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PERSPECTIVE

Year in review 2020: cases involving lawyers

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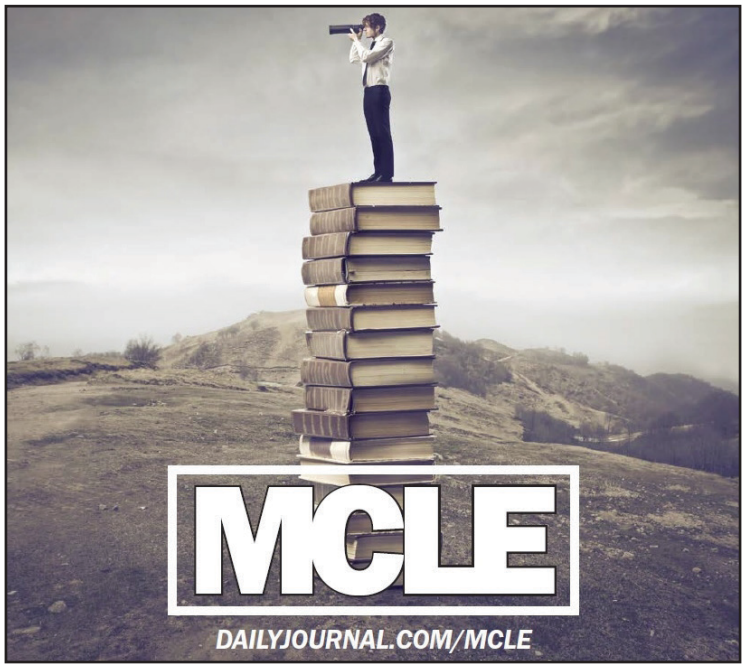
"Disruption" is a word that comes to mind when we look back on this past year, and while the appellate courts were not spared (oral argument via Blue-Jeans became commonplace), they nevertheless managed to address a number of familiar issues affecting lawyers as defendants, issuing opinions addressing the statute of limitations, causation and malicious prosecution claims, particularly in the context of anti-SLAPP motions. Sanctions against lawyers and fee splitting were also the subject of published cases.

The California Legislature also implemented a fifth tolling basis applicable to claims against lawyers arising in relation to fee arbitration, which we described in our article last year, but, in what could be a future source of controversy, did not have a hand in imposing a broad emergency tolling rule prompted by the COVID pandemic, enacted instead by Judicial Council decree.



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Statute of Limitations

While the fifth tolling circumstance is of narrow application, Emergency Rule 9 — issued by the Judicial Council extending limitations periods of more than six months up to potentially 178 days — may have much broader implications in relation to claims against lawyers. That emergency tolling rule seemingly constitutes a sixth tolling basis to the statute of limitations applicable to claims against lawyers, unless it is trumped by the case law consistently holding that only the tolling bases explicitly described in Code of Civil Procedure Section 340.6 constitute the exclusive bases for tolling. *See Laird v. Blacker*, 2 Cal. 4th 606, 618 (1992) ("Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute.").

Many a plaintiffs' lawyer will presumably argue that all limitations periods triggered between April 6 and Oct. 1, 2020, including those specifically applicable to claims against lawyers, are extended for that time frame, to which lawyer defendants may respond conflicts with the California Supreme Court's direction in Laird. While the emergency rule explicitly purports to supplant any contrary rule ("notwithstanding any other law"), there are sure to be questions about the legitimacy of the authority vested by the governor in the Judicial Council rather than the Legislature, where the exclusive power to prescribe limitations periods generally resides.

Similarly, questions will likely arise about statutes of limitations initially triggered in 2019 such that a lawsuit otherwise had to be filed during the emergency tolling period in order for the claim to be timely. If that is the situation, must a legal malpractice lawsuit have been filed immediately upon the lifting of tolling on Oct. 1, or was the limitations bar suspended for the entirety of the tolling period and then would it recommence when the emergency order was lifted? Perhaps the answer depends on when the one-year period would have otherwise run. (Compare a statute that was triggered on May 1, 2019 versus a statute triggered on Aug. 1, 2019.) Similarly, if Section 340.6 was trigerred in 2020 prior to April 6, how does the 178-day period impact that scenario? Or how might tolling agreements entered into before, and expiring during, the Emergency Rule factor in? The answers to these, and other related questions, may have to be resolved in future years, and certainly would be ripe for a more in-depth article.

