SAN DIEGO COUNTY BAR ASSOCIATION

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Introduction

This issue features three disqualification cases, one — *Yim* — underscores that, the language of the advocate/witness rule notwithstanding, judges retain discretion to disqualify lawyers who seek to testify and serve as advocates. We included the *Big Lots* and *Wellons* cases — the other federal cases from earlier this year — to highlight different approaches to attempts to disqualify lawyers who pressed the edges of their *pro hac vice* status.

We have also included two litigator misconduct cases — one which involved unprofessional conduct at a mandatory settlement conference that gave rise to a contempt order; the other, a frivolous appeal producing a hefty sanction — each resulting in referral to the State Bar for possible discipline, a pointed reminder of the court's Business and Professions Code section 6086.7: obligation to report contempt orders, reversals, or sanctions where disciplinable misconduct may have occurred.

As always, we welcome your comments and suggestions about recent decisions, authority, or issues we might address in future editions. For immediate questions, the Legal Ethics Committee maintains a hotline that SDCBA members can call at any hour (619) 231-0781 x4145. Just follow the instructions and a committee member will get back to you with the ethics authority you might consider.

We look forward to 2021.

In This Issue:

20.4.1 *Doe v. Yim* (2020) 55 Cal.App.5th 573 — Court of Appeal of California, Second Appellate District, Division Four (October 5, 2020)

Issue:
Can a long-standing relationship trigger disqualification under the advocate/witness rule, in spite of the client's informed written consent?

Analysis:
Yes. About eight months after her marriage ended, a lawyer sued her former husband on behalf of her adult daughter, who was his stepdaughter, alleging he had sexually abused her daughter throughout a four-year period of their 17-year marriage when her daughter was a minor (9 to 13 years old).

The former husband moved to disqualify the lawyer under the advocate-witness rule (Rules of Professional Conduct, rule 3.7(a)). He argued she would be a key witness whether he had exploited his marriage with her to sexually abuse her daughter and, even if her daughter had given informed consent to the representation, the lawyer's dual role as advocate and witness would prejudice the integrity of the judicial process. Specifically, her role would confuse the jury with respect to any argument she made as a lawyer about her own testimony as a witness; and would create a conflict between her duty as a witness to tell the truth, even where the truth might harm her daughter's interests, and her duty as lawyer to advocate for her daughter's interests. The lawyer argued she had her daughter's informed consent and that rule 3.7(a) applied only to trial, not pre-trial activities.

The trial court granted the motion to disqualify the lawyer from the case in its entirety. In disqualifying the lawyer from trial and certain pretrial events, the court relied on the advocate-witness rule; in disqualifying the lawyer from representing her daughter at all, the trial court relied on the lawyer's potential misuse of confidential information she obtained through her 17-year marriage with the defendant would prejudice him and the integrity of the judicial process.

The Court of Appeal affirmed. It agreed that the lawyer was nearly certain to be a key witness at trial and the trial court acted within its discretion to employ the advocate-witness rule — to avoid factfinder confusion — to disqualify the lawyer not only at trial, but also in deposition and pretrial evidentiary hearings at which she was likely to testify.

The appellate court also agreed that the trial court acted within its discretion to disqualify the lawyer from all other phases of the litigation because of the potential misuse of confidential information obtained during her marriage to the defendant. Here, the lawyer had obtained confidential information from the defendant that she could use in drafting discovery requests and responses, preparing her daughter and other witnesses for deposition, formulating deposition questions, even if disqualified from taking or defending the depositions themselves, and negotiating settlement.

Comment [3] to rule 3.7(a makes clear that a client's informed consent is not absolute. It provides, "Notwithstanding a client's informed consent, courts retain discretion to take action, up to and including disqualification of a lawyer who seeks to both testify and serve as an advocate, to protect the trier of fact from being misled or the opposing party from bring prejudiced."

One purpose of the advocate-witness rule is to prevent factfinder confusion, whether an advocate-witness's statement is to be considered proof or argument, as well as avoiding the risk that a jury would tie a lawyer's persuasiveness as an advocate to her or his credibility as a witness.

