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Lawyers as defendants in 2019

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In 2019, the Court of Appeal (but not Supreme Court) predictably addressed many of the same general issues which come before it year after year, including nuances in relation to malicious prosecution and its connection to the anti-SLAPP statute, statute of limitations applicable to claims by third parties against attorneys, and the existence of an attorney- client relationship. Glaringly absent were any published cases — besides one involving the statute of limitations — as to claims brought by former clients, although there have been a few juicy unpublished cases which have elicited requests that they be published, but to no avail. Most interesting may have been the courts' willingness to extend the analysis of those issues into broader principles such as civility and the value of the services performed by lawyers.

Broad Principles

"Of course, on occasion, a client may not fully appreciate the excellent result achieved by her or his attorney. Such an occasion provides the background from which this case arises." That's how Justice Arthur Gilbert of the 2nd District Court of Appeal began the opinion in *Mancini & Associates v. Jason Schwetz*, 39 Cal. App. 5th 656 (2019), which involved a fee dispute between attorney and client — a sweeping observation which happens to form the backdrop to many claims against lawyers which find their way to the trial and appellate courts.

In *Mancini*, the plaintiff had retained an attorney subject to a contingency fee in a wrongful termination case. Plaintiff obtained a sizeable jury award, but the judgment turned out to be essentially uncollectible. Years later, the plaintiff informally resolved her differences with the defendant, eventually signing an agreement releasing him from the pending judgment, including the fees and costs owed under the contingency agreement, without providing any consideration. However, the attorney's collection efforts against the defendant continued, and the *Mancini* court ultimately held the release by a client did not preclude the attorney from pursuing enforcement of the judgment which had incorporated the fees and costs owed under the contingency arrangement.

A bit earlier, the wisdom of the 4th District Court of Appeal was on display in *Lasalle v. Vogel*, 36 Cal. App. 5th 127 (2019), a legal malpractice case ostensibly about an order denying a motion to set aside a default, but which the court (Justice William Bedsworth) took as an opportunity to remind practitioners that civility is the bedrock principle upon which civil litigation depends:

"The practice of law is not a business. It is a profession. And those who practice it carry a concomitantly greater responsibility than businesspeople. The term 'officer of the court,' with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance."

In reversing the order denying a motion to set aside the default, the *LaSalle c*ourt bemoaned the sharp practice of a lawyer who took the default of another lawyer within just days of a responsive pleading not being filed, and after a mere single warning by email. The *LaSalle* court noted that "[t]he State Bar Civility Guidelines deplore the conduct of an attorney who races opposing counsel to the courthouse to enter a default before a responsive pleading can be filed" and concluded that the duty to cooperate included a responsibility on the part of a lawyer intending to enter a default to exhaust reasonable efforts to compel compliance with a summons before seeking the entry of a default.

Malicious Prosecution Suits

A different kind of incivility was at issue in *Cuevas-Martinez v. Sun Salt Sand, Inc.*, 35 Cal. App. 5th 1109 (2019), which involved interpretation of the malice and probable cause elements in a malicious prosecution action in the context of an anti-SLAPP motion. (Code Civ. Proc. Section 425.16.) Although the lawyer who handled the underlying case was named as a defendant along with his client, the *Cuevas-Martinez* court did him no favors in barely endeavoring to apply a different malice standard to the attorney.

The underlying action arose out of a claim that the former head cook of a restaurant called Grill-A-Burger had been misappropriating trade secrets, interfering with contractual relationships with suppliers and engaging in unfair business practices. The cook prevailed on summary judgment, and then sued the owners of the restaurant for malicious prosecution, eliciting a successful anti-SLAPP motion, in which the trial court observed that summary judgment based on insufficient evidence "does not equate to evidence that those claims were filed without probable cause such that no reasonable attorney would have thought the claims were tenable."

The *Cuevas-Martinez* Court of Appeal reversed, deciding that the cook established not only a reasonable probability of success as to the lack of probable cause element, but as to the malice element as well, in large part based on the collective continued pursuit of an action which the court characterized as baseless. While the *Cuevas-Martinez* court identified discovery responses which it found demonstrated knowledge of the lack of probable cause (in part because there were no actual contracts to interfere with), the court made little effort to distinguish the knowledge of the clients from that of the attorney, who generally has less direct knowledge of the actual facts. The court noted that the moment when the parties obtained knowledge of the lack of probable cause may have been different as between the lawyer and clients, "but at the very least, all respondents knew probable cause was lacking during discovery."

