Barristers BTG – January 20, 2024

Session 2

Case Study 1

People v. Kelley

75 Cal.App.3d 672
Court of Appeal, Second District, Division 2, California.

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Stanley Paul KELLEY, Defendant and Appellant.

Cr. 30435.
|
Dec. 7, 1977.
|
Hearing Denied Feb. 1, 1978.

Synopsis
Defendant was convicted in the Superior **Court**, Los Angeles County, Earl F. Riley, J., of three counts of armed robbery with use of a firearm. Defendant appealed, and the **Court** of Appeal, Fleming, Acting P. J., held that: (1) the trial **court** did not abuse discretion in admitting evidence of an uncharged offense; (2) the trial **court's** failure to give sua sponte an instruction limiting the applicability of evidence of the uncharged offense was not prejudicial; (3) the trial **court** did not err in failing to give detailed instructions enumerating factors jury should consider in evaluating eyewitness identification testimony, and (4) though the prosecuting **attorney** engaged in unprofessional conduct during the course of the trial, the misconduct did not require reversal of the conviction in light of circumstances indicating that, far from prejudicing defendant's case, the prosecutor's misconduct helped defendant's case by eliciting jurors' sympathy.

Affirmed.

West Headnotes (14)

[1] **Criminal Law**⇨Prejudicial effect and probative value

Where the State seeks to introduce evidence of uncharged offenses, trial **court** must weigh the probative value against the danger of undue prejudice. West's Ann.Evid.Code, § 352.

[2] **Criminal Law**⇨Other offenses

Trial **court's** exercise of discretion in determining whether to admit evidence of uncharged offenses will not be disturbed absent a clear showing of abuse. West's Ann.Evid.Code, § 352.

7 Cases that cite this headnote

[3] **Criminal Law**⇨Robbery

In armed robbery prosecution, trial **court** did not abuse discretion in admitting evidence of an uncharged automobile theft offense where evidence of the automobile theft was relevant to show that the automobile came into defendant's possession before commission of the charged offenses and where quantity of evidence introduced on issue was small and consumed little time, no attempt was made to prove circumstances of the theft and, given the length of the trial and the volume of eyewitness identification, brief testimony concerning the theft could not have influenced the outcome of the case.

[4] **Criminal Law**⇨Purpose and effect of evidence; excluding evidence from consideration

Failure to give a limiting instruction on evidence of an uncharged offense is reversible error only when it is prejudicial.

[5] **Criminal Law**⚖Instructions Already Given

Where trial **court**, in armed robbery prosecution, gave instructions which sufficiently focused jury's attention on State's burden of proof on issue of identity, it was not error for trial **court** to refuse to give detailed instructions set out in *People v. Guzman* which enumerated factors for jury to consider in evaluating eyewitness identification testimony.

7 Cases that cite this headnote

[6] **Criminal Law**⚖**Duties** and Obligations of Prosecuting **Attorneys**

As the representative of the government, a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty but also is obligated to uphold the orderly administration of justice as a servant and representative of the law; hence, prosecutor's **duty** is more comprehensive than a simple obligation to press for conviction.

1 Case that cites this headnote

[7] **Criminal Law**⚖**Duty** to allow fair trial in general

Because the prosecutor is the representative not of an ordinary party to a controversy but of a sovereignty having an obligation to govern impartially, it is as much the prosecutor's **duty** to refrain from improper methods calculated to produce a wrongful conviction as it is his **duty** to use every legitimate means to bring about a just conviction.

2 Cases that cite this headnote

[8] **Criminal Law**⚖Appeals to Sympathy or Prejudice

Threats by **counsel** in the courtroom to kick opposing **counsel** in the ankle, to hit him in the face and to disrupt his vacation plans amount to unprofessional conduct and, therefore, clearly comprise professional misconduct when coming from a public prosecutor.

[9] **Criminal Law**⚖**Duties** and Obligations of Prosecuting **Attorneys**
Criminal Law⚖**Duties** and Obligations of Defense **Attorneys**

All **counsel** are held to a uniform minimum standard of courtroom behavior which is the professional standard of **courtesy** and decorum; the identical standard of professional behavior in **court** applies to prosecutor and defense **counsel** alike.

4 Cases that cite this headnote

[10] **Criminal Law**⚖Constitutional obligations regarding disclosure
Criminal Law⚖Impeaching evidence

A prosecutor is required to meet standards of candor and impartiality not demanded of defense **counsel**; for example, prosecutor must disclose unfavorable aspects of his case and must make available impeaching evidence relating to witnesses.

[11] **Criminal Law**⚖Conduct of **counsel** in general
Criminal Law⚖Comments on evidence or witnesses, or matters not sustained by evidence

A conviction in a criminal cause may be

reversed if the prosecutor suppresses material evidence, makes improper comment during cross-examination, makes improper references to extrinsic matters or fails to disclose important information to the defense.

2 Cases that cite this headnote

[12] **Criminal Law**⚖Rebuttal Argument; Responsive Statements and Remarks

A prosecutor may not excuse his own courtroom misconduct by pointing the finger of blame at another; lapses of behavior by defense **counsel** do not excuse professional misconduct by a district **attorney**.

2 Cases that cite this headnote

[13] **Criminal Law**⚖Conduct of **counsel** in general

Reversal of a conviction is not required by prosecutorial misconduct unless such misconduct prejudiced the defendant's case.

1 Case that cites this headnote

[14] **Criminal Law**⚖Conduct of **counsel** in general

Though prosecutor engaged in intemperate and unprofessional conduct during course of armed robbery trial by making personal attacks and threats against defense **counsel** and by ridiculing defendants and their defense, misconduct did not require reversal of conviction where evidence against defendant was strong and review of entire record indicated that prosecutorial misconduct may have helped defendant's case by generating enough jury sympathy to produce a hung jury on nine of 12 counts. West's Ann.Const. art. 6, § 13.

3 Cases that cite this headnote

Attorneys and Law Firms

*674 **458 Paul Arthur Turner, Los Angeles, under appointment by the **Court** of Appeal, for defendant and appellant.

Evelle J. Younger, Atty. Gen., Jack R. Winkler, Chief Asst. Atty. Gen., Crim. Div., Daniel J. Kremer, Asst. Atty. Gen., Jay M. Bloom and Steven H. Zeigen, Deputy Attys. Gen., for plaintiff and respondent.

Opinion

*675 FLEMING, Acting Presiding Justice.

Appellant is one of three defendants originally charged in a twenty-two count information, from which twelve counts were severed for the instant trial: nine counts of armed robbery with use of a firearm, one count of kidnapping for purposes of robbery with use of a firearm, one count of armed burglary with use of a firearm, and one count of first degree murder. After a jury trial in excess of four weeks, the jury found appellant guilty of three counts of armed robbery with use of a firearm and disagreed on the other nine counts, as to which the **court** declared a mistrial. The **court** denied appellant's motion for new trial and sentenced him to state prison for terms to be served concurrently.

On this appeal appellant contends: (1) the trial **court** should have excluded evidence of an uncharged offense, namely, the theft of a two-tone brown Cadillac Seville used in some of the robberies, and in any event it should have given sua sponte an instruction limiting the applicability of evidence of the Cadillac's theft; (2) the **court** should have given appellant's requested Guzman instructions concerning eyewitness identification (People v. Guzman (1975) 47 Cal.App.3d 380, 121 Cal.Rptr. 69); (3) the repeated misconduct of the deputy district **attorney** prejudicially influenced his case.

