

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 20-0004

MARLENE WESTBROOK )  
(Widow of PAUL WESTBROOK) )  
 )  
          Claimant-Petitioner )  
 )  
      v. )  
 )  
F. RODGERS INSULATION, WESTERN )  
MACARTHUR COMPANY )  
 )  
      and )  
 )  
STATE COMPENSATION INSURANCE )  
FUND )  
 )  
          Employer/Carrier-Respondents )  
 )  
PERFORMANCE ABATEMENT )  
SERVICES )  
 )  
      and )  
 )  
STATE COMPENSATION INSURANCE )  
FUND )  
 )  
          Employer/Carrier-Respondents )  
 )  
PERFORMANCE CONTRACTING, )  
INCORPORATED )  
 )  
      and )  
 )  
NATIONAL UNION FIRE INSURANCE )  
 )

DATE ISSUED: 05/18/2021

Employer/Carrier-Respondents )  
 )  
 PLANT INSULATION COMPANY )  
 )  
 and )  
 )  
 ARROWOOD INDEMNITY COMPANY )  
 (Successor in interest to EMPLOYEE )  
 BENEFITS INSURANCE COMPANY) )  
 )  
 Employer/Carrier-Respondents ) DECISION and ORDER

Appeal of the Order Awarding Fees of Steven Berlin, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimant.

Merri A. Baldwin and Aaron M. Scolari (Rogers Joseph O’Donnell), San Francisco, California, for Brayton Purcell, LLP.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Claimant and Brayton Purcell (BP) appeal Administrative Law Judge Steven Berlin’s Order Awarding Fees (Fee Order) (2015-LHC-00587) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). The amount of an attorney’s fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 41 BRBS 53(CRT) (9th Cir. 2007).

The facts in this case are undisputed: Decedent worked for various employers on the docks as an asbestos insulator; he developed asbestosis in the 1970s, retired in 1988, and died in February 2013, due in part to the asbestosis alleged to be work-related. In 2007, after his lung collapsed, he and his wife, Claimant, retained Brayton Purcell (BP) as their counsel and filed two civil personal injury claims, as well as an action to preserve his deposition. They settled with approximately 55 defendants (companies and bankruptcy trusts) before his death, recovering over \$1,400,000. Cl. Brief at 3. Upon Decedent’s death, counsel filed a wrongful death claim in California in April 2013 on behalf of

Claimant and the couple's adult children. In July 2013, counsel filed a Longshore claim for death benefits on Claimant's behalf. 33 U.S.C. §§909, 913.

After consultation with BP, Claimant thereafter chose to pursue only the Longshore claim as a litigation strategy and opted-out of the wrongful death claim. She was dismissed from the wrongful death suit on August 13, 2013, before any settlements were reached, and pursued her rights exclusively under the Act.<sup>1</sup>

To protect an employer's right to offset any third-party recovery against its liability for compensation under the Longshore Act, 33 U.S.C. §933(f), a claimant must either give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the employer's and carrier's prior written approval of the third-party settlement. 33 U.S.C. §933(g). Any amount Claimant would have recovered in the wrongful death claim thus would subject her to an in-kind reduction in her Longshore claim recovery under the statutory scheme. 33 U.S.C. §933(f). A claimant's decision concerning which remedies to pursue (via a third-party claim and/or a Longshore claim) creates a common dilemma in Longshore claims, and the application of Section 33(g) to the choices of the uninformed claimant aptly has been termed "a trap for the unwary." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 483, 26 BRBS 49, 53(CRT) (1992).