20.4.2 *In the Matter of Campbell* (Review Dept. 2020) Case Nos. 16-O-17493; 17-O-04404 — Unpublished State Bar Court of California, Review Department (October 22, 2020)

Issue:
Can a lawyer, acting as an agent for a client under a springing power of attorney, be disciplined for Probate Code violations?

Analysis:
Yes. Office of Chief Trial Counsel charged Campbell with misappropriation and client trust account violations in the representation of one client (Major) and breach of fiduciary duty for violation of the Probate Code in another (Moore). In the Major matter, the Review Department reversed the misappropriation charge because Campbell was entitled to the full amount of her agreed-upon fee. But it upheld the client trust account violation because Campbell did not withdraw funds to which she was entitled from the account as soon as she was entitled to them.

In the Moore matter, Campbell agreed to be Moore's agent under a springing durable power of attorney. When Moore became hospitalized, her doctors gave Campbell letters consistent with the power of attorney provisions that Moore could not handle her own affairs. Campbell had access to Moore's savings account from which she paid Moore's bills and paid herself $380 an hour, reduced to $365 — the same rate she charged when representing Moore as a lawyer — to take Moore shopping and to lunch, to talk to her on the phone, and to socialize with her. She also billed Moore for talking on the phone about Campbell's son. Campbell explained that she charged Moore in this way because Moore was asking for her time and she was billing for her time as an attorney. Campbell never advised Moore what she was charging her nor sent her itemized statements.

The Review Department found a breach of fiduciary duty and moral turpitude. As a fiduciary, Campbell was held to a high standard of conduct and had to conform to professional standards. As a fiduciary, it was improper for Campbell to charge her lawyer rate for performing the simple tasks she did; it as not prudent to burn through Moore's money so rapidly — better part of $300,000 — and she could not show her actions benefitted Moore.

The discipline recommended was two years suspension, stayed, with six months actual suspension, among other conditions.

20.4.3 *Moore v. Superior Court* (2020) 57 Cal.App.5th 441 — Court of Appeal of California, Fourth Appellate District, Division Three (November 16, 2020)

Issue:
Should a lawyer be subject to contempt for rude and unprofessional conduct at a settlement conference?

Analysis:
Yes. The Court of Appeal annulled in part and sustained in part the Superior Court's order convicting a lawyer of four counts of indirect civil contempt based on conduct in a settlement conference. Whereas the record supported a finding of contempt, the lawyer's due process rights were violated by not providing adequate notice of separate and distinct counts.

Here, at a mandatory settlement conference that lasted approximately 15 minutes, among other things, a lawyer persistently yelled at and interrupted other participants, accused opposing counsel of lying while providing no evidence to support his accusation, refused to engage in settlement discussions, and effectively prevented the settlement officer from invoking the aid and authority of the supervising judge by asserting this would unlawfully divulge settlement information. Later, the lawyer acknowledged the behavior reflected a tactical decision made in advance of the mandatory settlement conference. The court convicted the lawyer of four counts of civil contempt, imposed a $900 fine for each count, and ordered the payment of attorney fees and costs to the opposing party.

One important distinction the Court drew in this case is that between advocacy and contempt. "To avoid undue interference with an attorney's obligation vigorously to represent the interest of his client, counsel should not be held in contempt for disrespectful conduct unless the disrespect is objectively clear and not dependent upon the subjective impression of the judge." But being loud, rude, and obnoxious so as to undermine the ability of the settlement conference to proceed is not an adversarial "tactic." It is contempt for the process.

20.4.4 *Big Lots Stores, Inc. v. Superior Court* (2020) 57 Cal.App. th 773 — Court of Appeal of California, Fourth Appellate District, Division One (November 20, 2020)

Issue:
Does *pro hac vice* admission to represent a corporation allow a lawyer to represent present or former employees of the corporation if substantive law does not otherwise prohibit it?

Analysis:
No, but the trial court's revocation of its *pro hac vice* order to represent the employer itself was unwarranted. In an employee "misclassification" lawsuit, Big Lots, an Ohio corporation, retained a California law firm as counsel of record. It later sought permission for three Ohio lawyers also to represent it *pro hac vice*, which the trial court granted. When, however, the trial court learned that the Ohio lawyers were attempting to represent various current and former Big Lots managers in depositions, in which they were deposed in their individual capacities, the court revoked the *pro hac vice* authorization of all three lawyers.