**459 Before discussing the facts and contentions in detail, it is helpful to put the issues in perspective. The evidence against appellant on almost all counts was strong, and in fact it is surprising the jury disagreed on them. Defendants, while driving the stolen Cadillac, were involved over a two-day period in a series of armed

robberies, many of whose victims identified some or all defendants credibly. Much of the stolen property was recovered in codefendant Miller's apartment or personal possession, and appellant was arrested in the stolen Cadillac. On such a record only extremely serious error at trial could be deemed prejudicial, and for this reason, among others, most of appellant's contentions are not significant. However, the conduct of the deputy district **attorney** raises a serious question whether the trial itself, characterized by the trial judge as an unprofessional "Pier 6 brawl," deteriorated into farce and sham.

FACTS

The charged offenses, occurring on 21 and 22 February 1976, involved (1) the armed robbery of Hicks; (2) the armed robberies of Menefee and Powell; (3) robbery and burglary of the Club Mugen; (4) armed robbery *676 of Huey, who was locked in the trunk of his car following the robbery; (5) armed robbery of Alvin Tate and murder of Jimmie Grisby. The jury convicted appellant of the Menefee/Powell robberies and the Huey robbery.

The Hicks incident allegedly occurred about 1 a. m. on 21 February 1976. Hicks had dropped off his girlfriend at her Culver City home and was beginning to drive away when a Cadillac Seville, which he described as black over silver, pulled abreast of him. Two individuals got out of the Cadillac and approached Hicks; one, defendant Miller, had a gun. Hicks unlocked the car door, and Miller took his digital watch, rings, and cash, and tore the telephone out of the automobile. One robber threw Hicks' car keys into the bushes. After the robbers departed, Hicks reported the robbery to the police but lied about the place of its occurrence to prevent his wife discovering he had been out with a girlfriend. Hicks' watch and some of his rings were later recovered from Miller on the latter's arrest. Hicks' identification of Miller was shaky. He testified that he only glanced at him a couple of times. The jury hung on this charge.

Next came the Menefee/Powell robberies, about 9 or 10 p.m. on February 21. While Powell, a retired police officer, and Menefee were sitting in a parked car in the View Park area, three individuals approached the car from both sides, and one put a gun to Powell's head. Appellant told Menefee "Don't turn around. I'll blow your head off." While appellant took a watch, ring, and about $175 from Menefee, defendants Miller and Robinson were robbing Powell. After the robberies, two of the three robbers were observed fleeing toward a two-toned brown Cadillac. An eyewitness, Yolanda Lewis, identified appellant as one of the robbers and described the Cadillac Seville. Powell identified Robinson and Miller, and Menefee identified appellant. As stated, the jury convicted on the charges arising out of this incident.

The Club Mugen incident occurred about 10:15 p.m. on February 21, the same evening as the Menefee/Powell incident. Various witnesses testified that four armed individuals entered the club (a restaurant and bar on Crenshaw) from the rear exit, held up the patrons, and cleaned out the cash register. The club proprietor and an eyewitness, Ed Sanders, identified Miller and Robinson at a lineup, and the bartender, Reva Caliman, identified all defendants. Mrs. Sanders also identified Miller and appellant. A credit card stolen from one of the patrons, Freddie *677 Chavez, later turned up in the brown Cadillac Seville in which appellant was ultimately arrested. The jury hung on the Club Mugen charges.

The Huey incident and the Tate/Grisby incident both occurred around 2 to 3 a. m. on February 22 in the parking lot across from a club called the 2001 Disco near Eighth and La Brea. Huey testified that as he was leaving the club and walking to his car he saw the three defendants get out of a brown Cadillac Seville, appellant and Miller being armed with guns. Huey later **460 identified appellant from a photo lineup. Miller ordered Huey out of the car and took his money and jewelry. The three then locked Huey in the trunk of his car. His ring was later found in Miller's possession at the time of Miller's arrest. The Huey charges resulted in conviction.

The Tate/Grisby incident, which did not result in a conviction, occurred as Jimmie Grisby and his brother-in-law Alvin Tate were leaving the 2001 Club about 3 a. m. As they were getting into their automobile, appellant and Robinson approached with a gun and demanded money from Tate. While Robinson was searching Tate on the passenger side of the car, Tate observed two persons robbing Grisby on the driver's side. Someone told Grisby to "shut up", and then Tate saw a shot fired. Grisby ran into the street, collapsed, and died. Tate identified appellant and Robinson, but he had changed his story several times between pretrial and trial.

Appellant was arrested in the two-tone brown Cadillac Seville. Over objection, evidence was introduced that the vehicle belonged to David Shapell and had been stolen from a Beverly Hills parking garage on 17 February 1976 prior to the time of the charged offenses. The vehicle when stolen had personalized license plates, DS 18. A friend of appellant's testified that at one point she rode with appellant in the Cadillac and he told her the DS

stood for "Diamond Stanley." The evidence also showed that on 20 February 1976 license plates 758 JMU had been removed from a Chrysler Imperial, and thereafter placed on the two-tone Cadillac Seville in which appellant was arrested on February 23. After the car was returned to its owner from the police impound, one of Shapell's employees found two .38 calibre bullets in it and two stolen credit cards, one of which belonged to a Club Mugen patron.

*678 CONTENTIONS

1. Admission in Evidence of Cadillac Theft and Lack of Limiting Instruction Thereon.

[1] [2] It is hornbook law that evidence of uncharged offenses is inadmissible to prove criminal propensity to commit the crime charged, but that such evidence may be used to prove other matters if it is sufficiently relevant and not unduly prejudicial. (People v. Sam (1969) 71 Cal.2d 194, 203, 77 Cal.Rptr. 804, 454 P.2d 700; People v. Haston (1968) 69 Cal.2d 233, 245, 70 Cal.Rptr. 419, 444 P.2d 91.) In such instances the trial **court** must weigh " probative value" against "danger of undue prejudice" (Evid. Code, s 352). On appeal the **court's** exercise of discretion will not be disturbed absent a clear showing of abuse. (People v. Delgado (1973) 32 Cal.App.3d 242, 251, 108 Cal. Rptr. 399, overruled on another point in People v. Rist (1976) 16 Cal.3d 211, 221-22, 127 Cal.Rptr. 457, 545 P.2d 833.)

[3] At bench, use of the Cadillac Seville was part of the res gestae of the crime and relevant to the issue of identity. (Cf. People v. Rodriguez (1977) 68 Cal.App.3d 874, 883, 137 Cal.Rptr. 594.) Evidence of the stolen license plates was necessary to explain the changes in the automobile's plates between the time appellant was first observed in the vehicle and the time of his arrest. Evidence of the theft of the automobile was relevant to show that it came into defendants' possession before the time of the charged offenses. The quantity of evidence introduced on this issue was small and consumed little time. No attempt was made to prove the circumstances of the theft of the vehicle. The brief testimony concerning the theft could not have influenced the outcome of this case, given the length of the trial, the volume of eyewitness identification, and the multiplicity of similar charges. The trial **court** did not abuse its discretion in admitting this evidence.