Rule 9 aside, the statute of limitations applicable to claims against lawyers almost always comes before the appellate courts each year, and in this one instance at least, 2020 was no exception, as the court in *Nguyen v. Ford*, 49 Cal. App. 5th 1 (2020), found time to dismiss a claim that relied on a baseless continuing representation tolling theory. The court in Nguyen ultimately had "little difficulty" affirming the sustaining of a demurrer on statute of limitations grounds against a lawyer where a notice of withdrawal was granted by the underlying appellate court more than a year before the malpractice action was filed. The plaintiff contended that the malpractice action arose out of the underlying district court action rather than the appeal, and because the representation in the appeal and district court case required separate engagement agreements, continuing representation tolled the limitations period as to malpractice arising out of the district court case.

However, the Nguyen court declined to parse the two proceedings, easily concluding that they arose out of the same "specific subject matter," and that therefore the withdrawal order extended to the district court action as well (the court also noted that the attorney defendant had actually filed a motion to withdraw in the district court case, but it had just not been granted within the year of filing the malpractice case). Of course, the Nguyen court also made it clear that the ending of continuous representation is not necessarily marked by an order of withdrawal, as continuous representation ends as soon as the client's objectively reasonable expectations no longer recognize an ongoing mutual relationship.

Causation and Settle and Sue

Much more controversial than the Nguyen decision was the opinion issued in *Masellis v. Law Office of Leslie F. Jensen*, 50 Cal. App. 5th 1077 (2020), which presented itself as a mere interpretation of existing law concerning application of the causation element to a mal-

practice claim. However, *Masellis* raised questions regarding whether it sought to modify the existing burden of proof applicable to the causation element in malpractice claims, particularly as to "settle and sue" cases.

In order to prove liability against an attorney, a plaintiff must not only prove a standard of care breach, but also that it caused damage, which typically is addressed through the so-called case-within-the-case method. That approach becomes more complicated (and uncertain) when the underlying case within the malpractice case resolved through settlement. Because of that fact, in assessing the preponderance of evidence standard in these "settle and sue" cases, courts have applied an exacting "to a legal certainty" standard — as the court put it in *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154, 166 (2012), a plaintiff must present "evidence showing to a legal certainty that" the alleged breach of duty caused damage-which implies that evidence of causation cannot be based on essentially speculation that a better result would have been achieved absent the settlement which was allegedly prompted by the negligence.

The defendant in *Masellis* had relied on *Filbin* (well known to the San Francisco-based author who coincidentally served as both trial and appellate counsel) and related case law to contend that a higher standard of proof is imposed in settle and sue cases, to which the *Masellis* court offered an emphatic rejection: "we conclude the applicable standard of proof for the elements of causation and damages in a "settle and sue" legal malpractice action is the preponderance of the evidence standard set for the in Evidence Code Section 115" and that "[a] higher standard of proof is not "otherwise provided by" the judicial decisions relied upon by Attorney." The *Masellis* court concluded that "legal certainty" references in case law were "simply referring to the degree of certainty inherent in the applicable burden of proof," confirming that the burden is merely preponderance of evidence in malpractice cases, but nevertheless leaving room for attorney defendants to show that evidence of a better result may still be too afflicted by speculation to pass muster as admissible evidence.

Many expected the Supreme Court to grant review given the extent of amicus briefing submitted in support, including some arguing for a blanket prohibition or limitation on settle and sue cases based on public policy concerns, as Pennsylvania and Wisconsin have adopted. These decisions are largely premised on the recognition that a comparison between a settlement and what should have happened absent alleged negligence inherently invites speculation given the myriad of considerations which generally lead into a settlement. The Supreme Court was not sufficiently interested this time, but it also probably will not be its last chance, as the level of proof necessary to establish a causal connection to injury will undoubtedly continue to be a hotly contested issue in malpractice cases.

Malicious Prosecution

The appellate courts also addressed malicious prosecution claims once again in three cases, and covered the three typical elements. Malicious prosecution cases are published with relevant frequency, despite that it is a "disfavored" tort. In fact, the court in *Zhang v. Chu*, 46 Cal. App. 5th 46 (2020), relied on that very characterization in dispensing with a malicious prosecution action against a lawyer who dismissed, without prejudice, a defendant he had sued on behalf of his client, eliciting an anti-SLAPP motion under Code of Civil Procedure Section 425.16 for lack of evidence of malice which was granted. The *Zhang* court affirmed after analyzing whether the lawyer had filed the action initially to force a settlement with no relation to the merits, one of four indicia of potential malice. In doing so, the *Zhang* court acknowledged that the burden on the malicious prosecution plaintiff was "hard," because it required him to prove a negative, but found solace in the fact that it should be, because malicious prosecution actions are "disfavored."

