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PERSPECTIVE

2022 in Review: Cases Involving Lawyers

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The anti-SLAPP statute, codified in Code of Civil Procedure section 425.16, was a hot topic before the appellate courts in 2022 when it came to cases involving lawyers. Both its reach and potential for abuse were the subject of multiple rulings, underscoring its prominence as a tool in cases against lawyers. Some of the 2022 cases confronted run-of-the-mill fact patterns while others were more bizarre, although none appear to have arisen out of malicious prosecution – unlike most prior years.

Apart from the anti-SLAPP cases, the appellate courts also found time to publish cases concerning the funding of arbitration in legal malpractice cases involving an allegedly indigent plaintiff, the statute of limitations applicable to claims against lawyers (another issue seemingly annually before the courts), the more than 140 year old *Barton* doctrine pertaining to claims which arise in the course of bankruptcy, and the limits of disqualification.

Anti-SLAPP Cases

Catlin Ins. Co., Inc. v. Danko Meredith Law Firm, Inc., 73 Cal. App. 5th 764, was one of the more strange anti-SLAPP cases. It presented an odd procedural issue pertaining to fees awardable when a case is dismissed while an anti-SLAPP motion is pending. It is well settled both that a voluntary dismissal does not eliminate fee exposure under Code of Civil Procedure section 425.16(c), and that fees are mandatory in the event that the movant can establish they would have prevailed on the motion but for the dismissal – both of which the *Catlin* Court affirmed. In that scenario, an anti-SLAPP movant defendant will often file a fees motion after the dismissal and request that the Court consider whether the movant would have prevailed as the predicate to awarding fees. But the law firm defendant in *Catlin* did not want to do that for some reason (the Catlin court implied it may have been due to a concern about the rare fee boomerang that can occur if an anti-SLAPP motion is deemed "frivolous or is solely intended to cause unnecessary delay"), and instead asked the trial court to rule on the anti-SLAPP motion despite the dismissal so it could decide whether to subsequently pursue fees.

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Neither the trial court nor the *Catlin* Court was interested in jumping through such hoops. The *Catlin* Court rejected the request as essentially an advisory opinion on what it deemed an unripe issue. The question of whether the law firm defendant was likely to prevail, and correspondingly entitled to fees, could only be raised via motion for fees, which the anti-SLAPP movant had simply not filed.

Exactly 50 years ago, Johnny Nash released his #1 hit, "I Can See Clearly Now," which may be (or maybe not) what the general counsel for a health care company was thinking after being assessed a litigation adversary's fees in *Clarity Co. Consulting, LLC v. Gabriel*, 77 Cal. App. 5th 454, after being found to have abused the anti-SLAPP process. Maybe the law firm defendants in *Catlin* were right to be concerned as *Clarity* made clear that fee exposure is a risk, rare as it may be, to those who argue frivolously

that a lawsuit is strategic litigation against public participation (which comprises the SLAPP acronym).

The movant general counsel in *Clarity* was accused, along with his company, of not paying for services rendered after he had negotiated both an employment and services contract. He also was involved in subsequent negotiations after relations went south, and so when the other contracting party sued for payment, the general counsel filed an anti-SLAPP motion asserting that his actions in connection with negotiations over the contract were tied to supposedly anticipated litigation, which would generally be protected under the statute.

The problem though, as the *Clarity* Court clearly saw, was that "litigation-related activity did not commence until the employment-contract negotiations 'broke down' and the health care company refused to pay invoices owed." Put another way, the causes of action at issue "focus on appellant's unprotected activity before the commencement of protected settlement discussions on respondent's breach of contract claim." Not only was the anti-SLAPP motion denied, but the general counsel was ordered to reimburse his opponent for its trouble. According to the *Clarity* Court, "[a] ny reasonable attorney would also have understood that the allegedly injury-producing conduct was defendants' fraudulent, unprotected misrepresentations (fifth cause of action) and concealment (sixth cause of action) that preceded litigation-related settlement discussions over respondents' unpaid invoices."