[4] Similarly, lack of a limiting instruction in such instances is reversible error only when prejudicial. (People v. Harris (1974) 39 Cal.App.3d 965, 971, 114 Cal.Rptr. 892; People v. Williams (1970) 11 Cal.App.3d 970, 979, 90 Cal.Rptr. 292.) In People v. Williams, supra, defendant was being **461 tried for forgery, and the trial **court** admitted extensive evidence "that defendant Williams was a nonfictional Fagin who had organized and operated a team of bad check passers," evidence which was "relevant only to prove that Williams was a very criminal character." (Williams, supra, at 978-79, 90 Cal.Rptr. at 298.) Yet the **court** found that neither the *679 receipt of the evidence, nor the **court's** failure sua sponte to give a limiting instruction, was prejudicial. A fortiori, the same result obtains here.

2. Failure to Give Guzman Instructions.

[5] People v. Guzman (1975) 47 Cal.App.3d 380, 386-87, 121 Cal.Rptr. 69, sets out a series of detailed instructions enumerating in detail the factors a jury must consider in evaluating eyewitness identification testimony. Although the **court** held it erroneous in that case not to give the instructions, it did not declare that such instructions should be required in every case. Rather it enunciated the general principle that "a defendant is entitled to an instruction directing the jury's attention to evidence from the consideration of which reasonable doubt of defendant's guilt might be engendered." (Guzman, supra, at 387, 121 Cal.Rptr. at 73.) At bench the **court** gave CALJIC instructions 2.20 and 2.91, set forth in the margin.[1] These instructions sufficiently focused the jury's attention on the People's burden of proof on the issue of identity. (People v. Boothe (1977) 65 Cal.App.3d 685, 690, 135 Cal.Rptr. 570; People v. Smith (1977) 67 Cal.App.3d 45, 49, 136 Cal.Rptr. 387.) The trial **court** did not err in refusing to give the Guzman instructions.

*680 3. Instances of Misconduct by the Deputy District **Attorney**.

[6] [7] As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the

orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's **duty** is more comprehensive than a simple obligation to press for conviction. As the **court** said in Berger v. United States (1935) 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314:

> "(The Prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ****462** ones. It is as much his **duty** to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

(See also, United States. v. Agurs (1976) 427 U.S. 97, 110-11, 96 S.Ct. 2392, 49 L.Ed.2d 342; Giglio v. United States (1972) 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104; United States v. Ash (1973) 413 U.S. 300, 320, 93 S.Ct. 2568, 37 L.Ed.2d 619; United States v. Whitmore (1973) 156 U.S.App.D.C. 262, 266, 480 F.2d 1154, 1158; People v. Bain (1971) 5 Cal.3d 839, 849, 97 Cal.Rptr. 684, 489 P.2d. 564; In re Ferguson (1971) 5 Cal.3d 525, 531, 96 Cal.Rptr. 594, 487 P.2d 1234; People v. Sheffield (1930) 108 Cal.App. 721, 732, 293 P. 72; People v. Ruthford (1975) 14 Cal.3d 399, 405-8, 121 Cal.Rptr. 261, 534 P.2d 1341; People v. Wagner (1975) 13 Cal.3d 612, 619-20, 119 Cal.Rptr. 457, 532 P.2d 105; People v. Kiihoa (1960) 53 Cal.2d 748, 753, 3 Cal.Rptr. 1, 349 P.2d 673; People v. Mendoza (1974) 37 Cal.App.3d 717, 112 Cal.Rptr. 565).

Set out below are instances in this case where the conduct of the deputy district **attorney** appears to have fallen short of those standards.

1. At the outset of the proceedings the deputy district **attorney** refused to sign a pretrial discovery compliance order, which signature is routinely required by superior **court** rules. Rather than risk a confrontation, the trial judge permitted her to allege discovery compliance orally.

***681** 2. During a preliminary motion the deputy district **attorney** told appellant's **attorney**, deputy public defender Nierenberg, "Excuse me, if you interrupt me again, I'm going to kick you in the ankle." The record does not indicate significant prior interruptions by Nierenberg. The **court** remonstrated and said to her, "I think you have been doing rather well on interrupting people."

3. At the point in Hicks' cross-examination when he admitted having lied about the place of the robbery, Meyers (codefendant Miller's **attorney**) asked Hicks if he had brought a lawyer to **court** with him, which he had. The deputy district **attorney** approached the bench and requested that Meyers be cited for misconduct. The objection was proper, but her attack was personal, and included a statement that "**counsel** has been a lawyer much too long." Charging **counsel** with bad faith, she asked that Meyers be cited for contempt. Nierenberg asked the **court** to admonish the prosecutor to address the **court** on legal issues and refrain from the constant, personal, vindictive statements of the last two to three days, and the **court** requested all parties to act professionally "like lawyers and not like people that come off the streets."

4. Shortly thereafter during questioning of the same witness, the **court** permitted Nierenberg to ask Hicks if he had talked to a lawyer. The prosecutor objected, saying that **counsel** knew better. At a bench conference the deputy district **attorney** reprimanded Nierenberg for being awfully noisy, stated "How dare they," and this time requested that Nierenberg be cited for misconduct.

5. The deputy district **attorney**, in objecting on the ground of relevancy to a particular line of cross-examination by deputy public defender Nierenberg, stated that when the time came the deputy public defender wanted to go on vacation she was not going to speed up the process of putting on relevant evidence.
"THE **COURT**: We don't need threats being made here as to what you are going to do.

(THE PROSECUTOR:) I know, but I just

THE **COURT**: Will you please let me finish, for a change?

(THE PROSECUTOR:) All right.

*682 THE **COURT**: Now, we don't need these threats being made, . . ."

6. Later, the deputy district **attorney** uncooperatively refused to stipulate to the foundation for a lineup, although she did not dispute that foundation and had herself been present at the lineup. She accused defense **counsel** of "screaming and yelling" and "yapping and screaming," and the **court** accused her of the same.

463 7. During the questioning of Chavez, a deaf and dumb mute who had been present during the robbery of the Club Mugen, the deputy district **attorney alluded to a conversation between Chavez and the **attorney** with the yellow tie (Nierenberg). The latter volunteered to testify about the content of the conversation. The **court** called both **attorneys** to the bench and threatened to cite both for misconduct. The deputy district **attorney** appeared to be losing control of herself. The exchange went:
"(THE PROSECUTOR:) Your Honor

THE **COURT**: Let him finish.

(THE PROSECUTOR:) He was all through and he interrupted me.

THE **COURT**: You stop it right now.

(THE PROSECUTOR:) I'm angry.

THE **COURT**: I know you are angry and I am angrier than you are, and I wear the black robe. Now, you shut up.

(THE PROSECUTOR:) Yes, you do wear a black robe."

8. Later, Nierenberg objected to a question by the deputy district **attorney** on the ground she was impeaching her own witness. She again appeared to lose control of herself, stated she didn't need to be reminded the **court** was wearing the robe, accused Nierenberg of lying, and said she could no longer tolerate Nierenberg's misconduct.

