SAN DIEGO COUNTY BAR ASSOCIATION

ETHICS QUARTERLY

A Publication of the San Diego County Bar Association

May 2019, Vol. 19, No. 1

Editors: David Majchrzak
Edward McIntyre

Introduction

We start 2019 with a broad selection of cases and ethics opinions, ranging from disqualification of lawyers to class action fee awards; attacks on the judiciary and the litigation privilege; when a lawyer must cease representing a client to discipline for performing incompetently and then failing to refund unearned fees; a criminal defense lawyer's non-disclosure, in spite of reciprocal discovery obligations, of his intent to cross-examine a witness called by another lawyer; permissible marketing and the ancillary sale of legal forms; and the judicial obligation to perform same-sex marriages.

We have included two unreported State Bar discipline cases; although they are not precedent, we found them instructive and include them for that reason. We hope you find them and all the cases and opinions discussed helpful. We are available to address any questions that might arise.

In This Issue:

19.1.1 *Strawn v. Morris, Polich & Purdy* (2019) 30 Cal.App.5th 1087 – Court of Appeal of California, First Appellate District, Division Two (January 4, 2019)

Issue:
Are prelitigation communications privileged when litigation is a mere possibility?

Analysis:
No. Fire damaged an insured's home and truck. The insurance company denied coverage based on the position that it was caused by arson, and the owners sued both the insurer and its counsel. The causes of action against the lawyer and his firm were for invasion of privacy and elder abuse. These were based on repeated demands for financial records, including tax returns, that the insureds refused to waive privilege on, but that the lawyers nonetheless obtained and disclosed to the insurer.

The present appeal is from the dismissal of the owners' claims against the insurer's attorneys for invasion of privacy and financial elder abuse. The owners contend the trial court erred in sustaining the attorneys' demurrer without leave to amend. The court of appeal affirmed on the cause of action for financial elder abuse and reversed the cause of action for invasion of privacy.

The trial court sustained the lawyer's and law firm's demurrer to both claims. Significantly, it concluded that the invasion of privacy claim based was barred by the litigation privilege. This was because the court concluded that the lawyer was representing the insurer 'in anticipation of a possible lawsuit concerning the claim made by [appellants] for the fire damage to their residence and vehicle."

The First Appellate District reversed. A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration. Whether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact. The appellate court held that it was unclear whether the insurer was seriously considering litigation in good faith when its lawyer sent the insureds' tax returns to the insurer and its accountants without authorization. So, the litigation privilege was not conclusively established. The insureds had a legally-protected privacy interest in their tax returns, which they refused to waive.

Continued on next page

19.1.2 *In the Matter of Clark* (Review Dept. 2019) Nonpublished, Case No. 16-O-12069 – State Bar Court of California, Review Department (January 7, 2019)

Issue

In the face of an incomplete, and arguably defective, substitution of attorney form, and before a court acts, when a lawyer continues to submit documents to a court on behalf of a client after the client has told the lawyer that the client no longer wants the lawyer to represent the client, is the lawyer appearing for a party without authority, subject to discipline?

Analysis:

Yes. Clark represented her brother in an appeal. The appellate court extended the deadline to file the opening brief several times, dismissed the appeal, vacated the dismissal and gave Clark an additional 30 days to file the brief. The court rejected the brief Clark filed because it exceeded the permitted word count and gave Clark another 10 days to file a brief. At that point, Clark's brother decided he did not want her as his lawyer in the appeal, did not want her listed as his lawyer on any filing—but did want her to continue as his lawyer and "ghost write" documents he submitted to the court. The brother electronically served Clark with a substitution of attorney that she refused to sign. The court filed the substitution, on which the brother stated that Clark was his *former* legal representative and that he intended to represent himself. Only the brother signed the substitution from. The next day, Clark submitted the opening brief to the court, indicating that she was the attorney of record and, thereafter, four additional pleadings.

The court rejected Clark's argument that, as attorney of record, she had authority to appear until the court ruled on her brother's substitution request, because the substitution form was defective under Code of Civil Procedure section 284; rather, the court said she had a duty to follow her brother's instructions not to appear for her. The court also rejected her contention that former Rules of Professional Conduct, rule 3-700(A)(2) required that she not withdraw from representing her brother until the court issued its order ruling on his substitution request. Because she never sought to terminate her lawyer-client relationship with him, the rule's requirement that she take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client" never arose. And because clear and convincing evidence supported that fact that Clark knew her brother did not want her to appear for him in the appellate court proceeding, he had the right to prevent her from doing that regardless of the legal status of the substitution of attorney he filed. So, Clark violated Business and Professions Code section 6104 (appearing for a party without authority) when she filed the appellate brief and other pleadings because she did not have authority to do so. The Review Department recommended a 60-day actual suspension, among other discipline.

