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Introduction

This quarter brings another decision from the Fourth Appellate District, Division One, applying the "no contact" rule, Rules of Professional Conduct, rule 4.2—former rule 2- 100. We addressed its earlier decision, also authored by Associate Justice Dato, in the Fourth Quarter, 2018 edition of *Ethics Quarterly — City of San Diego v. Superior Court* (2018) 30 Cal.App.5th 457—in which the court found a violation of former rule 2-100 but held disqualification was not a proper remedy because the City Attorney's Office had not learned anything privileged, the ethics violation notwithstanding, that would give it an unfair advantage at trial. We also have, in *Connelly*, an important statute of limitations decision on malicious prosecution actions against lawyers, adopting the one-year limit of CCP section 340.6, subdivision (a).

We have included two State Bar cases—one published, one not—to illustrate the importance of mitigation evidence in State Bar discipline cases. In each case, the lawyers had been disciplined and then violated the terms of their State Bar probation. One received a suspension; the other, disbarment.

Finally, because California has adopted new and revised rules of Professional Conduct which, in many respects, mirror the ABA Model Rules, and because California has yet to develop a substantial body of guidance under its new rules, we have included two ABA Formal Opinions, one of which provides particular guidance about the special duties of Prosecutors in dealing with unrepresented persons accused of misdemeanors.

In This Issue:

19.2.1 *Connelly v. Bornstein* (2019) 33 Cal.App.5th 783—First Appellate District, Division 5, March 28, 2019.

Issue:
Does the one-year statute of limitations of Code of Civil Procedure section 340.6, subdivision (a) govern malicious prosecution actions against lawyers?

Analysis:
Yes. Appellant argued that section 335.1, which provides a two-year limitations period for "injury to" a person "caused by the wrongful act or neglect of another" governed his action against an individual and her lawyer who had brought and later dismissed an unlawful detainer action against him.

Earlier courts—*Vafi v. McCloskey* (2011) 193 Cal.app.4th 874 and *Yee v. Cheung* (2013) 220 Cal. App.4th 184—had held that section 346.6,subdivision (a) prevailed over section 335.1 and rejected the argument that section 340.6, subdivision (a) applied only to malpractice claims. But then *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.660 disagreed with *Vafi* and *Yee*.

Then, in 2015, the California Supreme Court decided *Lee v. Hanley* (2015) 61 Cal.4th 1225, in which the Court analyzed the language of section 340.6, subdivision (a)—"action against an attorney for a wrongful act or omission…arising in the performance of professional services—and the Legislative intent to have a single statute of limitations for all actions against lawyers arising from a lawyer's professional obligations. *Lee* cited *Vafi* and *Yee* and was critical of *Roger Cleveland*.

The court of appeal determined that, for a lawyer at least, a claim of malicious prosecution is the kind of action that arises out of the performance of professional services. That includes the ethical obligation not to "bring or continue an action, conduct a defense assert a position in litigation, or take an appeal, without probable cause and for the purposed of harassing or maliciously injuring any person," as found the Rules of Professional Conduct, rule 3.1(a)(1).

The court acknowledged that its holding results in a different—two-year—statute of limitations for non-lawyers, but they have the advice-of-counsel defense that lawyers do not have.

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19.2.2 *In the Matter of Amponsah* (Review Dept. 2019) _5 Cal. State Bar. Ct. Rptr._ Case Nos. 17-N-06871; 17-O-06931, April 22, 2019.

Issue: Does failure to comply with court-imposed conditions of probation as a result of State Bar Discipline warrant disbarment?

Analysis:
No. The Hearing Department (trial judge) found Amponsah culpable of failing to comply with California Rule of Court 9.20 and two probation conditions in a prior discipline case and recommended discipline that included a one-year actual suspension, because Amponsah had made "attempted, albeit, deficient, compliance efforts in the midst of extreme emotional distress," and did not demonstrate indifference to the disciplinary system. The State Bar appealed, seeking disbarment.

Amponsah, originally disciplined for trust-account comingling, was suspended for 90 days and ordered, among other things to notify his clients and the courts of his suspension and file a declaration of compliance—Rule of Court 9.20, for which strict compliance is required. He notified some clients; failed timely to notify others; failed timely to file the required declarations in spite of notices from the probations department; and engaged a former law partner to assist him with limited compliance success. In short, his non-compliance with his probation and suspension conditions was not a material issue.

At trial, he and his therapist testified credibly about his extreme mental anguish during the period he was attempting to comply with the probations requirements—a significant factor in mitigation.

Rule 9.20 calls for disbarment or suspension for willful non-compliance. The Review Department rejected the State Bar argument for disbarment and upheld the one-year actual suspension.

19.2.3 *Jane Doe v. Superior Court* (2019) 36 Cal.App.5th 199)—Fourth Appellate District, Division One, June 13, 1019.