9. Next, Meyers asked a proper question of a police officer, namely whether he had ever taken the Club Mugen victims to a lineup. The deputy district **attorney** objected, and requested that Meyers be cited for misconduct. The **court** ruled the question was proper. Meyers again asked the question and the deputy district **attorney** again objected. *683 Rather than deal with the situation, the **court** dismissed the jury for the day.

10. Shortly afterwards the **court** attempted to get a simple stipulation regarding the impound of the Cadillac. Although defense **counsel** agreed to it, the deputy district **attorney** interpreted a remark by Nierenberg as non-agreement, and stated "we have no stipulation." The others claimed they did indeed have a stipulation. The **court** said, "I have had enough of all of you today" and adjourned the proceedings.

11. The following **court** day the **court** in chambers characterized the trial to that point as follows:
"In my opinion, Mr. Broady is the only one who has behaved in a professional fashion in this case; and, as I said, I include myself in that. As to that, I owe an apology to **counsel**. I have not kept control of these proceedings as I should; and, as a result of the failure to control it as I should have, I think it has degenerated into a Pier 6 brawl, and I don't think this serves the cause of justice.

"So to that extent I do apologize to all **counsel** and advise you that that condition is going to be attempted, very hard, to be corrected immediately."

Discussion followed. Nierenberg made the following request, set out here because it puts on record nonverbal conduct not otherwise apparent from the transcript:
"I would ask one thing, most respectfully, Your Honor. I am having trouble with it right now. As soon as (the prosecutor) says something or I object or I say something, the immediate thing that comes to mind or the image or impression is dirty glares, sinister looks, as though I am doing something wrong, by innuendo or otherwise; and it has just now occurred. She talks about **attorneys** as the man in the yellow tie I do have an identity. I do have a name or these **attorneys**, but she says it with a glare.

". . . gl

"What I am asking for is, most respectfully, to have **counsel** for the People refrain from that kind of conduct in front of the jury. I don't *684 know at this point what effect it has, if any, but I do know, in speaking with Mr. Miller (co-defendant) on Thursday, at Mr. Meyers' request, that this was one of the prime concerns he had.

"He felt he wasn't getting a fair trial because he did not know what was transpiring at the bench every time we went up there; the excitement of all the parties. **464 He didn't know what was going on with the coin flipping in

the **court** and other conduct of that nature; and, again, I'd just like to do the trial and I'd like to complete it.

"My client is entitled to have a fair trial and I would ask the **Court** to just take that into consideration; that if it does occur, please advise (the prosecutor) at the bench or whatever, so it doesn't happen again, because it is a constant thing.

"Also, I'll be quite frank, it affects me emotionally, takes me off stride possibly, and that may very well create a problem for my client in my representing him, and it has gone on from the first day we started these proceedings and it has just picked up and magnified totally out of context, and I don't see any reason for it."

The **court** acknowledged that such conduct had occurred but also faulted Nierenberg, to a lesser degree:
"THE **COURT**: I don't think it is necessary. My only observation was going to be, Mr. Nierenberg, that I don't countenance some of the things that have been done in this trial, including some of the innuendoes, and looks, and all those things that you are talking about.

"By the same token, I certainly cannot countenance the blow-up which you had with her after **court** was over. I think if I had been in those shoes and I was practicing law, and you blew up at me the way you blew up at her, I might feel some kind of resentment and take it out on you in one fashion or another."

12. To these statements the deputy district **attorney** responded in part:
"I do not like Mr. Nierenberg. I do not like the things that he has done. I am a good lawyer and I now how to conduct myself as such. I will not tolerate his double talk nor his trying to put different documents together than are in fact true, or inferring things that are not true, and I ***685** must object because I represent the People of the State of California and will do it to the best of my ability.

"His conduct was reprehensible. I do not wish to speak to him other than on the record and, as a matter of fact, under State Bar rules, conduct and ethics, what he did is subject to reprimand."

The judge responded that **counsel** should try the cause as lawyers and not as alley cats.

Meyers then moved for a mistrial, citing as grounds the cumulative misconduct of the prosecutor, the circus atmosphere of the trial, raucous laughter of jury and judge, hostility of the deputy district **attorney**, and her flippancy on certain occasions. He also asserted the judge had lost his temper, yelled, pounded the deck, and told the lawyers to shut up. He felt that the trial had degenerated into a farce and maybe a sham. (The motion for mistrial was subsequently denied.)

13. To the motion for mistrial the deputy district **attorney** made the following provocative and unprofessional remark:
". . . If I had been a male lawyer, someone would have hit each one of you, except Mr. Broady, of course, right square in the face.

There is no doubt in my mind about that."

14. In further comment to the trial judge on the motion for mistrial, the deputy district **attorney** expressed her personal belief in the defendants' guilt and ridiculed their defense in sarcastic terms:

> "These defendants are vicious, bad people. I have done nothing wrong. There is nothing prejudicial on anything I have done. They killed somebody's father. They killed somebody's husband, and the poor baby doesn't like the way someone identifies him. I don't feel sorry for him. They think they are cute. They did not stop doing it."

15. In further response to the motion for mistrial, the deputy district **attorney** attempted to justify to the trial judge her prior misconduct in People v. Mendoza (1974) 37 Cal.App.3d 717, 112 Cal.Rptr. 565, by asserting that both Justices Ross (Roth) and Fleming of this division personally ****465** talked to her about that case and suggested that she have a little compassion (an assertion best described as the product of fantasy and creative imagination). She then continued:

> "So don't say that I did anything prejudicial. What is prejudicial is sometimes I win."

***686** 16. Next, defendant Miller described his impression

of his trial:

> "DEFENDANT MILLER: I mean there's little things like the prosecutor does, so far as making little, short remarks to the jury, you know, when the **attorneys** don't see it; you know, the way she has attacked the **attorneys**, and we don't do things like it is a personal thing between her and them is what I am saying, a war between them, other than trying us."

His description was apt; the war between the **attorneys** had become more interesting than the trial.

17. Another childish exchange occurred when Nierenberg requested that the deputy district **attorney** be admonished not to refer to a part of defendant's statement to a witness that had been ruled inadmissible. Her responses were "I can ask any questions I want" and "If I want to engage in misconduct I will just go ahead and do it." Again, the trial **court** let pass her contemptuous attitude toward the **court**.

18. The next instance of courtroom disruption was a minor shoving match between Nierenberg and the prosecutor while Nierenberg was addressing the **court**.
"... Excuse me ... you are leaning against me.

(THE PROSECUTOR:) Don't push me, **Counsel**.

MR. NIERENBERG: You are leaning against me. I wish you would move away.

THE **COURT**: I wish you would act like an adult.

MR. NIERENBERG: I am just asking her to lay off me. She is backing into me inadvertently. That's all I said."

19. On two occasions the deputy district **attorney** stated, out of the hearing of the jury, however, that the **court's** position was that the People don't have a fair trial. In the presence of the jury such a statement would be serious misconduct; at bench they are merely indicative of a paranoiac attitude.

20. The following flippancy occurred during oral argument to the jury:
***687** "(THE PROSECUTOR:) He (Nierenberg) describes his client's (appellant's) characteristics.

Now, in the whole thing, he doesn't say he has pointed ears, he had slant eyes. He says 'Characteristics.'