19.1.3 *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115 – Court of Appeal of California, Second Appellate District, Division Seven (January 7, 2019)

Issue:
Should a law firm be vicariously disqualified when it hires a lawyer who possesses an adversary's confidences obtained outside an attorney-client relationship?

Analysis:
Yes. Darren Richie, a former president and chief operating officer of O'Gara Coach Company, is a principal of the law firm, Richie Litigation. When he was with O'Gara Coach Company, Richie was not a member of the State Bar of California. Richie Litigation represented Joseph Ra in litigation, which included cross-actions between O'Gara Coach Company and Ra. O'Gara Coach Company moved to disqualify Ritchie Litigation premised on the fact that, while at O'Gara Coach Company, Richie had been a client contact for outside counsel investigating the charges of fraudulent conduct that ultimately led to the lawsuit.

The trial court denied the motion because there was no attorney-client relationship. It concluded that the fact he had received confidential information was not enough to disqualify a former employee who later becomes a lawyer

The Court of Appeal reversed. To protect client confidences, attorney disqualification is not limited to situations in which the lawyer has acquired an adversary's privileged communications through a previous attorney-client relationship. For example, law firms that hire nonlawyers who know adversaries' confidential information are in a situation similar to hiring an adversary's attorney. That suggests that confidential information is at risk. Here, Richie could not act as Ra's counsel because he obtained privileged information relating to the pending litigation as O'Gara Coach Company's president and chief operating officer

19.1.4 *Hill v. Volkswagen Group of America, Inc.* (9th Cir. 2019) 914 F.3d 623 – United States Court of Appeals for the Ninth Circuit (January 22, 2019)

Issue:
May lawyers be denied fees in class litigation where the lawyer fails to show how services benefited their individual clients or contributed to the common benefit?

Analysis:
Yes. The District Court consolidated cases addressing a car manufacturer's use of defeat devices, and appointed class counsel. Accordingly, fees and costs were limited to designated counsel and to counsel performing work for the common benefit of class members. The court denied fees to other lawyers who failed to show how their activities before appointment of class counsel benefitted the entire class or contributed to the settlement.

The Ninth Circuit affirmed. Courts may "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." This could conceivably include non-class counsel. But courts must ensure that any fee award, even if the parties agree, is reasonable. Here, the proper determining factor was whether the lawyers provided that services that bestowed a substantial benefit to the class.

Even though the lawyers may have provided services to their individual clients before consolidation, the determination whether they were entitled to fees, had to be looked at through this lens. So, it did not matter whether the lawyers may have done work that benefitted their individual clients. If it did not benefit the class, then they were not entitled to compensation from a fee award.

19.1.5 *In the Matter of Na (Review Dept. 2019)* Nonpublished, Case Nos. 15-O-15994, 16-O-12345, 16-O-13582, 16-O-16844 – State Bar Court of California, Review Department (February 1, 2019)

Issue:
Will a lawyer who fails to perform with competence and refund unearned fees be subject to discipline and actual suspension from practice?

Analysis:
Yes. One client hired Na in an immigration matter and paid $1,500. But Na knew the client was not eligible for the relief sought (a waiver) and never told the client he might have to wait years for a change in law. Na did not file for the waiver, did not tell his client, and did not return the fees paid.

The court rejected Na's defense that he "performed all possible services." It was incompetence not to tell the client immediately, let three years pass without taking any action, and simply "monitor" immigration law in the hope it would change.

Another client hired Na to file an immigration-related application, which he did but with an entity that had no jurisdiction. It was rejected, twice. After delay, the client fired Na, hired a new lawyer who filed the application with the entity that had jurisdiction.

The court rejected Na's claim that filing with the wrong agency was "simple negligence" not ethical incompetence subjecting him to discipline and that after the client took his file, Na was unable to correct his error.

The Review Department, however, did recommend only a six-month actual suspension, among other discipline—the trial judge had recommended a one-year actual suspension.