Given Claimant's opt-out of the wrongful death claim, the facts in this case are fundamentally distinguishable from those in *Hale v. BAE Sys. San Francisco Ship Repair*, 52 BRBS 57 (2018), *rev'd*, 801 F. App'x 600 (9th Cir. 2020). *Hale* similarly involved a widow's claim for death benefits under the Act and a California wrongful death claim that the heirs of the decedent filed, which initially included the widow as a necessary party. Like here, BP represented the widow in both claims. Unlike this case, however, the widow in *Hale* never opted-out of the wrongful death claim, which BP settled without notifying

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<sup>1</sup> The California wrongful death statute is designed to compensate individual heirs for the value of support they could have reasonably expected to have received from the deceased if he or she had lived. CAL. CIV. PRO. §377.61. The California Book of Approved Jury Instructions thus specifically instructs juries to determine the amount of damages based on the support "each of the heirs" would have personally received, guided by a list of considerations to determine their subjective circumstances and respective relationship to the deceased. *See* BAJI CAL. JURY INSTR. CIV. 1450. Given that procedure, it is difficult to see how removing Claimant from the equation necessarily benefits the other heirs, as the administrative law judge concluded in determining a conflict exists, given that her removal does not change their individual relationships to the deceased and thus the damages they would be expected to receive under the jury guidelines. CAL. CIV. PRO. §377.61; BAJI CAL. Jury Instruction CIV. 1450.

the Longshore defendants/employers. Because California contract law bound her to the wrongful death claim settlement, the Board affirmed the administrative law judge's finding that she "entered into" it for the purposes of Section 33(g), 33 U.S.C. §933(g). Consequently, as she did not obtain the employer's prior written approval, it barred her recovery under the Act. *Hale*, 52 BRBS 57.

By contrast, Claimant in this case indisputably opted-out of the wrongful death claim, so the primary concerns in *Hale* -- whether BP (either negligently or intentionally) bargained away the claimant's Longshore remedy in favor of the wrongful death remedy, thereby violating its duty of care and jeopardizing the employers' Longshore liability offsets -- never was an issue. *Hale*, 52 BRBS at 63. Moreover, the United States Court of Appeals for the Ninth Circuit's subsequent reversal of *Hale*, in which it held that the widow did not personally sign the settlement and therefore did not "enter into" it for purposes of Section 33(g), inevitably calls into question whether those concerns ever were really at issue. *Hale*, 801 F. App'x at 601-602.<sup>2</sup>

In 2016, Claimant and Employers/Carriers reached a Section 8(i), 33 U.S.C. §908(i), settlement, and Claimant received \$220,000 for her Longshore death benefits claim.<sup>3</sup> The

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<sup>2</sup> We disagree with the administrative law judge's speculation that it was categorically in Claimant's best interest to pursue both avenues of recovery via the wrongful death claim and her Longshore claim. Fee Order at 12-15. That decision is unique to the facts of each case and depends on the subjective interests of the individuals involved. Moreover, the possible outcomes vary greatly given the respective merits of each claim, so the best strategy does not fit neatly into a one-size-fits-all box. The primary source of conflict the administrative law judge identified thus is not supported by the record, nor Longshore practice in general. *See, e.g.*, Declaration of Alan Brayton at 3; *see generally Seachris v. Brady-Hamilton Stevedore Co., Director, OWCP*, \_\_\_ F.3d \_\_\_, No. 18-71807, 2021 WL 1523252 at \*7 (9th Cir. Apr. 19, 2021) (error to outright reject evidence supporting fee petitions in a conclusory manner). Nor does substantial evidence support finding that BP "coerced" Claimant into pursuing her Longshore claim to avoid a conflict. Fee Order at 15-20. The record is devoid of evidence that Claimant is dissatisfied with BP's representation. Her decision to freely follow BP's advice was immanently rational given their preexisting relationship and the results it obtained for Decedent and Claimant prior to Decedent's death. Claimant's exceptional Longshore claim result further confirms, in retrospect, it was not an unwise choice.

<sup>3</sup> The settlement agreement allocated payment of the \$220,000 funds as follows: \$123,200 (56%) from State Compensation Insurance Fund; \$30,800 (14%) from Arrowood

settlement also provided Employers/Carriers would pay BP an attorney's fee and costs in the amount of no more than \$145,000, apportioned among Employers. In addition, BP secured over \$240,000 for the Decedent's remaining heirs in the wrongful death claim. Ultimately, Administrative Law Judge William J. King approved the merits of the Longshore settlement agreement but not the fee -- raising sua sponte a potential ethical consideration involving BP. Before Judge King addressed this issue, he left the Office of Administrative Law Judges and the case was assigned to Judge Berlin (the administrative law judge).<sup>4</sup>

Following the settlement, Counsel requested approval of the Longshore fee agreement on three occasions. Neither Employers, nor the Director, Office of Workers' Compensation Programs, in his role as administrator of the Act, objected.

