Introduction

The first quarter of 2022 produced few authorities for discussion. The two litigation cases, however, give significant instruction: one in a criminal matter; the other, involving lawyer-client arbitration. In the criminal matter, the court held that a lawyer representing a defendant in a criminal case had the ethical obligation under rules of Professional Conduct, rule 3.3(a)(2), to cite known controlling adverse authority to the court that the prosecutor had not cited — even though the defense lawyer’s brief did not make any affirmative representations on the issue. In the civil case, the appellate court held that a law firm that elected to have an arbitration provision in its retainer agreement, when a former client is unable financially to pay the arbitrator’s fee or arbitration costs, has a choice: pay the former client’s share or waive its right to arbitration.

The two State Bar discipline cases involve misrepresentation to clients, third parties, and a court, as well as, in one case, misappropriation of a substantial amount of money. One matter resulted in actual suspension: the other, disbarment.

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 ethics authority you might consider.
In This Issue
Among the questions answered by rulings abstracted in this issue of *Ethics Quarterly* are:

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Are a lawyer’s misappropriation of client funds and a propensity for dishonesty, including misrepresentation to a court and the State Bar, grounds for disbarment, when the lawyer has no record of prior discipline?
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*22.1.4 Aronow v. Superior Court*
22.1.1 *In re Edward Shkolnikov (Review Dept. 2022) Case No. 16-O-17503* – State Bar Court of California, Review Department (February 11, 2022)

**Issue:**
May a lawyer be properly disciplined for failing to prosecute his client’s claims and then misrepresenting to them the status?

**Analysis:**
Yes. The disciplinary proceedings addressed representation of two clients. In the first, the lawyer represented a personal injury plaintiff. The lawyer failed to appear for the final status conference, did not communicate with the court about the non-appearance, and had not served the defendant with the summons and complaint. On the date set for trial, the lawyer appeared and indicated he would serve the summons and complaint by publication. The court reset trial, but also scheduled an order to show cause six months out regarding why the case should not be dismissed for failure to prosecute. At that hearing, the lawyer requested additional time, but the court dismissed the case with prejudice on the third anniversary of its filing.

The lawyer failed to inform the client her case had been dismissed. Rather, he told her he was still working on the case and had negotiated a $40,000 settlement. Eighteen months after the dismissal, the lawyer texted his client that he was working on tracking down the settlement funds. The client asked for both the settlement money and her file, and after she did not receive them, requested the lawyer return to the court to enforce. Similar communications continued for more than two years since the dismissal until the client learned what had happened.

In the second representation, the lawyer represented a married couple in another personal injury action. The court sustained an unopposed demurrer based on the failure to comply with the requirements of the California Tort Claims Act. After dismissal, the lawyer did not take any other action, but messaged his clients that he was working on setting aside the dismissal. Ultimately, he admitted to them that they could no longer sue.

The lawyer was found culpable of engaging in moral turpitude because he misrepresented the status of his clients’ matters to them; of failing to perform competence since he did not timely prosecute the actions; failure to inform the clients of significant developments when their cases were dismissed; and improper withdrawal since the lawyer stopped working on the second case despite leading his clients to believe that he was continuing to represent them. Based on the above, coupled with an analysis of mitigating and aggravating factors, the lawyer was given a six-month actual suspension from the practice of law.
22.1.2 In re Derek James Jones (Review Dept. 2022) Case No. 16-O-17503 – State Bar Court of California, Review Department (February 11, 2022)

Issue:
Are a lawyer’s misappropriation of client funds and a propensity for dishonesty, including misrepresentations to a court and the State Bar, grounds for disbarment, when the lawyer has no record of prior discipline?

Analysis:
Yes. Jones, while an attorney for a family-owned corporation, negotiated a lease and related documents with a third party on his client’s behalf. In connection with those negotiations, the other party delivered to Jones $125,000 and $50,000 to be held in his client trust account; Jones, however, put the funds in his operating account and then used them for personal expenses. Willful misappropriation of funds involves moral turpitude, in violation of Business and Professions Code section 6106 and former rule 4-200(A). The Review Department found that the misappropriation was intentional. Not only did Jones owe a fiduciary duty to his client, but he also had a fiduciary duty to the third party because he received money on behalf of that non-client. A lawyer who breaches fiduciary duties that would justify discipline if there was a lawyer-client relationship may be disciplined for such misconduct.

The Review Department also found Jones culpable for his misrepresentations to the third party about the account into which he had deposited the funds and constituted moral turpitude because it was both material and intentional. Similarly, Jones’s issuance of NSF checks also constitutes moral turpitude.

The Review Department also found moral turpitude in misrepresentations Jones made to the court in a civil matter arising out of the client/third-party transaction and that he made to the State Bar (Office of Chief Trial Counsel).