19.1.6 *People v. Landers* (2019) 31 Cal.App.5th 288– Court of Appeal of California, First Appellate District, Division Four (January 14 and February 7, 2019)

Issue:
May a court sanction criminal defense counsel under Code of Civil Procedure section 177.5 for violation of a reciprocal discovery order for failure to disclose a witness with whom the defense lawyer had met, but did not call as a witness, and instead elicited testimony favorable to his client through cross-examination of the witness when counsel for a co-defendant in the same trial called her as a witness?

Analysis:
No. The public defender representing Landers interviewed, through his investigator and personally, Fletcher, a witness to a homicide. He did not disclose her identity or provide any witness statements to the prosecution as the prosecution argued Penal Code section 1054 (reciprocal discovery in criminal cases) and the trial court's reciprocal discovery order required. Defense counsel for a co-defendant, to be tried in the same trial, however, identified Fletcher to the prosecution as a witness he intended to call at trial and provided witness statements he had.

In post-trial proceedings—the district attorney accused the public defender of 19 alleged violations of the order and sought contempt, sanctions and a referral to the State Bar for discipline—the trial court found only one violation: that defense counsel had failed to identify Fletcher, whom he knew had testimony favorable to his client, even though he did not personally call her as a witness but relied on cross-examination of her after the lawyer for a co-defendant called her.

The court of appeal reversed. It first acknowledged that, because of constitutional constraints—e.g., *Brady v. Maryland* (1963) 373 U.S. 83—discovery in criminal cases is not truly reciprocal; rather it is asymmetrical. The prosecutor has the greater obligation of disclosure and to seek true facts, "while defense counsel has no comparable obligation to ascertain or present the truth. (*United States v. Wade* (1967) 388 U.S. 218, 256)." The defense has the option of standing mute and putting the state to its proof. In California, the trigger for section 1054 defense disclosure is "intent to call a witness at trial," which means, "reasonably anticipates it is likely to call" as a witness at trial. (*Izazaga v. Super. Ct.* (1991) 54 Cal.3d 356.)

Continued on next page

The Court of Appeal then turned to an analysis of "without good cause or substantial justification" in section 177.5 and concluded that, where reasonable minds could differ, a lawyer's position will be deemed to be substantially justified. Using that criterion, the court further concluded that reasonable minds could have differed whether in a multiple defendant case, the public defender had an obligation to disclose Fletcher's identity under section 1054. In the face of considerable uncertainty in the law, the public defender took the position consistent with Rules of Professional Conduct, rule 3.1 that he could urge a good faith extension of existing law and which expressly recognizes the ethical propriety of positions taken by criminal defense lawyers in service of an effort to "defend the proceeding by requiring that every element of the case be established"—as the public defender was attempting to do by not calling Fletcher as a witness.

The court also held that the trial court failed properly to apply the *Izazaga* standard; rather, the trial court conflated "possibility" of his having to call Fletcher as a witness with "likelihood" of calling her. Instead, the public defender's strategy worked. The court of appeal also rejected any inference that because the public defender knew Fletcher's testimony was exculpatory—elicited in fact through examination by other defense counsel—his cross-examination of her was a sham. Further, it rejected any inference based on that cross-examination that the public defender "must have intended" to call her as a witness, what it characterized as "serious reverse engineering." Moreover, Fletcher had been identified to the prosecution by that defense counsel; that the prosecutor did not track her down and prepare for her testimony could not be attributed to the public defender. Finally, the prosecutor did not object until the very end of the public defender's third re-cross-examination of Fletcher that it was "beyond the scope" of direct examination, again not supporting a deliberate attempt to circumvent mandatory disclosure obligations. The court of appeal also held that the trial court's discovery order, to the extent that it purported to compel the public defender to disclose to the prosecutor all exculpatory information he knew Fletcher had, whether or not he intended to call her as a witness, it goes beyond the scope of section 1054, the only basis for defense discovery in a criminal case and is no basis for sanctions.

Finally, the court of appeal addresses the public defender's omissions and lack of candor during an in camera hearing, which it found more serious than simple discovery abuse, but they were not the basis of the sanctions order and would not fill the factual and legal gaps in the order itself.

19.1.7 *Martinez v. O'Hara* (2019) 32 Cal.App.5th 853 - Court of Appeal of California, Fourth Appellate District, Division Three (February 28, 2019)

Issue:
Will a lawyer be subject to potential discipline when the lawyer accuses a trial judge of intentionally refusing to follow the law and when the lawyer makes pejorative references to that trial judge?