In response, the administrative law judge issued an Order to Show Cause (OSC) on February 26, 2019, identifying many of Judge King's conflicts of interest concerns. *Compare* Order (Nov. 18, 2016) *with* OSC (Feb. 26, 2019). Based on the documents and answers BP filed -- and his view of inherent conflicts that the simultaneous representation of clients pursuing Longshore and wrongful death claims created -- the administrative law judge found BP violated Rule 3-310 of the California Rules of Professional Conduct, CAL. ST. RPC 3-310 (1992) (California Rules or Rules). He found undisclosed conflicts of interest and a failure to obtain consent for conflicted representation. Having found the violations were "not trivial," were "durable and ongoing," and the firm did not appreciate their seriousness, he cut BP's fee in half: instead of awarding the \$145,000 the parties had settled on, he awarded \$83,000 (\$21,000 in costs + 50% of the remaining \$124,000), apportioning liability to the Employers/Carriers in accordance with the agreed percentages.

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Indemnity Company; and \$66,000 (30%) from National Union Fire Insurance. Section 8(i) Addendum; Decision and Order (Apr. 26, 2017).

<sup>4</sup> Normally, when an attorney's fee is included in a settlement of a claim, approval of the agreement includes approval of the fee, and disapproval of any part of a settlement means the entire agreement is disapproved. 20 C.F.R. §§702.132(c), 702.241(e); *see Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014). Originally, Judge King disapproved the settlement in its entirety; he stated the disapproval was temporary for the compensation settlement, as it was adequate and not procured under duress, but he ordered additional filings to support the attorney's fee and to address the conflicts issues he raised. Order (Nov. 18, 2016). Claimant moved to vacate the Order in part, asking for approval of the settlement of the compensation claim while severing the fee issue. Cl. Motion to Vacate (Feb. 17, 2017). Thereafter, Judge King approved the settlement of the Longshore death benefits claim and retained jurisdiction over the fee/conflict issues.

Fee Order at 39-40.<sup>5</sup>

Claimant and BP appeal, contending the administrative law judge erred in finding conflicts of interest and in disregarding the settlement agreement. They ask the Benefits Review Board to award the agreed-upon fee. None of the Employers has responded or otherwise objected to the original fee agreement; the Director filed a letter indicating he would not be filing a response brief.<sup>6</sup>

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<sup>5</sup> Though the Rules “underwent substantial revision” in 2018, and Rule 3-310 was amended and re-numbered to Rule 1.7, CAL. ST. RPC 1.7 (2019), the administrative law judge found the 1992 version of the California Rules applies in this case. He stated:

The relevant rule [is] Rule 3-310, “Avoiding the Representation of Adverse Interests.” Rule 3-310(C) provides:

A member shall not, without the informed written consent of each client:

- (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
- (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
- (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Order Awarding Fees (Fee Order) at 8. Additionally, he noted the following definitions: “‘Informed written consent’ means ‘the client’s or former client’s written agreement to the representation following written disclosure.’ Rule 3-310(A). ‘Disclosure’ is ‘informing the client o[r] former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client.’ *Id.*” Fee Order at 8 n.12.

<sup>6</sup> On August 12, 2020, the Board granted Claimant’s and Performance Contracting, Inc./National Union Fire Insurance’s joint motion to dismiss Performance Contracting and its insurer from the appeal without prejudice. The Board remanded that portion of the case to the district director to address a proposed settlement of counsel’s attorney’s fee for which

Section 28(a) of the Act, 33 U.S.C. §928(a), provides for an employer-paid attorney's fee when the employer declines to pay any benefits, and the claimant successfully uses an attorney to obtain them. A settlement of the claim following a dispute constitutes a successful prosecution. *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230 (1993); *Brown v. Gen. Dynamics Corp.*, 12 BRBS 528 (1980).