Issue:
If a plaintiff's lawyer communicates with a non-party employee of a government-entity defendant, whom the government entity's lawyer says will be represented by another lawyer, has the plaintiff's lawyer violated Rules of Professional Conduct, rule 4.2, subjecting the lawyer to disqualification?

Analysis:
No. The appellate court found no evidence that the employee was actually represented at the time of the communication, and her acts or omissions were not the kind that could bind the government entity; thus no violation of rule 4.2, subdivision (a) or (b), and disqualification was improper.

A student-employee in the Southwestern College police department brought claims of sexual harassment and sexual assault against the Community College District and three District employees. The complaint also alleged sexual harassment of two other female District employees presumably relevant because it provided notice to the District about similar misconduct by at least one involved employee. The plaintiff's lawyers identified one individual, Andrea P., as a "current District employee who may be a percipient witness to some allegations giving rise to this lawsuit," and noticed her deposition. A lawyer for the District told the plaintiff's lawyer that Andrea P., as a current District employee, was "entitled to representation" and that he "was in the process of securing conflict counsel for [her]." He requested the deposition be rescheduled to which plaintiff's lawyer agreed. The next day, however, the plaintiff's lawyer communicated to the District's lawyer that he now represented Andrea P.

Letter exchanges with accusations about direct contact with District employees when suing the District ensued, followed by the successful motion to disqualify plaintiff's lawyer.

Rule 4.2, subdivision (a), prohibits communication "directly or indirectly about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer." [Emphasis added.] Former rule 2-100 prohibited communication with a represented "party"—rule 4.2 thus significantly expands the scope of the rule's prohibition.

The court of appeal said the trial court order was not "completely clear" whether Andrea had retained her own lawyer, and, thus, was a currently represented person within the scope of subdivision (a) when the plaintiff's lawyer contacted her. The court of appeal, however, found no evidence of representation; no evidence that she had agreed to be represented at the District's expense; hence, she was not a represented person at the time of the communication and, thus, no violation of rule 4.2, subdivision (a). At most, the district expressed the intent to offer to provide her a lawyer.

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Rule 4.2, subdivision (b) (2) prohibits communication with a current a current employee of a governmental organization, among others, "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability."

As an alleged victim of sexual harassment, communication with Andrea did not concern her own actions or omissions concerning the dispute, but her percipient knowledge of events. Moreover, whether she reported or failed to report any alleged misconduct would not be the type of act or omission that could be binding on the District; rather only the District's own conduct can bind it. Thus, there was no violation of rule 4.2, subdivision (b) (2) and disqualification was improper.

19.2.4 *In the Matter of Lee* (Review Department 2019) Public Matter—Not Designated For Publication, Case Nos. 17-N-07479; 18-O-10432, June 26, 2019.

Issue:
Does failure to comply with court-imposed conditions of probation as a result of State Bar Discipline warrant disbarment?

Analysis:
Yes. Lee, a lawyer in Ohio and California, was disciplined in Ohio and indefinitely suspended there for serious misconduct including failure to provide services to a client while leading the client to believe he was protecting her interests. This led to discipline proceedings in California, including six-month actual suspension and specific probation duties and compliance with Rule 9.20.

Lee failed timely to comply with two of the probation conditions and to comply with Rule 9.20. The Hearing Department and Review Department rejected Lee's argument that, because he did not open his email, he was unaware of Probation's letter or email messages to him and thus did not have "actual knowledge" of the dates of his probation obligations. Having read and signed the stipulation, and being aware of his probation duties once the Supreme Court entered the suspension order, Lee had "actual knowledge" of what he had to do.

The Review Department also upheld the Hearing Department's rejection of Lee's evidence of mitigation based on severe emotional distress because he had not established that he had recovered from his emotional conditions. The Review Department upheld the disbarment recommendation.

19.2.5 ABA Formal Opinion 486, May 9, 2019 (Obligations of Prosecutors In Negotiating Plea Bargains for Misdemeanor Offenses)

Issue:
Do prosecutors have unique ethical obligations when entering into plea bargains with unrepresented persons accused of misdemeanors?

Analysis:
ABA Model Rules 1.1, 1.3, 3.8(a), (b), and (c), 4.1, 5.1, 5.3 and 8.4(a), (c), and (d) impose obligations on prosecutors when entering into plea bargains with persons accused of misdemeanors. These obligations include the duty to ensure that the accused is informed of the right to counsel and the procedure for securing counsel, the duty to avoid plea negotiations that jeopardize the accused's ability to secure counsel, and without regard to whether an unrepresented accused has invoked the right to counsel, to avoid offering pleas on terms that knowingly misrepresent the consequences of accepting the pleas or otherwise pressuring or improperly inducing acceptance by the accused.