Well, I'd say he was a pretty boy. That is a characteristic. Well, I guess beauty is in the eye of the beholder.

His mother may think he's pretty, and Nierenberg may think he's a pretty boy. He's kind of cute, but that's not a characteristic."

Put together in one trial the foregoing activities of the deputy district **attorney** clearly comprise professional misconduct which violates the standard of behavior required from a public prosecutor. (People v. Bain (1971) 5 Cal.3d 839, 97 Cal.Rptr. 684, 489 P.2d 564.) A.B.A. Standards for Criminal Justice, Prosecution Function, section 5.2, (1974), sets out the standard of courtroom behavior required for a prosecutor.
"5.2 Courtroom decorum.

"(a) The prosecutor should support the authority of the **court** and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing **counsel**, witnesses, defendants, jurors and others in the courtroom.

"(b) When **court** is in session the prosecutor should address the **court**, not opposing **counsel**, on all matters relating to the case.

"(c) It is unprofessional conduct for a prosecutor to engage in behavior or tactics purposefully calculated to irritate or annoy the **court** or opposing **counsel**.

****466** "(d) A prosecutor should comply promptly with all orders and directives of the **court**, but he has a **duty** to have the record reflect adverse rulings or judicial conduct which he considers prejudicial. He has a right to make respectful requests for reconsideration of adverse rulings."

As the Commentary to section 5.2 states:
"The gravity of the human interests at stake in a criminal trial demands that the proceeding ***688** be conducted in an orderly and dignified manner. . . . Rudeness and intemperance have no place in any **court**, especially in the relations between its professional members, the judge and lawyers." (A.B.A., The Prosecution Function, Standards with Commentary, (1971), supra, pp. 113-14.)[2]

[8] It is scarcely open to question that threats by **counsel** in the courtroom to kick opposing **counsel** in the ankle, to hit him in the face, and to disrupt his vacation plans amount to unprofessional conduct. A fortiori, they amount to unprofessional conduct when coming from a public prosecutor. (People v. Bain (1971) 5 Cal.3d 839, 845-50, 97 Cal.Rptr. 684, 489 P.2d 564.)

On appeal the **Attorney** General in effect complains of a double standard governing prosecution and defense in that "only the prosecutor, as the 'glorified' representative of the People, can commit misconduct." He seems to conclude that the prosecutor should not be held to a higher standard of behavior than defense **counsel** and therefore misbehavior of one **counsel** cancels out misbehavior of the other.

[9] In response, we first point out that all **counsel** are held to a uniform minimum standard of courtroom behavior, which is the professional standard of **courtesy** and decorum required for the pleading by **counsel** of causes at the bar. When **counsel's** conduct falls below the minimum standard, the conduct is unprofessional. The identical standard of professional behavior in **court** applies to prosecutor and defense **counsel** alike.

[10] [11] Nevertheless, it is true that a public prosecutor, as representative of the People, must satisfy additional standards of conduct by reason of his ***689** position as the officer who possesses the power and authority to speak for the State. In practical effect the public prosecutor functions in a dual capacity as both agent and principal, as both **attorney** and client. Because he exercises a dual function, the prosecutor possesses additional responsibilities and becomes subject to broader **duties** than does defense **counsel**, who only exercises the one function of agent-**attorney**. Thus a prosecutor is required to meet standards of candor and partiality not demanded of defense **counsel**. For example, a prosecutor must disclose unfavorable aspects of his case; defense **counsel** can remain silent. A prosecutor must disclose unfavorable evidence relating to the accusation and must make available impeaching evidence relating to witnesses. Defense **counsel** need not do either. A conviction in a criminal cause may be reversed if the prosecutor suppresses material evidence (People v. Ruthford (1975) 14 Cal.3d 399, 405-8, 121 Cal.Rptr. 261, 534 P.2d 1341; In re Ferguson (1971) 5 Cal.3d 525, 531-32, 96 Cal.Rptr. 594, 487 P.2d 1234; Brady v. Maryland (1963) 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215; ****467** Giglio v. U. S. (1972) 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104); makes improper comments during cross-examination (People v. Wagner (1975) 13 Cal.3d 612, 619-20, 119 Cal.Rptr. 457, 532 P.2d 105; People v. Perez (1962) 58 Cal.2d 229, 240-41, 23 Cal.Rptr. 569, 373 P.2d 617; makes improper references to extrinsic matters (United States v. Whitmore (1973), 156 U.S.App.D.C. 262, 266, 480 F.2d 1154, 1158; Berger v. United States (1935) 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314); or fails to disclose important information to the defense (United States v. Agurs (1976) 427 U.S. 97, 110-11, 96 S.Ct. 2392, 49 L.Ed.2d 342). Lapses by defense **counsel** in these and other respects can never bring about reversal of an acquittal. To this extent the **Attorney** General's complaint about a double standard is correct, for "[t]he **duty** of the district **attorney** is not merely that of an advocate." (In re Ferguson (1971)5 Cal.3d 525, 531, 96 Cal.Rptr. 594, 598, 487 P.2d 1234, 1238.)

Yet in numerous respects the situation of the prosecutor is overwhelmingly advantageous when compared to that of defense **counsel**. The prosecutor is not required to believe or disbelieve any particular witness. Defense **counsel** is more or less bound to accept his client's key assertions at face value. The prosecutor is not required to prosecute any particular defendant. Defense **counsel**, and in particular public defenders, must defend persons entitled to claim the benefit of their services. The prosecutor may modify charges, abandon charges, or throw in his hand. Defense **counsel**, by himself, can do none of these things. In short, ***690** the prosecutor has tremendous freedom to rationally evaluate the merits of any accusation he brings and to pursue it accordingly. But with greater freedom comes greater responsibility. A prosecutor cannot keep his dual functions wholly separate, and to some extent he always remains the officer who acts for the State even though in a given instance he may be merely arguing in his capacity as **counsel**. Accordingly, imposition of a broader standard of conduct on the prosecutor than on defense **counsel** is justified by the different functions these **attorneys** perform, in that while they both function as **attorneys** and agents, the prosecutor exercises the sovereign power of the State as principal.

[12] From this disparity in function and responsibility the conclusion follows that the prosecutor may not excuse his own misconduct by pointing the finger of blame at another. To put it bluntly, lapses of behavior by defense **counsel** do not excuse professional misconduct by a deputy district **attorney**. The Supreme **Court** had so held in People v. Bain (1971) 5 Cal.3d 839, 849, 97 Cal.Rptr. 684, 689, 489 P.2d 564, 569, stating, "A prosecutor's misconduct cannot be justified on the ground that defense **counsel** 'stated it' with similar improprieties (People v. Kirkes, supra, 39 Cal.2d 719, 725-26, 249

P.2d 1; People v. Sampsell (1950) 34 Cal.2d 757, 765, 214 P.2d 813; People v. Kramer (1897) 117 Cal. 647, 650, 49 P. 842; People v. Talle, supra, 111 Cal.App.2d 650, 677, 245 P.2d 633.)"