Parties may agree to settle an attorney's fee as part of a Section 8(i) settlement. *See generally Losacano v. Elec. Boat Corp.*, 48 BRBS 49 (2014); 20 C.F.R. §702.132(c). While an administrative law judge has the authority to address whether an attorney has committed an ethical breach in deciding to approve an attorney's fee, *see generally Smiley v. Director, OWCP*, 984 F.2d 278 (9th Cir. 1993); *Baroumes v. Eagle Marine Services*, 23 BRBS 80, 83 (1989), the Longshore Act and regulations make clear that an administrative law judge must consider "the necessary work done [taking] into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded" when awarding a fee. 20 C.F.R. §§702.132(a), 702.242(b)(1); *see* 33 U.S.C. §928(c).

The administrative law judge erred applying these factors. We agree with Claimant and BP: whether or not a California Rule 3-310 violation occurred, it did not affect the quality of representation in this Longshore claim in a manner that justifies disregarding the fee agreement. 20 C.F.R. §702.132(a).

This is a complex case with an appreciable outcome. Unlike the case authority the administrative law judge relied on, Claimant never objected to BP's representation, despite at all times being aware of the facts that give rise to any alleged potential conflict. Moreover, BP successfully navigated the Section 33(g) trap in a manner that never put Claimant's Longshore claim at risk or jeopardized Employers' right to an offset of its Longshore liability. As a result -- to this day -- no party in this case objects to BP's conduct or contests its right to the agreed-upon fee. For these reasons, as detailed more fully below, and given the strong preference for settlement of fees over protracted litigation, we believe the administrative law judge was bound to honor the parties' fee agreement.

*First*, the Longshore claim settlement is an objectively exceptional result for Claimant. As BP notes in its brief, given the timing of Decedent's death and Claimant's life expectancy, a fair estimate of the entirety of her Longshore claim was \$238,000. By any measure, \$220,000 upfront without having to face the uncertainty of a hearing and the prospect of lengthy appeals prior to receiving compensation is an exceptional outcome, as

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Performance Contracting/National Union is liable. The appeal involving the remaining Employers/Carriers is before us.

Judge King recognized in approving the settlement. *See, e.g., Carlin v. Diary America, Inc.*, 380 F. Supp. 3d 998, 1010 (E.D. Cal. 2019) (“Approval of settlement is preferable to lengthy and expensive litigation with uncertain results.”). Notably, the administrative law judge did not revisit the sufficiency of the settlement in his fee order -- other than to reluctantly acknowledge Claimant suffered no economic consequences as a result of BP’s representation. Fee Order at 38.

*Second*, even assuming (*without deciding*) an ethical violation occurred, the factors the Ninth Circuit has identified in determining whether to reduce an attorney’s fee, and the equitable considerations California courts have considered that mitigate a potential California Rule 3-310 violation, do not support the administrative law judge’s decision. *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012) (listing, among other relevant factors, the gravity and willfulness of the violation, its effect on the client, and any harm suffered by the client); *Sheppard, Mullin, Richter & Hampton, L.L.C. v. J-M Manufacturing Co., Inc.*, 425 P.3d 1 (Cal. 2018) (equitable considerations did not justify an outright ban on attorney’s fees where counsel hid adverse representation from client, client objected, and client sued to recover all fees upon learning of the conflict) (“*Sheppard*”).

There is no suggestion BP willfully violated the California Rule, and there has been no showing of any harmful effect on Claimant. Moreover, unlike *Sheppard*, which is the only authority the administrative law judge cited in his discussion to justify the cutting of the agreed-upon fee, Fee Order at 33-39, Claimant was at all times aware of the facts that gave rise to any potential conflict. She unambiguously consented to continued representation through her retention of counsel and through the consent forms she signed at various points. She still does not object to BP’s representation. That fundamentally distinguishes these cases.