Because of the seriousness of the misconduct, especially the misappropriation of entrusted funds and Jones’s indifference regarding his misconduct and his attempt even to mislead the court, the Review Department recommended disbarment.
22.1.3 People v. Williams (2022) 75 Cal.App.5th 584 – Court of Appeal of California, Second Appellate District, Division Five (February 24, 2022)

Issue:
Must a criminal defense lawyer cite directly adverse authority in an appellate brief?

Analysis:
Yes. A criminal defendant was found guilty of robbery and burglary; because it was a third strike, he was sentenced to 35 years to life in prison. Twenty-five years later, he filed a petition to modify his sentence, which was denied. After the defendant appealed in propria persona, counsel was assigned. In the opening brief that lawyer filed a statement of appealability provided that the appellant had “filed a Notice of Appeal from the ruling as an order after judgment affecting substantial rights,” but failed to cite multiple authorities providing that a reviewing court has no jurisdiction to entertain an appeal of a ruling of the type here because it is a nonappealable order.

The Court then questioned the lawyer, while also reminding him about the duty of candor mandated by Rules of Professional Conduct, rule 3.3(a)(2), to disclose directly adverse controlling authority, why those authorities had not been cited. Counsel responded without an argument that the authority was distinguishable or should not be followed. Nor was there an assertion that the failure to cite was based on mistake, inadvertence, or administrative error. Rather, the lawyer simply argued that he did not argue or state that the appeal was proper, only the basis for his client’s belief that it was.

The Court determined that, in the absence of the people citing such authority, a defense lawyer has an obligation to disclose known authority holding the court has no jurisdiction to decide an appeal. It did not matter that no affirmative representation of appealability had been made or that such a citation could indicate the appeal was frivolous. The mere fact that a lawyer prosecutes an appeal (and here, requested the Court to follow Serrano procedures) is a representation that the court has jurisdiction. Further, the duty to disclose the authority to a tribunal is not tantamount to acquiescence. Lawyers are able to make arguments for contrary conclusions. The Court noted, “Any such future violation, in the view of this court, may warrant disciplinary review by the State Bar or other corrective action.”
**22.1.4 Aronow v. Superior Court (2022) 2022 Cal. App. LEXIS 247** – Court of Appeal of California, First Appellate District, Division Four (March 28, 2022)

**Issue:**
Will lawyers have to pay a former client’s share of arbitration costs or waive their right to arbitrate if the former client demonstrates financial inability to pay anticipated arbitration costs?

**Analysis:**
Yes. A law firm successfully enforced the arbitration provision in its retainer agreement that stated, inter alia: “The parties shall bear their own legal fees and costs for all claims ....” The law firm and former client agreed to an arbitrator — a retired judge — whose hourly rate was $600; $3,600 for a (four-hour) half day and $6,000 for a full (eight-hour) day. The former client was required to make “a $1500 advance payment.” At the initial conference, the former client said he was unable to pay the arbitration fees; the conference was adjourned, and the arbitration did not proceed.

The trial court denied the former client’s motion for arbitration fees and costs waiver and to life the court stay; the trial court certified the question to the appellate court (Code Civ. Proc., § 166.1). The Court of Appeal reversed, recognizing, however, that split of appellate authority on the issue — *MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal. App.4th 643, 658-659 (no jurisdiction to lift stay, on which the trial court had relied as “better reasoned authority ”) and *Roldan v. Callahan & Blaine* (2013) 219 Cal. App;4th 87 and *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970 (concluding there is jurisdiction). The appellate court observed that the parties had failed to inform the trial court that the Supreme Court had cited *Roldan* in reaching its holding in *Jameson v. Desta* (2018) 5 Cal.5th 594, 605, 621-622. In that case, the Court held that the San Diego Superior Court’s policy of not providing official court reporters in most civil trials, while permitting privately retained court reporters for parties who could afford to pay, “creates the type of restriction of meaningful access to the civil judicial process that the relevant California in forma pauperis precedents and legislative policy render impermissible.” In citing *Roldan*, the Court observed it was based on “California’s long-standing public policy of ensuring that all litigants have access to the justice system for resolution of their grievances, without regard to their financial means.”

The *Roldan* court stated, “if, as plaintiffs contend, they lack the means to share the cost of the arbitration, to rule otherwise might effectively deprive them of access to any forum for resolution of their claims against [the defendants.] We will not do that.” The *Roldan* court gave the law firm the choice: pay the former client’s share of the arbitration cost or waive its right to arbitrate the claim.
The Court of Appeal chose to follow the Roldan and Jameson resolution. Further, because the risk that a claimant may have to bear substantial costs may deter the exercise of the right to seek redress of a grievance, the trial court should decide the issue of arbitrator fee payment before the arbitration begins, including, where appropriate, limited discovery directed only to the party’s financial circumstances. The Court reiterated that in forma pauperis status is not dispositive nor required.

On remand, the Court of Appeal directed the trial court to lift the stay, give the former client the opportunity to demonstrate inability to pay the arbitrator’s fees and, if it finds the former client is unable to pay, to give the law firm the choice: pay the former client’s share of the arbitrator’s fee or waive the right to arbitrate.
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.