Pech v. Doniger, 75 Cal. App. 5th 443, pertained to a more garden-variety anti-SLAPP issue, in which the Court held (almost) unremarkably that advising a client not to file a lawsuit is protected conduct. The attorney plaintiff in *Pech* had entered into a fee agreement with a client which entitled him to a certain percentage of fees depending on when the claim was resolved, all of which would arise only after a complaint was filed. But no complaint was filed before the engagement was terminated. The attorney blamed, in part, the new attorneys that his former clients had retained for interfering with his contract with them. The *Pech* Court had no difficulty concluding that "the allegation that [new counsel] played a role in the clients' decision not to file the complaint and to terminate Pech's services" was protected conduct, and also privileged under Civil Code section 47(b): "Counseling others in anticipation of litigation or encouraging others to sue is considered protected prelitigation activity."

Bowen v. Lin, 80 Cal. App. 5th 155, likewise affirmed that "[d] ecisions about hiring and firing one's attorney" are clearly protected conduct. In *Bowen*, an attorney sued his clients both for fees he claimed he was owed, and also family members of his clients who he claimed interfered with the attorney-client relationship when they sought to resolve the litigation the attorney had initiated. "Few acts are more squarely protected by the anti-SLAPP statute" than those of the family members who the attorney alleged, failed to "actively cooperate" with him "… to achieve a successful result [and] … obtain[] an award for damages," the Bowen Court concluded.

Most recently, the Court in *Flickinger v. Finwall*, 2022 Cal. App. LEXIS 981, further narrowed an exception to protected conduct which involves "speech or petition activity that [i]s illegal as a matter of law." That exception, emerging from *Flatley v. Mauro*, 39 Cal.4th 299 (2006), often arises in the context of alleged extortion, which is how the respondent sought to characterize an attorneys' prelitigation response to a demand letter in *Flickinger*. However, like many cases before it, *Flickinger* gave room to lawyers to negotiate on behalf of their clients: "not every threat by an attorney to settle or be sued is extortion."

In fact, in assessing the letter at issue, the *Flickinger* Court observed that "[i]n it, defendant addressed the merits of plaintiff's claims and offered facts relevant to his client's claimed lack of liability" … "made no threat to report plaintiff to any prosecuting authorities" and "[h] is only express 'threat' was that his client, [] would "aggressively defend himself" in litigation." Even though the letter also mockingly urged counsel to advise his client "about how litigation '[could] result in Apple opening an investigation into [plaintiff's] relationships with vendors,'" the *Flickinger* Court found such a veiled threat "does not lie so far outside the bounds of professional communication to amount to criminal extortion as a matter of law."

Arbitration

Aronow v. Superior Court, 76 Cal. App. 5th 865, involved a Fourth District split of authority between San Diego and Orange County courts which the First District weighed in on. In that case, the First District answered "yes" to both questions it self-explanatorily teed up: (1) "Does a trial court that granted a defendant's petition to compel arbitration have jurisdiction to lift the stay of trial court proceedings where a plaintiff demonstrates financial inability to pay the anticipated arbitration costs?" and (2) "[i]f so, may the court require defendant either to pay plaintiff's share of arbitration costs or to waive the right to arbitration?"

On one side of the debate, Division One of the Fourth District had declared in 2011 that to "permit a trial court to allow litigation to proceed whenever the court determines that a party cannot afford the costs of arbitration … would be fundamentally inconsistent with [both] California's 'strong public policy favoring contractual arbitration' [citation] [¶] … [and] well-established case law holding that a trial court retains only a very narrow scope of jurisdiction with respect to an action that has been stayed pending arbitration." In 2013 and then again in 2018, Division Three disagreed, explaining most recently that "forcing the plaintiff 'to remain in the arbitral forum with an obligation to pay half the fees will lead to the very real possibility [that she] might be deprived of a forum to resolve her grievances against defendants'" and concluding that "[t]he interest in avoiding such an outcome far outweighs the interest, however strong, in respecting parties' agreements to arbitrate." *Aronow* went with the Division Three reasoning, but noted that an opposing party should be entitled to conduct limited discovery into the alleged inability to pay before a determination is made that the contracting lawyer must either cover the indigent parties' fees or waive arbitration.