At bench, the prosecutor must accept full responsibility for intemperate and unprofessional conduct, which included personal attacks and threats against defense **counsel**, ridicule of defendants and their defense, and refusal on occasion to comply with the **court's** orders.
[13] [14] The issue of remedy for prosecutorial misconduct remains. Reversal of the judgment has been the remedy most frequently used in recent years, but reversal is not required unless prosecutorial misconduct has prejudiced the defendant's case. Here, the evidence against appellant on all counts was strong. Defendants were involved, while driving the stolen Cadillac, in a common pattern of similar armed robberies over a two-day period. Defendants were credibly identified by the victims, and much of the stolen property, including the stolen Cadillac, was recovered in defendants' possession. On such a record only egregious error at trial could be deemed prejudicial. On reviewing the entire record we are of opinion that prosecutorial misconduct did not prejudice appellant's case, but to the contrary may have helped it by generating ****468** jury sympathy to produce a hung jury on nine of twelve counts. We conclude that the ***691** misconduct of the prosecutor does not require reversal of the judgment of conviction. (Cal.Const., art. VI, s 13.)

The judgment is affirmed.

COMPTON and BEACH, JJ., concur.

All Citations

75 Cal.App.3d 672, 142 Cal.Rptr. 457

Footnotes

1 CALJIC 2.20: "Every person who testifies under oath is a witness. You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

"In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

"His demeanor while testifying and the manner in which he testifies;

"The character of his testimony;

"The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;

"The extent of his opportunity to perceive any matter about which he testifies;

"The existence or nonexistence of a bias, interest, or other motive;

"A statement previously made by him that is consistent with his testimony;

"A statement made by him that is inconsistent with any part of his testimony;

"The existence or nonexistence of any fact testified to by him;

"His attitude toward the action in which he testifies or toward the giving of testimony;

"His admission of untruthfulness."

CALJIC 2.91: "The burden is on the State to prove beyond a reasonable doubt that the defendant is the person who committed the offense with which he is charged. You must be satisfied beyond a reasonable doubt of the accuracy of the identification of defendant as the person who committed the offense before you may convict him. If, from

the circumstances of the identification you have a reasonable doubt whether defendant was the person who committed the offense, you must give the defendant the benefit of that doubt and find him not guilty."

[2] The Commentary further observed that "far too many American judges have tended to allow their courtrooms to 'get out of hand,' thus encouraging bad manners, excessive and unregulated zeal and other habits which prolong trials, confuse jurors and generally demean the profession and the **courts**. Interestingly, the lawyers of the widest experience in hotly contested criminal cases share a conviction that a 'tightly run' courtroom is to be preferred over one which is lax. The latter, in this view, tends to lower the level of conduct to that of the least professional and most ill-mannered lawyer. Since the lawyers consulted and interviewed in depth (often recorded in verbatim transcripts) represented in the aggregate many hundreds of years of experience in the trial **courts**, this Committee attaches special significance to their views on the important of courtroom decorum. Many of these consultants voiced apprehension that excesses of advocates are placing stresses on the adversary system tending to undermine if not defeat the basic objectives of a system of justice and indeed expose the adversary system itself to challenge."

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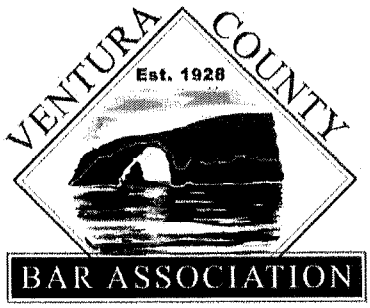

Barristers BTG – January 20, 2024

Session 2

Case Study 2

Lasalle v. Vogel

36 Cal.App.5th 127
Court of Appeal, Fourth District, Division 3, California.

Angele LASALLE, Plaintiff and Respondent,
v.
Joanna T. VOGEL, Defendant and Appellant.

G055381
|
Filed 6/11/2019

Synopsis
Background: In legal malpractice action, the Superior **Court**, Orange County, Randall J. Sherman, J., entered default judgment against **attorney** following **attorney's** failure to timely answer and subsequently denied **attorney's** motion to set aside the judgment. **Attorney** appealed.

[Holding:] The **Court** of Appeal, Bedsworth, Acting P.J., held that **attorney's** neglect in failing to answer was excusable.

Reversed.

Procedural Posture(s): On Appeal; Motion to Set Aside or Vacate Default Judgment.

West Headnotes (12)

[1] **Attorneys and Legal Services**⇨Character and Conduct in General
Judges⇨In general; constitutional and statutory provisions

Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle. Cal. Civ. Proc. Code § 583.130.

[2] **Attorneys and Legal Services**⇨**Attorney** as officer of **court**

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 maintaining standards of professionalism. Cal. Civ. Proc. Code § 583.130.

[3] **Appeal and Error**⇨Judgment by default or decree pro confesso

An order denying a motion to set aside a default is appealable from the ensuing default judgment. Cal. Civ. Proc. Code § 473.

10 Cases that cite this headnote

[4] **Appeal and Error**⇨Setting Aside Verdict; New Trial

The standard of review for an order denying a set aside motion is abuse of discretion. Cal. Civ. Proc. Code § 473.

2 Cases that cite this headnote

[5] **Action**⇨Course of procedure in general

The law favors judgments based on the merits, not procedural missteps.

3 Cases that cite this headnote

[6] **Appeal and Error**⚙Relief from default judgment

A trial **court** order denying relief from default judgment is scrutinized more carefully than an order permitting trial on the merits.

6 Cases that cite this headnote

[7] **Attorneys and Legal Services**⚙Conduct as to Adverse Parties and **Counsel**

An **attorney** has an ethical obligation to warn opposing **counsel** that the **attorney** is about to take an adversary's default.

7 Cases that cite this headnote

[8] **Judgment**⚙Want or insufficiency of notice of proceedings

Attorney's neglect in failing to answer malpractice complaint, regarding representation in matter dissolving registered domestic partnership, was excusable, and thus **attorney** was entitled set aside default judgment entered against her, where **attorney** received notice of default via unreliable e-mail, deadline provided to **attorney** was unreasonably short, and no prejudice resulted from set-aside. Cal. Civ. Proc. Code §§ 473, 583.130.

4 Cases that cite this headnote

[9] **Constitutional Law**⚙Notice

Due process requires not just notice, but notice reasonably calculated to reach the object of the notice. U.S. Const. Amend. 14.

[10] **Judgment**⚙Right to Relief in General
Judgment⚙Prejudice from judgment

When evaluating a motion to set aside a default judgment on equitable grounds, the **court** must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party. Cal. Civ. Proc. Code § 473.

1 Case that cites this headnote

[11] **Evidence**⚙Evidence of Character or Reputation

Judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. Cal. Evid. Code § 1101.

[12] **Judgment**⚙Negligence in suffering default
Judgment⚙Prejudice from judgment

Where there would have been no real prejudice had a set-aside motion been granted, the rule is that a party's negligence in allowing a default judgment to be taken in the first place will be excused on a weak showing. Cal. Civ. Proc. Code § 473.

Witkin Library Reference: 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial **Court**, § 191 [Order Denying Relief; Order Reversed.]

****264** Appeal from a judgment of the Superior **Court** of Orange County, Randall J. Sherman, Judge. Reversed with directions.

Attorneys and Law Firms

Law Offices of Dorie A. Rogers, Dorie A. Rogers and Lisa R. McCall, Orange, for Defendant and Appellant.