A five-year study found, notwithstanding the commitment of most prosecutors to high professional standards, evidence in misdemeanor cases where the accused is or may be legally entitled to counsel methods of negotiating plea bargains in some jurisdictions that are inconsistent with the duties in the Rules of Professional Conduct: requiring or encouraging plea negotiation before the right to counsel has been raised; using delay or the prospect of a harsher sentence to dissuade the accused from invoking the right to counsel; fathering arrestees into court en masse and instructing them, before any advice about the right to counsel or other rights, that they must tell the clerk how they intend to plead; using forms to obtain waivers of the right to counsel and other rights as a condition of negotiating a plea or following a negotiation absent proper confirmation that the defendant understands; permitting police officers involved in the investigation or arrest to act as prosecutors and negotiate pleas; telling defendants of the right to counsel but failing to provide any procedure for asserting or validly waiving that right before requiring please negotiation; failing to inform indigent defendants of the procedure for requesting a waiver of court fees associated with assignment of a state subsidized defense lawyer.

Model Rules 3.8(a), (b), and (c) provide the foundation for the opinion's analysis, prohibiting: a charge not supported by probably cause (3.8(a)); requiring reasonable efforts to assure the accused has been advised of the right to, and the procedure to obtain, counsel and a reasonable opportunity to do so (3.8(b)); and prohibiting seeking from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing (3.8(c)).

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California Rules of Professional Conduct, rule 3.8 (a), (b), and (c) are the same. Hence the ABA opinion, while not binding on California lawyers, provides helpful guidance especially since California's adoption of rule 3.8—former rule 5-110, amended by Supreme Court order, effective November 2, 2017—is new, effective as of November 1, 2018.

Similarly, with respect to plea negotiation and truthfulness, California's rules 4.1, 4.3, and 8.4(c) mirror or closely follow ABA Model Rules 4.1, 4.3, and 8.4(c). Thus, the ABA opinion provides guidance here as well.

The opinion concludes that prosecutors have a duty to ensure that charges underlying a plea offer in misdemeanor cases have sufficient evidentiary and legal foundation and that they must take appropriate steps to make reasonably sure that the work of their subordinates and agents is compatible with their professional obligations. They must make reasonable efforts to ensure that unrepresented accused persons are informed of the right to counsel and the process for securing counsel and avoid conduct that interferes with the process. Once an unrepresented accused has been informed of the right to counsel and is deciding whether to invoke that right, a prosecutor may not pressure, advise, or induce accepting a plea or waiver of the right to counsel. Finally, whether an unrepresented accused has invoked the right to counsel, a prosecutor must avoid offering, negotiating, and entering pleas on terms that knowingly misrepresent the consequences of acceptance, or otherwise improperly pressure, advise, or induce acceptance by an unrepresented accused.

19.2.6 ABA Formal Opinion 487, June 18, 2019 (Fee Division With Client's Prior Counsel)

Issue:
In a contingent fee case, when a successor lawyer from one firm replaces a former lawyer from another firm, must the successor lawyer tell the client in writing that a portion of any contingent fee earned may be paid to the former lawyer?

Analysis:
Yes. A client has the right to terminate the services of a lawyer at any time. But when the client terminates the services of a contingent fee lawyer, without cause, before the occurrence of the contingency on which the agreement is based, the lawyer may be entitled to a fee for services performed before discharge under *quantum meruit* or on some other basis. That gives rise to obligations on the part of the successor lawyer.

Model Rules 1.5(b) and (c) require the successor lawyer notify the client in writing that a portion of any contingent fee earned may be paid to the former lawyer, even though the successor lawyer may not be able to state at the beginning of the representation the specific amount or percentage of a recovery, if any, that may be owned to the former lawyer unless the amount or percentage has been agreed by the client and both the former and successor lawyers. Model rule 1.5(e) does not apply because it addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another.

If there is a money recovery, the successor lawyer may only disburse a portion of the overall attorney's fee to the former lawyer with the client's consent or an order of a tribunal. If there is a dispute about the amount due the former lawyer under Model Rule 1.15(e), the disputed amount may have to remain in a client trust account until the matter is resolved. In addition, if the successor lawyer negotiates with the former lawyer on the client's behalf, the successor lawyer must explain to the client the potential conflict of interest in the dual roles, pursuant to Model Rule 1.7, where the successor layer has a personal interest in the amount the former lawyer may receive or in the timing of the release of funds held pursuant to Model Rule 1.15(e).

California did not adopt Model Rules 1.5(b) or (c); rather Business and Professions Code section 6147 and 6148 govern what must be in a written fee agreement with a client. The ABA Formal Opinion, however, does provide useful guidance, especially for a successor lawyer to ensure that the client understands—informed in writing—that the client's former lawyer may have a claim on the client's ultimate money recovery, *in addition* perhaps to any contingent fee the client will owe to the successor lawyer.