Answering the plaintiff's contention that a pattern of settlement offers implied malice (they increased before falling below the original demand), the *Zhang* court rejected plaintiff's portrayal of "improper extortion," noting that the demands may simply have reflected an evolving analyses of case value, or maybe just "tactical bluffing, or alternating moods of optimism and panic, or a combination of all the above, or something else entirely." In other words, the *Zhang* court was uninterested in speculating as to the basis behind varying demands for purposes of assessing whether the plaintiff was added to the case merely to force a settlement with no connection to the merits.

Later in the year, in *Golden State Seafood, Inc. v. Schloss*, 53 Cal. App. 5th 21, another malicious prosecution action, the court went the other way, affirming the denial of the anti-SLAPP motion on grounds that the plaintiff could establish a probability of proving a lack of probable cause. The underlying case alleged against a delivery driver violations of civil rights statutes for denying equal access to a banquet hall. The driver had parked in a space reserved for drivers possessing a handicap placard.

The court in *Golden State Seafood* explained, however, that while parking in a reserved space may be a violation of the Vehicle Code, it "is not the type of discrimination the Unruh Civil Rights Act, DPA, or ADA was intended to remedy." The delivery driver was not a "'business establishment'" subject to the statutes' reach" nor was the plaintiff one of the delivery driver's "clients, patrons or customers" to whom it was providing a good or service. The plaintiff also could not prove he possessed a valid handicap placard, and therefore failed to show that the delivery driver actually denied him access to that particular space and most crucially, could not show the banquet hall was open on the day of the delivery, causing the lawyer's client to dramatically change his story at trial.

The court could not countenance the lawyer's active abandonment of the allegations pled with a good faith reliance on the truth of his client's story. As the *Golden State Seafood* court put it, "[w]hile 'the attorney is entitled to rely on information provided by the client' (citation), once the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action." In dicta, the court addressed the interim adverse judgment rule, but its analysis seemed to miss the mark.

A third malicious prosecution opinion was issued, namely *Alston v. Dawe*, 52 Cal. App. 5th 706 wherein the Court of Appeal (Orange County) reversed the granting of an anti-SLAPP motion, on the grounds the plaintiff had shown a probability of prevailing on the favorable termination element of the claim. The court in distinguishing *JSJ Limited Partnership v. Mehrban*, 205 Cal. App. 4th 1512 (2012), referred to the matter as a "convoluted case" and found that a dismissal of the underlying action on collateral estoppel grounds can sometimes qualify as a favorable termination, and found that the reason for the underlying dismissal was decided on the merits, as opposed to on procedural grounds. Accordingly, the Court of Appeal reversed and remanded the case for the trial court to make a determination as to whether plaintiff made the requisite showing of a probability of prevailing on the lack of probable cause and malice elements.

Sanctions

Sanctions sought against a lawyer were at issue in two cases published late in the year. In *Kwan Software Engineering, Inc. v. Hennings*, 58 Cal. App. 5th 57 (Dec. 2, 2020), the court found that sanctions should not be imposed against an attorney, whereas in *Malek Media Group v. AXQC*, 2020 DJDAR 132387 (Dec. 16, 2020) the Court of Appeal imposed sanctions. Earlier, in *Levine v. Berschneider*, 56 Cal. App.5th 916 the Court of Appeal affirmed a sanctions order assessed against an attorney for lack of candor to the trial court.

The *Kwan Software* court underscored that attorneys are not responsible for their client's discovery misconduct. *Kwan Software* involved discovery sanctions imposed against the plaintiffs in business litigation - which the trial court premised on "'egregious and deliberate' 'litigation abuse,'" — resulting in dismissal of the action, but not monetary sanctions. Following appeal, defendants were awarded monetary sanctions against plaintiffs as well, but the *Kwan Software* court denied sanctions against the plaintiff's attorneys, although not on the due process grounds that the trial court had relied ("attorneys' ability to speak on their own behalf and defend against the award of attorney's fees is severely hampered by their ethical duty of confidentiality, the attorney-client

privilege and the invocation of the Fifth Amendment privilege by their former client.").