The Court of Appeal agreed there is a difference between a lawyer's representation of a defendant corporation in a lawsuit and the lawyer's representation of current or former employee-witnesses. In short, *pro hac vice* admission to represent one client does not necessarily allow a lawyer to represent a different client, even if substantive law does not otherwise prohibit it. To do so, a lawyer must go back to the court and ask.

But the appellate court reversed the total revocation of permission to in the remainder of the case. The scope of the court's orders was not an issue until after all the depositions at which the Ohio lawyers had represented the manager deponents. Because there was a good faith dispute about the scope of the court's order, it should not have resulted in disqualification until the issue had been before the trial judge for clarification. The trial court could have prohibited additional representation of manager deponents or set a hearing to determine whether the Ohio lawyers had engaged in ethical misconduct by contacting the prospective deponents justifying some corrective action. But in advance of a hearing and appropriately supported findings, the circumstances did not justify barring all further participation by Big Lots lawyers.

20.4.5 *Wellons v. PNS Stores, Inc.* (S.D. Cal. 2020) 2020 U.S. Dist. LEIS 110030 — United States District Court for the Southern District of California (May 11, 2020)

Issue:

Can contacting former employees of corporate defendants result in disqualification of the lawyers who were admitted *pro hac vice* to represent the corporate defendants?

Analysis:

No. This is a wage and hour case in which the same Ohio lawyers, admitted *pro hac vice*, solicited a number of the corporations' former employees by phone, offering to represent them at depositions for which they were subpoenaed to appear. The lawyers represented eight former and two current employees at their depositions; all were California residents and the depositions were in California.

The plaintiffs contended the Ohio lawyers should be disqualified because (1) they acted beyond the scope of their *pro hac vice* admissions; (2) they solicited clients in violation of Rules of Professional Conduct, rule 7.3(a); and (3) they had a conflict of interest, under rule 1.7(a), with current employees who are among the group of employees whom plaintiffs' Private Attorneys General Act (PAGA) action represents.

The District Court denied the motion. On the *pro hac vice argument*, the court accepted the Upjohn argument that lawyers for the corporations should be able to fully defend the action in which they were admitted and accepted the lawyers' "reasoned arguments" why they believed there were "able to properly represent these non-party witnesses at their depositions in this action." With respect to the rule 7.3(a) contention, the court found that the lawyers did not solicit the former employees for pecuniary gain, but rather as part of their pre-existing representation of the corporate defendants. So, they did not violate rule 7.3(a). Finally, the two current employees were not "directly adverse" for purposes of the PAGA claim because a "PAGA claim is brought on behalf of the State, not individual employees."

20.4.6 *Malek Media Group, LLC v. AXQG Corporation* (2020) 58 Cal.App.5th 817 — Court of Appeal of California, Second Appellate District, Division Three (December 16, 2020)

Issue:

Can a frivolous appeal lead not only to sanctions but to potential State Bar discipline?

Analysis:

Potentially yes. After the parties' film production project soured, they eventually landed in commercial arbitration that the superior court confirmed, and Malek Media Group challenged on appeal. It claimed the award had to be overturned because the arbitrator, a decorated retired ambassador, failed to disclose his "self-proclaimed status as a gender, social, female and LGBTQ activist" after he had become aware of Malek's Catholic background. The Court of Appeal dispatched that argument because the commercial arbitration had nothing to do with LGBTQ issues or the Catholic Church; rather, it concerned misappropriation of corporate funds, inappropriate agreements and exposing the company to reputational harm.

The Court found the appeal both objectively and subjectively frivolous. It was

> . . .
> *objectively frivolous because it is devoid of factual or legal support. Its primary argument is that the arbitrator was required to disclose his prior relationship with an LGBTQ rights organization because that relationship would cause a reasonable person to question his impartiality in a commercial arbitration where one of the parties' principals was a white male Catholic. [Appellant's] argument is based on a mischaracterization of the underlying arbitration as "headlining a major social justice issue" concerning sexual harassment between an employee and her boss. Not only has [appellant] failed to define what it believes are social justice issues, but the case was a commercial arbitration between co-owners of a film production company who sought to dissolve the company after their relationship became irreconcilable. Neither LGBTQ rights nor the Catholic Church have any connection to this case.*

. . .