While there may be an issue about the timing and full extent of the written disclosures, those issues pale in comparison to the active deception which occurred in *Sheppard* and Claimant’s full-throated and enthusiastic endorsement of BP’s representation here, particularly given Rule 3-310 is designed to protect the client. *Flatt v. Superior Court*, 885 P.2d 950, 956 n.4 (Cal. 2010) (“The principle of loyalty is for the *client’s* benefit”). Moreover, the sufficiency of the written disclosures is at best unclear as “California law does not require that every possible consequence of a conflict be disclosed for a consent to be valid.” *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1301 (Cal. Ct. App. 1995). Instead, a conflict waiver may be valid even though it does not undertake “the impossible burden of explaining separately every conceivable ramification.” *Maxwell v. Superior Court*, 639 P.2d 248, 257 (Cal. 1982).

*Finally*, in addition to protecting the Longshore claim recovery, opting Claimant out of the wrongful death claim also protected Employers’ interests. The purpose of Section



33 is to prevent double recovery and to protect employers from liability when another party is at fault, as the employers are the real parties-in-interest when a third-party settlement might reduce their Longshore claim liability. *See Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT). That Employers and the Director have not objected to BP's conduct, or to the attorney's fee in this case, further indicates BP adequately navigated any potential conflict between the Act and the California wrongful death statute in its representation of Claimant and Decedent's other heirs. That lack of objection further favors honoring the parties' original agreement: "Strong judicial policy favors settlements" particularly with "complex" litigation. *In re Syncor ERISA Litigation*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution.") (citation omitted).<sup>7</sup>

The settlement in this case was an exceptional result for Claimant. Whether a violation of Rule 3-310 occurred, it did not affect the quality of representation in Claimant's Longshore claim, and it did not rise to the level where it justifies disturbing the parties' agreement pursuant to the factors the Ninth Circuit has identified in adjusting fee awards. Accordingly, we reverse the administrative law judge's reduction of BP's fee and

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<sup>7</sup> In light of other appeals with similar issues pending before the Board and the Office of Administrative Law Judges, we acknowledge a legitimate basis for the administrative law judge's concerns regarding a potential pattern of misconduct. *See Hale*, 52 BRBS 57; *Hodge, et al v. Dee Engineering Co. et al*, BRB No. 20-0189 *et al* (Apr. 29, 2021). But these cases differ in material aspects, and each must be considered on its own facts and merits. Moreover, the landscape has changed significantly following the Ninth Circuit's reversal of *Hale*. Approving the parties' agreement on fees thus does not "eliminate" an established Rule violation as our dissenting colleague states. Rather, putting any assumed Rule violation in context of the overall representation in this case, as the law requires, mandates respecting the parties' choices and their agreement to settle this dispute. 20 C.F.R. §§702.132(a), 702.242(b)(1); *see* 33 U.S.C. §928(c).

award the agreed-upon fee, as apportioned.<sup>8</sup>

SO ORDERED.

JONATHAN ROLFE  
Administrative Appeals Judge

I concur:

DANIEL T. GRESH  
Administrative Appeals Judge

JONES, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reverse the administrative law judge's order and award the full attorney's fee. I disagree with my colleagues' conclusion that the outcome of the Longshore case eliminates the original conflict by establishing it did not affect the quality of representation in the Longshore claim. Instead, I would reject Claimant's suggestion that the administrative law judge lacks authority to remedy an ethical violation by reducing counsel's fee, affirm the finding of a rule violation, and remand the case for the administrative law judge to reconsider the fee reduction based on both the proper conflict and regulatory fee factors.

Initially, Claimant and BP challenge the administrative law judge's finding that BP had an undisclosed conflict of interest which warranted a 50% reduction of BP's attorney's fee – firmly placing the question of an ethical violation before the Board.<sup>9</sup> As the majority correctly summarized above, the administrative law judge has the authority to address

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<sup>8</sup> To maintain the agreed apportionment, the total fee is subject to adjustment based on any approved fee settlement between Claimant and Performance Contracting/National Union. *See* n.6, *supra*.

