted the ethics rules and Rules of Professional Conduct of the states in which the courts sit. For example, the District of Arizona has adopted Arizona's Rules of Professional Conduct as its professional responsibility standards. [LRCiv. 83.2.]

32. Another example, across the country, is the District of Maryland, where Agent Townsend is admitted to practice; it has adopted the Rules of Professional Conduct "as adopted by the Maryland Court of Appeals." [Local Rule 704.]

33. The reason is simple; there are no "federal" rules of professional conduct, *except* as the various district courts have adopted the Rules of Professional Conduct that govern the ethical behavior of the lawyers in the state in which the courts sit.

34. The Ninth Circuit has left no room for doubt what ethics rules govern lawyers'

conduct in California district courts. "Under the district court's local rules, California law governs a district court's determination whether an ethical violation has occurred." [*Rodriguez v. Disner*, 688 F.3d 645, 656 (9th Cir. 2012) addressing alleged violation of Rule of Professional Conduct 3-310(C) (Conflict of Interest).]

35. The Circuit Court has also held that California's Rules of Professional Conduct apply to federal prosecutors in a case arising in the Central District and involving the alleged violation of Rule of Professional Conduct 2-100 (Communication With Represented Persons). [*United States v. Carona*, 660 F.3d 360, 363 (9th Cir. 2011).]

36. Further Messrs. , the two Assistant United States Attorneys, who participated in the interviews of Mr. 's former bankruptcy lawyer, , are currently members of the State Bar of California. [State Bar Numbers and , respectively.] As such, the California Rules of Professional Conduct and the State Bar Act govern their conduct. [Rule 1-100(A) and (D)(1).]

37. As a consequence, the conduct of all lawyers practicing in this court is governed by the same standards that govern all members of the State Bar of California. The principal ethics authority for California lawyers is the State Bar Act, the California Rules of Professional Conduct and related supporting authority, which, together with the opinions of California courts interpreting that authority, bind California lawyers.

38. In addition, although the ABA Model Rules of Professional Conduct are not binding in California, they provide California lawyers with authoritative guidance where there is no direct California authority and where the ABA Model rules do not conflict with California policy. [*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.]

39. Accordingly, in the absence of California authority, or to supplement that authority, California lawyers should look to the ABA Model rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance. [Rule 1-100; *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656.]

40. As a consequence, my analysis focuses primarily on the California Rules of

Professional Conduct and the State Bar Act.

41. Where appropriate, I have also considered the ABA Model Rules, especially since Maryland—as every other state and the District of Columbia except California—has adopted the ABA Model Rules as its Rules of Professional Conduct.

Duty of Confidentiality—Much Broader Than Attorney-Client Privilege

42. Rule 3-100 and the State Bar Act, business and Professions Code section 6068(e)(1) establish a California's lawyer's duty of confidentiality. A lawyer shall:

> maintain *inviolate* the confidence, and *at every peril* to himself or herself to preserve the secrets of his or her client. [Emphasis added.]

43. It permits only two narrow exceptions: to prevent a criminal act that will result in the death of or substantial bodily harm to another person. [Bus. & Prof. Code section 6068(e)(2).]

44. California's is the strictest confidentiality obligation in the nation, far stricter than found in the other fifty jurisdictions that have adopted some form of ABA Model Rule 1.6

45. Regrettably, some California lawyers conflate the duty of confidentiality with the attorney-client privilege. But they are far from the same.

Attorney-Client Privilege

46. The attorney-client privilege is a statutorily-created evidentiary rule that protects from disclosure a "confidential communication" between a lawyer and his or her client, in connection with seeking or giving legal advice. The attorney-client privilege, however, has exceptions [*United States v. Zolin*, 491 U.S. 554, 562; United States v. Martin, 278 F.3d 988, 999, 1001 (9th Cir. 2002)], and is subject to waiver. [*Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) *en banc*.]

47. Thus, the attorney-client privilege is expressly limited to confidential *communications* between a lawyer and a client.