Although generally, the malice element as applied to a lawyer is subject to a more lenient standard (generally, a client's malice cannot be imputed to the lawyer and the lawyer is entitled to rely on information provided by the client), the *Cuevas-Martinez* court only gave the distinction short shrift, noting that "[a]lthough attorneys may rely on their clients' allegations at the outset of a case, they may not continue to do so if the evidence developed through discovery indicates the allegations are unfounded or unreliable." In reaching that inexacting conclusion, the court also seemed to conflate the malice element with that of probable cause.

Probable cause was also the focus of the Court in *Litinsky v. Kaplan*, 40 Cal. App. 5th 970 (2019), another case arising out of an anti-SLAPP motion filed in response to a malicious prosecution case. But in *Litinsky*, the court placed more emphasis on the right of the attorney to rely on information from the client in bringing the action, which led to the Court affirming an anti-SLAPP dismissal of a malicious prosecution case brought against the lawyers.

In *Litinsky*, after the action against her was dismissed before trial, the plaintiff sued the lawyer representing her adversary for malicious prosecution and intentional infliction of emotional distress. The trial court granted the lawyer's anti-SLAPP motion, concluding that the IIED claim was barred by the litigation privilege and the malicious prosecution claim could not succeed because the evidence showed that the lawyer had probable cause to prosecute the prior action. In affirming the anti-SLAPP order, the court underscored that "an attorney may rely upon information supporting a client's claim unless the information is indisputably false," and noted that evidence from the opposing party or even third parties merely contradicting testimony by the client is not enough to establish a lack of probable cause:

"Faced with the choice of accepting the version of events presented by her client or the version described by the opposing party, [the lawyer] appropriately opted to continue advocating for her client. She could not be liable for malicious prosecution for making that choice so long as the client's claims were arguably meritorious."

Statute of Limitations Cases

Malicious prosecution actions have certainly kept the appellate courts busy in recent years, particularly in connection with evaluating the probable cause and malice elements, as in *Cuevas-Martinez* and *Litkinsky*. Likewise, the proper analysis of the statute of limitations pertaining to those actions has been a similarly hot topic, as was the case in *Connelly v. Bornstein*, 33 Cal. App. 5th 783 (2019).

Connelly addressed the ongoing saga concerning whether the one-year statute of limitations set forth in Code of Civil Procedure Section 340.6, subdivision (a) governs malicious prosecution actions against lawyers. That section, of course, provides a "one-year from discovery" statute of limitations

for "an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services." Connelly made it clear that even though the limitations period as to opposing party litigants is two years, it's only one under Section 340.6 if alleged against an attorney. For a more detailed discussion of Connelly, see Weatherup and Feldman "One Year Statute of Limitations on Malicious Prosecution Actions is Virtually Settled," Daily Journal, Aug. 8, 2019.

Garcia v. Rosenberg, 42 Cal. App. 5th 1050 (2019), which was decided later in the year, also involved an untimely filed malicious prosecution action, which prevented plaintiffs from establishing a probability of prevailing on the merits in response to an anti-SLAPP motion. Although Garcia found the one-year statute could apply, it did not resolve the factual issues and instead applied the alternative limitations period set forth in Code of Civil Procedure Section 340.6, which expires four years from the occurrence of the injury. In affirming the granting of an anti- SLAPP motion for the attorney for the opposing party in a prior litigation, the Court of Appeal reinforced the rationale set forth in Connelly, noting the Supreme Court in *Lee v. Hanley*, 61 Cal.4th 1225 (2015) settled a split of authority as to the limitations period applicable to malicious prosecution claims against attorneys, and found that Section 3406 controls.

Turning to a garden-variety legal malpractice case, in *Sharon v. Porter*, 41 Cal. App. 5th 1 (2019), the court reinforced that injury sufficient to trigger the legal malpractice statute of limitations occurs as soon as an appreciable injury occurs, even if less concrete than the damage experienced later. The plaintiff in *Sharon* sued her former attorney for legal malpractice for failing to properly plead damages in a complaint, resulting in the entry of a void default judgment in 2008. Many years later, in October 2015, the judgment debtor's attorney wrote the plaintiff a letter advising the judgment was void, and followed up with a similar letter to the plaintiff's attorney the following month. In September 2016, within a year of the first letter to plaintiff, the judgment debtor moved to vacate the default judgment, causing the plaintiff to incur attorneys' fees trying to oppose the debtor's efforts.