Law Office of Frank W. Battaile and Frank W. Battaile for Plaintiff and Respondent.

OPINION

BEDSWORTH, ACTING P. J.

***130** Here is what Code of Civil Procedure [1] section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other ****265** disposition." That is not complicated language. No jury instruction defining any of its terms would be necessary if we were submitting it to a panel of nonlawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period. Full stop.

Yet the principle the section dictates has somehow become the *Marie Celeste* of California law – a ghost ship reported by a few hardy souls but doubted by most people familiar with the area in which it's been reported. The section's adjuration to civility and cooperation "is a custom, More honor'd in the breach than the observance."[2] In this case, we deal here with more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and – in keeping with what has become an unfortunate tradition in California appellate law – we urge a return to the professionalism it represents.

***131** FACTS

From 2011 to 2015, appellant **Attorney** Joanna T. Vogel (Vogel) represented plaintiff/respondent Angele Lasalle (Lasalle) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. Lasalle repeatedly failed to provide discovery in that case, and the **court** defaulted her as a terminating sanction. She said her failure to provide discovery was caused by Vogel not keeping her informed of discovery orders, so she sued Vogel for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, Lasalle's **attorney** sent Vogel a letter and an e-mail – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against Vogel unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the e-mail was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching Vogel in Friday's post except to say it was slim.

Counsel did not receive any response from Vogel by 3:00 p.m. the following Monday, April 11. He filed a request for entry of default and e-mailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she e-mailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an **attorney** by Friday April 15th,[3] and that **attorney** had a motion to set aside the default on file a week later. We quote the entirety of Lasalle's declaration in support of the set aside motion in the margin.[4]

****266** ***132** Vogel's set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial **court's** discretion in cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an **attorney** confesses fault.

In opposing relief, respondent's **counsel** asked the trial **court** to take judicial notice of state bar disciplinary proceedings against Vogel stemming from two unrelated cases, which had resulted in a stayed suspension of Vogel's license to practice. The **court** denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of Vogel's prior discipline. A year later, a default judgment was entered against Vogel for $ 1 million. She has appealed from both that judgment and the order refusing to set aside the default.

We sympathize with the **court** below and opposing **counsel**. We have all encountered dilatory tactics and know how frustrating they can be. But we cannot see this as such a situation, and cannot countenance the way this default was taken, so we reverse the judgment.

DISCUSSION

[1]Three decades ago, our colleagues in the First District, dealing with a case they attributed to a "fit of pique between **counsel**," addressed this entreaty to California **attorneys**, "We conclude by reminding members of the Bar that their responsibilities as officers of the **court** include professional **courtesy** to the **court** and to opposing **counsel**. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641, 255 Cal.Rptr. 18.)

***133** In 1994, the Second District lambasted **attorneys** who were cluttering up the **courts** with what were essentially personal spats. In the words of a clearly exasperated Justice Gilbert, "If this case is an example, the term 'civil procedure' is an oxymoron." (*Green v. GTE California* (1994) 29 Cal.App.4th 407, 408, 34 Cal.Rptr.2d 517.)

In 1997, another appellate **court** urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17, 62 Cal.Rptr.2d 422.)

****267** By 2002, we had lawyers doing and saying things that would have beggared the imagination of the people who taught us how to practice law. We had a lawyer named John Heurlin who wrote to opposing **counsel**, "I plan on disseminating your little letter to as many referring **counsel** as possible, you diminutive shit." Admonishing **counsel** to "educate yourself about **attorney** liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in **Court**." That and other failures resulted in Mr. Heurlin being sanctioned $ 6,000 for filing a frivolous appeal and referred to the State Bar. Our **court** thought publishing the ugly facts of the case, which they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 122 Cal.Rptr.2d 630, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, 125 Cal.Rptr.3d 292, the First District tried again. They said, "We close this discussion with a reminder to **counsel** – all **counsel**, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth,' nor does it mean lack of civility. [Citations.] Zeal and vigor in the representation of clients are commendable. So are civility, **courtesy**, and cooperation. They are not mutually exclusive."

Six months later, our **court** said this, "Our profession is rife with cynicism, awash in incivility. Lawyers and judges of our generation spend a great deal of time lamenting the loss of a golden age when lawyers treated each other with respect and **courtesy**. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. All we have gotten from it is tired lips. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned **counsel** $ 10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293, 133 Cal.Rptr.3d 774 (*Kim*).)

This is not an exhaustive catalogue. Were we writing a compendium rather than an opinion, we could include keening from every state, because, ***134** "Incivility in open **court** infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

Courts have had to urge **counsel** to turn down the heat on their litigation zeitgeist far too often. And while the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success.

It's gotten so bad the California State Bar amended the oath new **attorneys** take to add a civility *requirement.* Since 2014, new **attorneys** have been required to vow to treat opposing **counsel** with "dignity, **courtesy**, and integrity."

That was not done here. Dignity, **courtesy**, and integrity were conspicuously lacking.

We are reluctant to come down too hard on respondent's **counsel** or the trial **court** because we think the problem is not so much a personal failure as a systemic one. **Court**

and **counsel** below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law is *not* a business. It is a profession. And those who practice it carry a concomitantly ****268** greater responsibility than businesspeople.

[2]So what we review in this case is not so much a failure of **court** and **counsel** as an insidious decline in the standards of the profession that must be addressed. "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." (*Kim, supra*, at p. 292, 133 Cal.Rptr.3d 774.) We reverse the order in this case because that significance was overlooked.

[3] [4] [5] [6]An order denying a motion to set aside a default is appealable from the ensuing default judgment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981, 35 Cal.Rptr.2d 669, 884 P.2d 126 (*Rappleyea*).) We acknowledge the standard of review for an order denying a set aside motion is abuse of discretion. (*Ibid.*) But there is an important distinction in the way that discretion is measured in section 473 cases. The law favors judgments based on the merits, not procedural missteps. Our Supreme **Court** has repeatedly reminded us that in this area doubts must be resolved *in favor of relief*, with an order denying relief scrutinized more carefully than an order granting it. As ***135** Justice Mosk put it in *Rappleyea*, "Because the law favors disposing of cases on their merits, 'any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial **court** order denying relief is scrutinized more carefully than an order permitting trial on the merits.' (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 [211 Cal.Rptr. 416, 695 P.2d 713]; see also *Miller v. City of Hermosa Beach* (1993) 13 Cal.App.4th 1118, 1136 [17 Cal.Rptr.2d 408].)" (*Id.* at p. 980, 35 Cal.Rptr.2d 669, 884 P.2d 126.)[5]

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate **court**, in language both apropos to our case and indicative of how law ought to be practiced, said, "The quiet speed of plaintiffs' **attorney** in seeking a default judgment without the knowledge of defendants' **counsel** is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500, 284 P.2d 194 (*Bookbinders*).)[6]

[7]In contrast to the stealth and speed condemned in *Bookbinders*, **courts** and the State Bar emphasize warning and deliberate speed. The 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. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 702, 84 Cal.Rptr.3d 351 (*Fasuyi*), quoting section 15 of the California **Attorney** Guidelines of Civility and Professionalism (2007).) Accordingly, it is now well-acknowledged that an **attorney** has an *ethical* obligation to warn opposing **counsel** that the **attorney** is about to take an adversary's default. (*Id.* at pp. 701-702, 84 Cal.Rptr.3d 351.)