48. The ethical duty of confidentiality, found in Rule 3-100 and Business and Professions Code section 6068(e)(1) is substantially different and is: "broader than the attorney-client privilege." [*Dietz V. Meisenheimer & Herron*, 177 Cal.App.4th 771, 786 (2009) (4th Dist.,

Div. 1), *citing Goldstein v. Lees*, 46 Cal.App.3d 614, 621 (1975).]

49. Throughout their September 22 testimony, Mr. and Ms. referred to the attorney-client privilege and Mr. 's purported waiver of the testimonial privilege as a rationale for Mr. disclosing client confidences. They fundamentally miss the point.

50. The California Supreme Court dismissed a claim by prosecutors that documents seized from two attorneys' offices should not be screened for privilege because the attorney-client privilege only applied to proceedings in which testimony can be compelled, not to criminal investigations.

51. Rejecting that argument and distinguishing the attorney-client privilege from the lawyers' duties under section 6068(e)(1) and mandating that the documents be screened, the Court stated:

52. Permitting unfettered access to attorney-client communications, simply because there is no pending proceeding at which testimony can be compelled, would violate the policies supporting the privilege as well as the *statutory and ethical obligations of attorneys to maintain client confidences*. [*People v. Superior Court*, 24 Cal.4th 704, 715 (2001), emphasis added.]

The Duty of Confidentiality

53. It has been a longstanding principle of California professional responsibility that "[n]o rule in the ethics of the legal profession is better established nor more rigorously enforced than this one." [*Wutchumna Water Co. v. Bailey*, 216 Cal. 564, 572 (1932).] A California lawyer's "duty to preserve the confidentiality of client information involves public policies of paramount importance." [*In re Jordan*, 12 Cal.3d 575, 580 (1974).]

54. Client confidences and secrets means *any information* a lawyer obtains during the professional relationship, or relating to the representation, which the client has requested be kept inviolate, *or* the disclosure of which might be embarrassing or detrimental to the client. [*Chubb & Son v. Superior* Court, 228 Cal.app.4th 1094 (2014); Cal. State Bar Formal Opn. Nos. 2016-195; 1993-133.]

55. Rule 3-100 itself states:

> The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under the ethical standards of confidentiality, all as established in law, rule and policy. [Rule 3-100, Discussion paragraph [2].]

56. Thus, the duty of confidentiality applies to *information* about the client, *whatever its source*. It applies to virtually everything the lawyer knows about the client or the client's matter regardless of the source of the information. Hence, the duty includes not only confidential attorney-client communications, but also information about the client that may not have been obtained through a confidential communication. The duty of confidentiality "prohibits an attorney from disclosing facts and even allegations that might cause a client or a former client public embarrassment" even if the information is a matter of *public record.* [*Elijah W. v. Superior Court,* 216 Cal.app.4th 140 (2013); *In the Matter of Johnson*, 4 Cal. State Bar Ct. Rptr. 179, 189 (Rev. Dept. 2000) (lawyer received a two-year actual suspension and three-year stayed suspension for disclosing a client's former conviction, even though it was a matter of public record.). *See also* Cal. State Formal Opn. Nos. 2016-195; 2004-165; 2003-161; 1996-146; 1993-133; 1976-37 (The duty of confidentiality applies even where the facts are already part of the public record, or where there are independent sources for information or the lawyer received the information from a non-client or some other source.).]

57. The duty lasts even after the lawyer-client relationship has ended. [*Wutchumna, supra*, at 573-74; *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 822-23 (2013; *Yorn v. Superior Court*, 90 Cal.App.3d 669, 675 (1979).]

58. Other than the two narrow, murder/mayhem exceptions in section 6068(e)(2), the *only* way a lawyer in California can disclose client confidential information or secrets is with the client's *informed* consent. [Rule 3-100(A) ("without the informed consent of the client").] The principles of waiver, including implied waiver, do not absolve a lawyer of his or her duty of

confidentiality.