Instead, the *Kwan Software* court concluded that the existence of due process aside, the record still did not support imposition of sanctions against the attorney because attorney declarations, signed under penalty of perjury, refuted the allegations of discovery misconduct on the part of the attorneys, asserting that they represented their clients "in conformance with the highest ethical standards," and were not rebutted by any evidence indicating that the attorneys advised their clients to engage in discovery misconduct, including spoliation of evidence and untruthful deposition testimony. The *Kwan Software* court acknowledged "the difficulty of eliciting direct proof of such conduct in light of an attorney's ethical obligations and privileges protecting attorney-client communications," but explained that "the difficulty of carrying this burden stems from the [discovery] statute itself," which "by its terms requires a finding that an attorney has advised misuse of the discovery process before monetary sanctions may be imposed."

The factual scenario of *Malek Media* differed markedly from that of *Kwan Software*. In *Malek Media*, sanctions were assessed against an attorney under not oft utilized Code of Civil Procedure Section 907 for pursuing what the appellate court characterized as an "objectively and subjectively frivolous" appeal, "devoid of factual or legal support" and rife with conspiracy theories about the arbitrator who had ruled against his client. The appeal arose from an arbitration stemming from a falling out between partners who had tried to start a film production company. After the arbitrator ruled against the attorneys' client in a 96-page award, the losing party "commenced a deep-dive, internet search into [the arbitrator's] background" in search of evidence of bias necessary to set aside the award. The client and attorney settled on the arbitrator's prior affiliation with GLAAD, a gender rights organization, which, according to the attorney, biased the arbitrator against his Catholic client.

Not only did the *Malek Media* court not buy the belatedly made argument, but it sent a message to both the party and the attorney that frivolous appellate arguments would not be tolerated. Citing *In re Marriage of Flaherty*, 31 Cal. 3d 637, 649–50 (1982), the court noted that "[s]anctions are appropriate when appellant's counsel had a professional obligation not to pursue the appeal or should have declined the case outright" and concluded that he was "equally culpable for pursuing this frivolous and bigotry-infused appeal" despite "numerous opportunities to dismiss the appeal and to withdraw its baseless claims." The Court of Appeal "is not the forum ... to rant about conspiracies or their politics," the *Malek Media* court admonished before imposing sanctions against counsel for having "wasted its time and resources considering MMG's appeal, which has only served as a drain on the judicial system and the taxpayers of this state."

In *Levine*, the trial court initially awarded sanctions against the defendant's counsel at a hearing on a motion to enforce settlement. Defendant's counsel had thought the hearing was off calendar, because in fact the payments previously were made in full. When defendant's counsel learned of the order, he brought this to the trial court's attention, and the trial court vacated its prior order, and ultimately sanctioned the plaintiff's counsel for his lack of candor. The Court of Appeal rejected the plaintiff's attorney's argument that he technically had not made any false statement to the trial court, since the trial court never specifically inquired about the status of settlement payments. The *Levine* court appropriately noted that an attorney has an affirmative duty to inform a court when a material statement of fact or law has become false and misleading in light of subsequent events.

Fee Splitting

Whether fee splitting was proper took center stage in *Hance v. Super Store Industries*, 44 Cal. App. 5th 676 (2020), in which the court held an agreement to divide fees amongst counsel unenforceable for failure to comply with the ethical rule requiring written disclosure to clients if they lack professional liability insurance. The court in *Hance* reasoned that to enforce the agreement "despite noncompliance with the requirements of the rule, would effectively condone that violation, contrary to the purpose behind the rules — 'to protect the public and to promote respect and confidence in the legal profession,'" would "bind the clients to an agreement they might not have entered into, or to a consent to fee division they might not have given, if the required disclosure had been made" and "would send an implicit message to attorneys" that the ethical rules "lack[] sufficient importance for courts to enforce compliance."

At the same time, the *Hance* court allowed for the possibility of a quantum meruit recovery, noting that "[w]hen the rule violation that invalidates a fee agreement or a fee division agreement is not sufficiently serious to warrant a complete forfeiture of attorney fees, allowing recovery in quantum meruit would not discourage compliance with the applicable ethical rules."

What to Watch for

As discussed above, litigators in all fields should be conversant with Emergency Rule 9 issued by the Judicial Council since not considering it, or not properly applying it, may itself lead to claims against lawyers. Issues arising from performance of legal services remotely are also sure to arise, including questions about the implications and fairness of transitioning formerly in person proceedings to a remote model, the continued viability of state restrictions concerning the practice of law across physical state boundaries, and the extent to which the COVID crisis interferes with access to evidence and maintenance of client files, among other issues. While we all hope to make great strides toward eliminating the COVID threat in the months to come, the disruption and impact on the practice of law is certain not to abate for many years.

Nevertheless, to paraphrase the Counting Crows from "A Long December," there's reason to believe this year will be better than the last. ■

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