At a bench trial, the trial court concluded the plaintiff did not incur actual injury until September 2016, when she incurred attorney fees, but the *Sharon* court reversed. It concluded that the plaintiff experienced actual injury no later than November 2015, when the debtor's lawyer sent a letter to the plaintiff's lawyer, as by then, the court found, plaintiff's settlement position and interests had already been tangibly diminished.

Existence of an Attorney-Client Relationship

In *Sprengel v. Zbylut*, 40 Cal. App. 5th 102 (2019) the court considered inferring an attorney client relationship in circumstances in which a member of an LLC sued the law firm which represented the LLC, but determined on the facts before it that was not appropriate. Plaintiffs Sprengel and Mohr formed a limited liability company, Purposeful Press LLC, and subsequently filed a malpractice action against the firm hired by Mohr to represent the company in connection with management disputes between the two members. Sprengel alleged the firm had violated their professional duties by undertaking representation of the LLC without her consent, and rendering legal advice in the underlying lawsuits adverse to her personal interests. The trial court granted summary judgment for the firm, concluding Sprengel lacked standing to bring her claims as a direct action, and that she failed to identify any evidence that would support a finding of an attorney-client relationship between herself and defendants.

On appeal the court affirmed the summary judgment, but on different grounds, holding that Sprengel lacked evidence that would support a finding of an implied attorney-client relationship with the firm because she never believed, or had any reason to believe, the firm was acting to protect her personal interests, or had impliedly agreed to avoid representations that were adverse to those interests. The Court of Appeal refused to draw a bright line, and decided the existence of an attorney-client relationship is to be decided on a case by case basis.

Parenthetically, *Sprengel* is an example of "if at first you don't succeed, try try again", as this is the second appeal in that case. Indeed, we discussed *Sprengel v. Zbylut*, 241 Cal. App. 4th 140 (*Sprengel 1*), in our 2015 year in review article. In *Sprengel 1* the court found the defendant had not met its burden of showing the alleged acts came within the ambit of the anti-SLAPP statute, but refused to look beyond the allegations in the complaint. It never reached the merits; hence the motion for summary judgment was filed on remand. We believe *Sprengel 1* is contrary to the statute's preamble to construe it "broadly" and to other cases. *See, e.g.*, *Karnazes v. Ares*, 244 Cal. App. 4th 344 (2016), and *Optional Capital, Inc. v. Akin Gump Strauss Hauer & Feld*, 18 Cal. App. 5th 95 (2017).

No Waiver of Attorney-Client Privilege

O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC, 42 Cal. App. 5th 546 (2019) also addressed an anti-SLAPP motion (unremarkably holding that settlement negotiations constituted protected conduct under Prong 1 of Section 425.16) but may be most relevant with respect to the issue of waiver of the attorney-client privilege. We note there are other issues discussed in the lengthy opinion. O&C arose from an insurance coverage dispute that resulted in a large settlement against which the attorney representing plaintiff had an attorney lien. That attorney passed away before enforcing the lien, but had been forced into involuntary bankruptcy prior to his death. Through the bankruptcy, the largest creditor of the bankruptcy estate – also an attorney — purchased the attorney lien and correspondingly obtained all the attorney's file for the case, including the underlying client's files.

The client objected to the attorney's acquisition of his files and demanded their return, but the attorney creditor contended that the attorney client privilege was waived when the client failed to object to the sale of the fee claim during the bankruptcy. The *O&C* court didn't buy it, underscoring that waiver does not occur "until the holder voluntarily discloses a substantial part of the privileged communication or otherwise manifests his or her consent to the disclosure by others." The *O&C* court thus declined to find a waiver by implication on the basis of a mere omission. *Cf. White Mountains Reinsurance Co. of America v. Borton Petrini LLP*, 221 Cal. App. 4th 890 (2013), wherein the court found a very limited exception to the no assignment of a malpractice action rule.

What to Watch for

The Legislature has amended Code of Civil Procedure Section 340.6, and added (a)(5), which is a new tolling provision in relation to the statute of limitations regarding the Mandatory Fee Arbitration Act (B&P Code Section 6200 et seq). This fifth tolling exception to the statute of limitations for malpractice claims now provides for tolling the limitations period pending the resolution of pending arbitration carried out pursuant to the Mandatory Fee Arbitration Act. "Pending" means from the date a request for arbitration is filed until 30 days after receipt of notice of the award, or notice of termination of the proceedings, whichever occurs first. For a more detailed discussion of 340.6(a)(5), see Feldman, "Amendments to Statute of Limitations for Actions Against Attorneys Coming in January," Daily Journal (Dec. 6, 2019).

We wish you a happy new year and new decade. Be careful out there. ■

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