59. I have relied on almost none of Mr. 's testimony because his memory of what happened during the interviews was so poor.

60. I did rely on his admission that he never obtained Mr. 's informed consent to make any of the disclosures he made to the FBI agent or to the Assistant United States Attorneys.

61. I was surprised when he testified that, during the first FBI/Assistant United States Attorney (AUSA) interview, he considered himself still to be Mr. 's lawyer.

62. I am aware of his rather adamant testimony contradicting Ms. that Mr. , and not Ms. , asked most of the questions during the interviews. That contradiction makes no difference in any opinion or conclusion I draw.

63. Rather than Mr. 's testimony about the interviews, I have relied on the typed memoranda of the FBI/AUSA interviews, admitted into evidence—in a binder the defense marked as an exhibit.

The First Interview

64. During the first, March 13, 2013, in person interview, Mr. revealed information that his duty of confidentiality forbad him from revealing.

65. For example, on page one of the notes of that interview, the second paragraph: " first met with , in approximately ..." to the end contains confidential information subject to section 6068(e)(1) and Rule 3-100. So does the whole third paragraph: "During his first meeting . . ." to the end. So does the fourth paragraph: "Until 's 2004 examination ..." to the end, even though it contains information that is in the public record.

66. On page two, Mr. reveals confidential information about two other clients, and . In the first paragraph on page two, the second sentence: " was shown . . . " to the end is confidential information subject to

section 6068(e)(1) and Rule 3-100.

67. The second paragraph on that page, starting with the second sentence: "His retainer did not ..." to the end is confidential. Business and Professions Code section 6149 expressly states that a lawyer's written fee agreement is a confidential communication within the meaning of section 6068(e)(1).

68. The third paragraph on page two: "There were no . . ." is likewise confidential.

69. The second paragraph on the first page and the last paragraph of the memorandum is arguably confidential within section 6068(e)(1) and Rule 3-100 in which he describes his "general client procedures" to the extent he permits others to contrast what "other" clients do with what Mr. is said to have done.

70. I know from Mr. 's admission during his testimony that Mr. never gave informed consent for Mr. to make these disclosures and, in fact, that Mr. did not know that his lawyer (as Mr. testified) or former lawyer was meeting with the government.

The Second Interview

71. The second, June 1, 2015, interview, by telephone, involved Messrs. and and Ms. . On page one of the interview memorandum, all three paragraphs: " recalled ...;" "At his second ...;" and " does not recall ..." contain confidential information subject to section 6068(e)(1) and Rule 3-100.

72. On page two, all the paragraphs—five—except the last contain confidential information that Mr. had no right to disclose.

73. I know from Mr. 's admission that Mr. did not give his informed consent to these disclosures.

The Third Interview

74. During his fourth, June 2, 2015 telephone interview with Messrs. and and Ms. , Mr. again revealed information that his duty of confidentiality required him to keep confidential. The fact that Ms. told Mr. the government did

not want anything covered by the attorney-client privilege is irrelevant.

75. His highly detailed description of his "general practices" with *all* his clients—impliedly including Mr. —on all three pages of the memorandum to two federal prosecutors and an FBI agent asking questions about his representation of Mr. is confidential information that could be detrimental to his former client. It falls within the scope of section 6068(e)(1) and Rule 3-100 and he should never have disclosed it.

76. Again I know from Mr. 's admission that Mr. never gave his informed consent for these disclosures.

The Fourth Interview

77. On May 31, 2016, AUSA and FBI Agents interviewed Mr. by telephone again.

78. Mr. 's statement that he did not reveal attorney-client privileged material to Mr. and Ms. because he talked about something that was a "matter of public record" demonstrates a fundamental misunderstanding of his duty of confidentiality to his former client as Rule 3-1000 and section 6068(e)(1) mandate.