<sup>9</sup> Claimant reasonably does not challenge the administrative law judge's sua sponte raising of the conflicts issue. Courts have a duty to ensure fairness and to oversee the members of the bar before them, *Smiley v. Director, OWCP*, 984 F.2d 278, 282 (9th Cir. 1993), and Employers do not have standing to raise the issue in this case, *In re Marriage of Murchison*, 199 Cal. Rptr. 3d 800 (Cal. Ct. App. 2016).

whether an attorney has committed an ethical breach under state law. *Baroumes v. Eagle Marine Services*, 23 BRBS 80, 83 (1989); *see also Smiley v. Director, OWCP*, 984 F.2d 278, 283 (9th Cir. 1993); *Gas-A-Tron of Ariz. v. Union Oil Co. of Cal.*, 534 F.2d 1322, 1324 (9th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976); 29 C.F.R. §§18.12(b), 18.22(c), 18.87. If there has been a violation, case precedent establishes he may deny or reduce the offending attorney’s fee. *Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012); *Sheppard, Mullin, Richter & Hampton, L.L.C. v. J-M Manufacturing Co., Inc.*, 425 P.3d 1 (Cal. 2018).

An attorney’s duty of loyalty to his clients, along with the complementary duty to avoid conflicts, arises at the beginning of the attorney’s representation. *Miller v. Alagna*, 138 F. Supp. 2d 1252, 1256 (D. Cal. 2000). Once Claimant was dismissed from the wrongful death claim, she and her adult children became simultaneous clients in different claims based on the same allegedly-work-related death. California law requires informing clients of all actual *and potential* conflicts, and the potential application of Section 33(g) against Claimant due to a third-party settlement involving the same death for which she filed a claim for benefits constitutes a potential conflict requiring disclosure and consent. 33 U.S.C. §933(g); CAL. ST. RPC 1.7 (2019); CAL. ST. RPC Rule 3-310(C) (1992).

The documents of record, which do not reveal any disclosure or consent at the beginning of the representation when the potential conflict arose, support the administrative law judge’s conclusion that there was a rule violation. Even BP concedes there was a “potential conflict.” Cl. Br. at 10.<sup>10</sup> Although BP tries to justify its actions, it created a situation where it could not provide undivided loyalty to all of its clients. In a self-regulated profession, informed consent and waivers are necessary *at the time the conflict is created*. Consequently, BP had an obligation to obtain Claimant’s informed consent and waiver at the beginning of the representation, and it did not do so. It matters not that the conflict did not materialize: A violation is not determined in hindsight or by the end result.

Having reasonably concluded a violation occurred, the administrative law judge cut BP’s fee in half. Although he has discretion in determining the amount of an attorney’s fee, *see, e.g., Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011), he did not explain how he arrived

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<sup>10</sup> BP attempts to mitigate its concession by asserting it “substantially complied” with the California Rules and its violation was “possibly a technical” one which “did not constitute a material violation” warranting a 50% fee reduction. Cl. Br. at 10. BP’s attempt to lessen the severity of its violation does not change the fact that BP violated the Rules.

at the 50% reduction.<sup>11</sup> While the administrative law judge considered the breach ongoing and serious, the “erosion” of loyalty and trust serious, and the potential for harm great, he did not consider the applicable factors set forth by the Ninth Circuit. *Rodriguez*, 688 F.3d 645. To determine the severity of the violation, and, therefore, the degree of an appropriate remedy, the administrative law judge must consider 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. *Id.* at 655. Because the case arises under the Act, he must also consider the factors identified in 20 C.F.R. §702.132(a).<sup>12</sup> Consequently, I would remand the case for the administrative law judge to reconsider the fee reduction in light of both the proper conflict and regulatory fee factors.

MELISSA LIN JONES  
Administrative Appeals Judge

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<sup>11</sup> The administrative law judge did, however, clearly state: “Weighing these [conflict] factors along with the need for deterrence, I find that a substantial reduction in fees and costs is necessary but that a complete forfeiture is unwarranted.” Fee Order at 38.

<sup>12</sup> Section 702.132(a) states in pertinent part: “Any fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. . . .”