Analysis:
Yes. Benjamin Pavone represented a client in an employment-related lawsuit. The trial court denied class-action certification—a decision the court of appeal affirmed. The jury awarded $1,080 in economic damages; $7,000, in noneconomic damages. In an attorney-fee petition, Pavone estimated $414,407 in fees, based on reconstructed, not contemporaneous, billing records. On one day he said he billed 25 hours; on multiple days, 15 hours. The trial court judge concluded, "These entries raise serious questions about the accuracy of counsel's alleged reconstruction of the time he spent working on this case. Taking into consideration the unreliability of the figures provided with the nominal damages the jury awarded," the court denied the more than $160,000 attorney-fee request.

Pavone appealed. His notice of appeal accused the trial court of intentionally refusing to follow the law; the notice of appeal also said: "The [trial court's] ruling's succubustic adoption of the defense position and resulting validation of the defendant's pseudohermaphroditic misconduct, prompt one to entertain reverse peristalsis unto its four corners." The characterizations may have seemed clever. The court of appeal, however, did not see it that way. It noted that Webster's Third International Dictionary defines "succubus" as "1: a demon assuming female form to have sexual intercourse with men in their sleep—compare incubus 2: demon, fiend 3: strumpet, whore." The trial judge who denied the fee request was a woman. The court's published portion of its opinion found that the notice of appeal's "reference to the ruling of the female judicial officer … as 'succubustic' constitutes a demonstration of bias, prejudice or harassment based on gender, and thus reportable misconduct" under Canon 3B (6) and Canon 3D (2) of the California Code of Judicial Ethics. The court cited Business and Professions Code section 6068, subdivision (b), that makes it the duty of a lawyer "to maintain the respect due to the courts of justice and judicial officers" as well as Rules of Professional Conduct, rule 8.4.1 that prohibits unlawful harassment or discrimination on the basis of gender, a rule not effective when he filed the notice of appeal. The court reported Pavone to the State Bar for his misconduct, directing the clerk to send copies of its opinion, the notice of appeal, and opening and reply briefs to the State Bar.

Continued on next page

Comment:
No one can predict what disciplinary action, if any, the Office of Chief Trial Counsel may take. The published Standards for Attorney Sanctions for Professional Misconduct, which the State Bar Court and the California Supreme Court follow as guidelines because they promote discipline uniformity (*In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 219; *In re Sliverton* (2005) 36 Cal.4th 81-91-92), provide for disbarment or actual suspension as the presumed sanction for a violation, *inter alia*, of Business and Professions Code section 6068, subdivision (b), the provision of the State Bar Act the court of appeal concluded that Pavone had violated. In short, intemperate linguistic forays directed at judicial officers can be costly. None of us relishes having our credibility challenged, particularly in a judicial decision—especially when, in our view, the criticism is unwarranted. Judicial officers make mistakes, just like the lawyers who appear before them. Professionalism and ethical standards, however, mandate that no matter how much we disagree with an outcome, an attack on the decision-maker—the judge's integrity or other personal characteristic—falls well out of bounds. Moreover, it may have consequences. This case serves as a graphic reminder that *ad hominem* attacks on judicial officers, even seemingly clever ones, not only fail—the Court of Appeal upheld the denial of attorney fees—but carry professional responsibility jeopardy.

19.1.8 *Jarvis v. Jarvis* (2019) 2019 Cal.App.LEXIS 224 – Court of Appeal of California, Sixth Appellate District (March 19. 2019)

Issue:
May one partner seek disqualification of a lawyer from representing the partnership when the lawyer is following the directions of another partner?

Analysis:
Yes. Two brothers both served as general partners, with a 50 percent interest in a limited partnership. They disagreed about how to use land owned by the partnership and one brother an action for partition against his other brother and the partnership. The other brother hired two lawyers, one to represent himself and another to represent the partnership. The plaintiff objected to the lawyer representing the partnership as he had not agreed, and the defendant brother—only a 50% stakeholder—did not have majority consent to the hire.

The plaintiff took the position that the lawyer was not acting in the best interests of the partnership and his work was unnecessarily depleting partnership assets. The trial court granted a motion to disqualify and the Court of Appeal affirmed.

Disqualification most frequently arises due to conflicts that imperil the duty of confidentiality and/or the duty of loyalty. Although the plaintiff brother never had an attorney-client relationship with the disqualified lawyer, he had standing to bring the motion because it was based on the fact that the lawyer was not properly authorized to act on behalf of the partnership.