79. Mr. again revealed confidential information about his client including " described as not being forthcoming … the sale," in the second paragraph; " did not expect to utilize … not surprised," in the third. Mr. 's statement in the paragraph on the second page of the interview memorandum that he saw himself as a "percipient witness" betrays a fundamental ignorance of the duty of a lawyer to a former client. We are not mere bystanders witnessing car accidents. We owe former clients a continuing duty of loyalty and confidentiality. The California Supreme Court made clear years ago that "an attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." [*Wutchumna, supra*, 216 Cal. At 573-74; *Oasis West Realty, supra* 51 Cal.4th 822-23.]

80. Mr. did not give Mr. informed consent to make the revelations nor could Mr. reasonably believe that the revelations were necessary to prevent Mr. from committing a criminal act that would reasonably result in the death or substantial bodily injury of a person.

81. The fact that the Mr. may have thought Mr. might somehow "blame" him for what occurred in his bankruptcy is not an excuse for disclosing client confidences or secrets.

82. Even the exception to the attorney-client privilege in California Evidence Code 958 only applies when "either the attorney or client charges the other with a breach of duty arising from their professional relationship." [*Dietz, supra* at 786.] Here, importantly, Mr. never asserted a breach of duty claim against Mr. , either in civil court or with the State Bar.

83. Critically, *no* case holds that there is any such exception to the duty of confidentiality that Rule 3-100 and section 6068(e)(1) impose.

84. Accordingly, Mr. had no right to reveal Mr. 's client confidences and secrets as he did.

85. Mr. breached his duty of confidentiality to Mr. during each of the four interviews with AUSAs , and FBI agents ;

86. The State Bar does not view such conduct lightly. The State Bar has adopted Standards for Attorney Sanctions for Professional Misconduct to determine appropriate sanctions and ensure consistency. Suspension is the presumed sanction when a member intentionally reveals client confidences or secrets. [Standard 2.6(a)]

Rule 1-120

87. Rule 1-120 prohibits California lawyers from knowingly assisting in, soliciting or inducing any violation of the Rules of Professional Conduct of the State Bar Act.

88. Messrs. , as well as Mr. are

members of the State Bar and also practicing before this Court. They must adhere to the California Rules of Professional Conduct and the State Bar Act as well as other "standards of professional conduct required of members of the State Bar."

89. It is clear from the four interview memoranda that the FBI agents and/or AUSAs asked questions of Mr. . Who asked the most questions is a disputed fact, but unimportant to my opinions and conclusions. We do not know from either the handwritten notes taken during some of the interviews or the subsequent memoranda what questions were asked. We do know, however, that the questions elicited Mr. 's revelation of client confidences and secrets patently within the scope of Rule 3-100 and section 6068(e)(1).

90. We know from the interviews that Mr. did not reveal a client confidence or secret just once, but repeatedly—responding to more than one, arguably many, questions.

91. We know from the interviews that Mr. revealed client confidences or secrets not just one day, but on four separate occasions.

92. We know from the interviews that Mr. conflated the attorney-client privilege with his duty of confidentiality and that he had little or any understanding of the duty of loyalty or confidentiality to a former client.

93. We know from the interviews that AUSAs attempted to obtain information from Mr. that was helpful to the government and detrimental to Mr. . And they were successful.

94. It is axiomatic that as lawyers we are responsible to know the Rule of Professional Conduct, the operative provisions of the State Bar Act and the opinions of California courts that establish the ethical standards for California lawyers. [Rule 1-100(A).]

95. That Mr. failed his duties of confidentiality and loyalty to Mr. , he did at his peril. But that was no excuse for Messrs. continuing to ask questions after it became apparent that Mr. was violating his obligations under Rule 3-100 and section 6068(e)(1) in order to get information that was detrimental to Mr. and favorable to the government.

96. In so doing, multiple times, they violated Rule 1-120 and assisted, solicited and induced Mr. 's violations of Rule 3-100 and section 6068(e)(1).