Parenthetically, the plaintiff in *Aranow* had asked the trial court pursuant to Code of Civil Procedure section 166.1 to certify the issue in question, which the trial court granted. We believe trial courts should employ this procedural device more often and the Court of Appeal should extend more deference to such certifications.

Statute of Limitations

Wang v. Nesse, 81 Cal. App. 5th 428, was a statute of limitations case arising under Code of Civil Procedure Section 340.6 in which the Court held that a claim was not subject to a summary judgment as time barred because there was a remaining dispute concerning whether the attorney continued to represent the client through the filing of a substitution of attorney. The lawyer had argued that his representation actually ceased earlier, and that therefore, the tolling provision extending the limitations period through the time an attorney continues to represent a client, could not save the claim. However the *Wang* Court could not say that contention was undisputed, construing emails between the attorney and his client as "equivocal" and "prospective," as opposed to a clear indication that the attorney had withdrawn: "Although it is conceivable that a trier of fact could determine that Nesse's e-mails to Wang between December 3 and December 15, 2014, constituted withdrawal, another reasonable inference is that Nesse requested his client's response, threatened to withdraw, and indicated his future intention to withdraw."

Bankruptcy Claims

The upshot of *Akhlagpour v. Orantes* 2022 DJDAR 12460 (decided on Dec. 13th), was the continued vitality of the Barton doctrine, derived from the US Supreme Court case of *Barton v. Barbour*, 104 U.S. 126 (1881), "which requires, before filing a lawsuit against officers appointed or approved by the court, obtaining leave from the bankruptcy court…" In *Akhlagpour*, the Court held that a former Chapter 11 debtor-in-possession may pursue malpractice claims, but only for actions taken by her court-appointed counsel after the trustee was appointed (when she was a debtor out of possession). Claims which arose prior to appointment of the trustee belonged to the bankruptcy estate, not plaintiff personally.

Significantly, citing a number of federal court cases, the *Akhlagpour* Court also held that the underlying bankruptcy court order approving the defendant attorney's fees for services would bar a malpractice action as to such services because a sufficient identity existed between the fee application and the legal malpractice case to support claim preclusion.

Disqualification

In *Victaulic Co. v. American Home Assurance Co.*, 80 Cal. App. 5th 485, the appellant insurance companies had attempted to disqualify opposing counsel on grounds that two attorneys who had done work for a claims handling arm of one of the insurance companies had recently joined the opposing firm, even though they were not working on the subject case. A primary argument was that those attorneys nonetheless were aware of the insurance companies' "playbook" in defending bad faith claims, and that such know-ledge should be imputed to the firm.

However, the *Victaulic* Court was not persuaded, noting that this was the third attempt to disqualify the firm, and that besides, the insurance companies had not shown that the new attorneys "had any access generally to confidential information that would be of benefit in this litigation other than defendants[‘] general business practices and philosophy." Such access, the *Victaulic* Court explained, "could not be presumed because the insurers failed to show that the attorneys had either a direct personal relationship or a substantial relationship with them, nor did they show that any information to which the attorneys had access was confidential."

Concluding Thoughts

2022 may have been a bellwether year for the anti-SLAPP statute from a procedural perspective in cases involving lawyers; it remains a potent and important vehicle to expeditiously resolve claims impeding a lawyers' right to petition (as it also includes a direct right to appeal and a fee shifting provision generally in favor of defendants). Beware, though, as the appellate courts are also keen to the statute being abused, particularly in the form of litigants attempting to fit within prong 1 conduct which is not actually protected by the First Amendment.

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