Here, the partnership agreement was silent on authority to select counsel or to provide direction when the decision-making is deadlocked. The authority to act, therefore, must be based on statute, which would require a majority of the partnership interests. Both the trial court and the appellate court concluded that meant more than 50 percent.

Although there was no conflict of interest, the court of appeal concluded there may be issues with the duty of loyalty when one partner is both paying and directing the lawyer to represent the entity's interests against the other partner. Because the partnership could only act through its highest authorized constituents, the lawyer was necessarily acting without the majority of the partnership's approval. And, if he was truly acting independent of the positions of the defendant brother—as was claimed—the lawyer may have also taken the role of the client in the relationship, and acted without direction of either partner. In other words, he would not have been representing the entity acting through its highest authorized constituents.

19.1.9 San Diego County Bar Association Opinion 2019-1

Issue:
Under what conditions may lawyers provide electronic form-based products to customers?

Analysis:
To the extent that lawyers sell form-based solutions, they must either provide an electronic form that the customer customizes without recommendations, or form an attorney-client relationship. A lawyer may offer a form product without creating an attorney-client relationship so long as the lawyer provides no advice, including which form to use or how to complete it.

The essence of rendering legal advice is the application of the appropriate law to a specific set of facts to reach a conclusion. Only providing information about what the law is and providing forms falls outside the practice of law. But advising others regarding what type of document they should prepare to effectuate their purpose constitutes the practice of law. While the sale of legal forms is not considered an unauthorized practice of law, the question becomes more difficult when detailed instructions for filling out the forms are provided or when the forms are accompanied by advice for how to proceed with particular legal actions. Services do not amount to the practice of law as long as the service is merely clerical. It is not the practice of law to make forms available for a person's use, even if they filled the forms in at the specific direction of that person and filed and served those forms as directed by that individual. Likewise, providing a manual, even a detailed one containing specific advice, is not the practice of law if the service did not advise regarding that person's specific case.

19.1.10 San Diego County Bar Association Opinion 2019-2

Issue:
What legal ethics regulations and standards must a California lawyer consider when deciding whether to participate in a marketing program where consumers obtain an immediate, brief, limited-scope telephonic consultation with a lawyer selected by the program?

Analysis:
Lawyers generally may not pay non-lawyers for cases, whether though a division of fees or through separate payment for a case. Likewise, the State Bar Act precludes runners and cappers from soliciting and procuring business for lawyers. Certified legal referral services are designed to facilitate the process of lawyer selection by identifying lawyers who meet minimum criteria. A lawyer's payment of a fee to a lawyer referral service that is not qualified under the State Bar Rules and is registered with the State Bar is an ethically impermissible payment to a nonlawyer for recommending the lawyer's services.

Additionally, a lawyer-client relationship initiated via a third-party introduction does not relieve the lawyer of the responsibility of performing a conflict check. Where payments are made to a lawyer by a third party, the lawyer must obtain the client's informed written consent. Failing to obtain informed consent for third-party payments and commingling fees for legal services with "marketing fees" or other property violates California's legal ethics regulations. Lawyers may not share fees directly or indirectly with an organization that is not authorized to practice law. This can happen through multiple means, including where a consumer pays legal fees directly to a third party, which holds and controls the fees until services have been completed, and retains a portion of the fee, paying the rest to the lawyer.

19.1.11 American Bar Association Formal Opinion 485

Issue:
Must a judge who performs marriages either as a mandatory obligation of judicial office, or a as a discretionary judicial function, perform same-sex marriages if the judge performs opposite-sex marriages?

Analysis:
Yes. A judge's refusal to perform same-sex marriages while performing opposite sex marriages calls into question the judge's integrity and impartiality and reflects bias and prejudice in violation of the Model Code of Judicial Conduct. In a jurisdiction in which a judge is not obligated to perform marriages but has discretion to do so, a judge may refuse to perform marriages for members of the public and a judge who declines to perform marriages for members of the public may still perform marriages for family and friends, but then the judge must perform same-sex marriages for family and friends. The opinion is based on the ABA Model Code of Judicial Conduct and its Rules 1.1, 2.2 2.3 (A) and 2.3(B) and an analysis of judicial ethics opinions around the country and an Oregon Supreme Court opinion, In re Day, 413 P.3d 907, in which that court held that the act of solemnizing marriages, once a judge has chosen to do so, qualifies as a judicial duty within the meaning of judicial ethics rules.