Likewise, [appellant's] appeal is subjectively frivolous. ... [Appellant] adopted a war-like mentality toward [opponent], its counsel, and anyone else involved with this case. The record is replete with personal attacks on [party]and [party's] counsel, as well as numerous unsubstantiated claims that everyone who was purportedly against Malek and [appellant] was engaged in an elaborate conspiracy to destroy him. These included allegations that [party] orchestrated "an extensive conspiracy to 'crush' and 'destroy' [Malek], which conspiracy ... included cybercrimes, safe-cracking, sexual espionage, manufactured evidence, the extensive suborning of perjury, and 'human chess pieces moving to create artificial breaches.' " But, as the arbitrator concluded, [appellant] "introduced no credible evidence to support its overarching conspiracy theory. The most charitable inference to be drawn from the record is that [appellant's] repeated insinuation of 'conspiracy' was a colloquial, rhetorical device Intended to undermine the credibility of [party] and its counsel. Setting charity aside, and considering the lack of competent supporting evidence in the record, it would appear that certain of the conspiracy contentions were frivolously asserted."

The court approved $46,000 in fees to the respondent for the frivolous appeal and imposed an additional sanction of $10,000. More importantly, the court ordered the lawyer to report the sanction to the State Bar and forwarded a copy of its opinion to the State Bar, citing Business and Professions code section 6086.7, subdivision (c).

20.4.7 American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 495

Issue:

May lawyers practice virtually in a jurisdiction where they are admitted while physically located in another jurisdiction?

Analysis:

Yes, so long as the jurisdiction does not prohibit it and the lawyer does not advertise or otherwise hold out as having a professional office in the jurisdiction where they are physically located, and do not provide or offer to provide legal services in that jurisdiction. The purpose of Model Rule 5.5 is to protect the public against rendition of legal services by unqualified persons. The rule prohibits lawyers from establishing an office or other systematic or continuous presence for the practice of law in a jurisdiction where the lawyer is not licensed. But, an office from which the lawyer practices remotely in a jurisdiction that the lawyer does not hold out to the public as an office, that does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence, is not "established" as an office within the meaning of the rule.

20.4.8 Bar Association of San Francisco Opinion No. 2020-1

Issue:
What ethical obstacles may a lawyer face during the joint representation of a large group of clients in a mass tort action, and how should those issues be addressed in accordance with a lawyer's ethical obligations?

Analysis:
Lawyers have an ongoing obligation to uphold their ethical duties to each client as the joint representation continues, including fulfilling the duties of communication and confidentiality, addressing potential and actual conflicts, heeding ethical rules regarding aggregate settlements and settlement offers made to or received from the opposing party, and fulfilling ethical obligations regarding the termination of the representation as to all or some of the joint clients.

In terms of communications and confidentiality, lawyers must maintain confidentiality to those outside the joint representation, but remember to communicate to each of the joint clients all information that is significant and relevant to the common interest.

Potential conflicts that could arise during a mass tort joint representation include disagreements regarding allocation of fees and costs (including any awarded to the opposing party), advocacy that may favor one subset of clients, differences in contractual arbitration mandates, revocation of consents, conflicting interests at trial and settlement. Settlement, in particular, may pose unique issues due to differences in the nature and provability of clients' claims. Lawyers should address these situations through disclosures and informed written consent at the beginning of the representation that may be repeated before negotiations begin. Plus Rule of Professional Conduct 1.8.7 requires lawyers to obtain each client's informed written consent before entering into an aggregate settlement.

Finally, termination of the representation in such cases can present some unique challenges. The opinion suggests that the engagement agreement should address who gets the original of the client file in such instances. And it should also specify what types of information may not be provided to terminating clients who request the file, such as information that may invade the privacy of another client.

Please note that, due to the break in continuity of publications, the volume number of Ethics Quarterly now matches the calendar year of publication and does not reflect the number of years that Ethics Quarterly has been published.