The *Rico/State Fund* Ethical Standard

97. The California Supreme Court has established an ethical standard for California lawyers who come into possession of confidential information—in that case protected attorney work-product notes—"inadvertently." [*Rico v. Mitsubishi Motors Corp.*, 42 Cal.4th 807, 817-818 (2007).] The Court adopted as the "standard governing the conduct of California lawyers" the "bright line" rule first announced in the *State Fund.* [*State Comp, supra.* at 656.]. The lawyer must immediately stop as soon as it is reasonably apparent that the information is confidential or privileged, and *immediately* notify the owner of the information that the lawyer has it. If they cannot work out how to address the issue, they go to the court. The penalty there for disregard of the standard was disqualification.

98. I put "inadvertent" in quotes because, for purposes of the *Rico/State Fund* ethical standard, "inadvertent" means information that the sender—in the case of documents—did not intend the lawyer to have. [*Clark v. Superior Court*, 196 Cal.App.4th 37, 54 (2011) (4th Dist., Div.1) (addressing, *inter alia*, the meaning of "inadvertent" under the *Rico/State Fund* standard; again disqualification for ignoring the ethical obligation).]

99. The California Supreme Court reaffirmed again this year its adoption of the *Rico/State Fund* ethical standard in *Ardon.* [*Ardon, supra.* at 1186-1188.]

100. While the *Rico/State Fund* standard has thus far been applied to documents in the reported cases—where the confidential nature of the information is more readily available—the same ethical standard applies to confidential information that a lawyer acquires through interview where the interview memoranda memorialize what Mr. said and where the confidential nature of the information is not in doubt.

101. I understand that Mr. . did not disclose for some time to Mr. 's lawyers either the fact of the first interview or the nature of the information they obtained.

102. Mr. failed to meet the *Rico/State Fund* ethical standard when they did not stop Mr. as soon as he began revealing client confidences or secrets during the first interview and immediately informing Mr. 's lawyers that they had interviewed him and what he had begun to say.

103. That Mr. failed his ethical responsibilities to his former client is no excuse. Under both the *Rico/State Fund* ethical standard and Rule 1-120, Mr. and Mr. cannot exploit that ignorance or failure.

104. By doing so Mr. violated Rule 1-120 and the ethical standard the California Supreme Court established in *Rico*.

105. The Standards for Attorney Sanctions provide that suspension not to exceed three years or reproval is the presumed sanction for a violation of a provision of a Rule of Professional Conduct not otherwise specified. [Standard 2.19.] That would include Rule 1-120.

106. In addition, the Court may look to the ABA Model Rules of Professional Conduct for guidance. [*Cobra Solutions, supra.* 38 Cal4th at 852.

107. As the District Court for the Northern District of California stated:

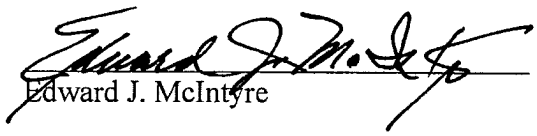
> The ethical duty of confidentiality may be enforced by more than just against an offending attorney. In a criminal case, where an attorney violates this ethical duty by revealing a client's confidences to the government, a court may suppress the resulting evidence. [Citation.] Prosecutors may also be subject to sanctions where they have induced an attorney to violate her duty of confidentiality. Model Rules of Prof'l Conduct, R. 8.4(a). [*United States v. Stepeny*, 246 F.Supp2d, 1069, 1074 (N.D. Cal. 2003)

Ethics Resources available

108. If Mr. had any questions about the propriety of discussing his representation of his former client with the FBI or prosecutors, both the State Bar and the San Diego County Bar Association maintain Ethics Hotlines that are staffed by persons with considerable ethics expertise available to answer a lawyer's questions.

109. I understand from the Department of Justice website that it has its own ethics resources available to its personnel.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the facts in my declaration are true and correct, that the opinions and conclusions in my declaration are based on my analysis, research and support as set forth and that I executed it on October 13, 2016, at San Diego, California.



Edward J. McIntyre