In that regard we heartily endorse the related admonition found in The Rutter Group practice guide, and we note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a ****269** lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19 (rev. #1, 2008) as quoted in *Fasuyi, supra*, 167 Cal.App.4th at p. 702, 84 Cal.Rptr.3d 351.)

***136** To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038, 198 Cal.Rptr. 389 (*Bellm*). Indeed, it was the most recent case cited by the trial **court's** minute order denying Vogel's set aside motion.

Bellm was written at a time when incivility was surfacing as a problem in the legal profession.[7] "Like tennis, the legal profession used to adhere to a strict etiquette that kept the game mannerly. And, like tennis, the law saw its old standards crumble in the 1970s and 1980s. Self-consciously churlish litigators rose on a parallel course with Jimmy Connors and John McEnroe." (Gee & Garner, *The Uncivil Lawyer:* (1996) 15 Rev. Litig. 177, 190.) Thus the majority opinion in *Bellm* lamented the "lack of professional **courtesy**" in **counsel's** taking a default without warning (See *Bellm, supra*, 150 Cal.App.3d at p. 1038, 198 Cal.Rptr. 389 ["we decry this lack of professional **courtesy**"]) but deemed it an

ethical issue rather than a legal one and affirmed the trial **court's** denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm, supra*, 150 Cal.App.3d at p. 1040, 198 Cal.Rptr. 389 (dis. opn. of Haning J.).)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* **court** did not have the benefit of the statute. The statute was passed to curb what the Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the California Law Revision Commission phrased it:

"Over the years the attitude of the **courts** and the Legislature toward dismissal for lack of prosecution has varied. From around 1900 until the 1920's the dismissal statutes were strictly enforced. Between the 1920's and the 1960's there was a process of liberalization of the statutes to create exceptions and excuses. Beginning in the late 1960's the **courts** were strict in requiring dismissal. In 1969, an effort was made in the Legislature to curb discretionary **court** dismissals, but ended in authority for the Judicial Council to provide a procedure for dismissal. In 1970, the **courts** brought an abrupt halt to strict construction of dismissal statutes and began an era of liberal allowance of excuses that continued to the early 1980's. The judicial attitude in the latter time was stated by the Supreme **Court**: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on ***137** procedural grounds.' " (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, 238 Cal.Rptr. 885, quoting ****270** *Denham v. Superior **Court*** (1970) 2 Cal.3d 557, 566, 86 Cal.Rptr. 65, 468 P.2d 193; see also *Hocharian v. Superior **Court*** (1981) 28 Cal.3d 714, 170 Cal.Rptr. 790, 621 P.2d 829.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. The ethical obligation to warn opposing **counsel** of an intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to trial or other disposition." (§ 583.130.) Quiet speed and unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the **courts**.

We cannot accept it because it is contrary to legislative policy and because it is destructive of the legal system and the people who work within it. Allowing it to flourish has been counterproductive and corrosive. First, it has led to increased litigation. Unintended defaults inevitably result in motions to overturn them (this case, exemplary in no other way, demonstrates well the resources consumed by such motions) or lawsuits against the defaulted party's **attorney** (who thought enough of his client's position to agree to represent him and then bungled it). There are plenty of demands on our legal resources without adding such matters.

But worse than that, it forces practitioners to sail between Scylla and Charybdis. They are torn between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their client as effectively as possible. We ask too much of people with families and mortgages – not to mention ex-spouses who fail to make tax and mortgage payments – when we ask them to choose "dignity, **courtesy**, and integrity" over easy "fish in a barrel" victories that are perceived to have statutory support. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

[8]With that in mind, we conclude that by standards now applicable to such motions, the trial judge here abused his discretion in not setting aside the default. Several factors combine to convince us of that.

The first is the use of e-mail to give "warning." E-mail has many things to recommend it; reliability is not one of them. Between the ease of mistaken address on the sender's end and the arcane vagaries of spam filters on the recipient's end, e-mail is ill-suited for a communication on which a million ***138** dollar lawsuit may hinge.[8] A busy calendar, an overfull in-box, a careless autocorrect, even a clumsy keystroke resulting in a "delete" command can result in a speedy communication being merely a failed one.

[9]We all learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318, 70 S.Ct. 652, 94 L.Ed. 865.) While there is no due process problem in the case before us now (Vogel has not complained she wasn't actually served), e-mails are a lousy medium with which to warn opposing **counsel** that a default is about to be taken. We find it significant that by law e-mails are insufficient to serve notices on **counsel**

in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of **Court**, rule 2.251(b).)

****271** Indeed, the sheer ephemerality of e-mails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the merits. While some e-mails seem to live on for years despite efforts to bleach them out, others have the half-life of a neutrino. We ourselves have learned the hard way that spam filters can ambush important, nonadvertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – us. We have, on occasion, had to reschedule oral arguments because notices to **counsel** of oral argument dates and times sent by e-mail got caught in spam filters and did not reach those **counsel**, or their requests for accommodation did not reach us.

The choice of e-mail to announce an impending default seems to us hardly distinguishable from stealth. And since the other course adopted by respondent's trial **attorney** was mailing a letter on Thursday in which he demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor we consider is the short-fuse deadline given by respondent's **counsel**. It was *unreasonably* short. It set Vogel up to have her default taken immediately. "[T]he quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy which, under [*Bookbinders*] justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616, 136 Cal.Rptr. 783 (*Robinson*).)

[10]The third factor is the total absence of prejudice to Lasalle from any set-aside, given the relatively short time between respondent seeking the ***139** default and Vogel asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the '**court** must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.' " (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249, 240 Cal.Rptr.3d 900.) Setting aside *this* default would have involved little wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the unusual nature of the malpractice claim in this case. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751, 33 Cal.Rptr.2d 391 [discussing dynamics bearing on whether a defendant might elect to default a given claim].) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the spectrum.

Because of the facts alleged in the complaint – namely that Vogel had been responsible for losing Lasalle's *entire* dissolution case – Lasalle's damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418, fn. 2, 68 Cal.Rptr.2d 324 ["every item of marital property presents a host of challenging issues"].) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241, 135 Cal.Rptr.2d 629, 70 P.3d 1046 [plaintiff must prove that "*but for* the alleged negligence of the defendant **attorney**, the plaintiff would have obtained a more favorable judgment or settlement in the action in ****272** which the malpractice allegedly occurred."].) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the presence of a plainly meritorious defense to at least part of Lasalle's default judgment. That judgment eventually included emotional distress damages of $ 100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, 13 Cal.Rptr.2d 133, this **court** squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if we were not directing the trial **court** to set aside the default, we would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

[11]Next, there was the trial **court's** taking judicial notice of, and reliance on, Vogel's two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 ***140** represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited to criminal cases by its terms,[9] though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176, 214 Cal.Rptr.3d 467 ["The purpose of this evidentiary rule 'is to assure that a

defendant is tried upon the crime charged and is not tried upon an antisocial history.' [Citation.]".) Nonetheless, the point is the same: Judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. The fact Vogel had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.

And finally, we are disappointed that Vogel's explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex-has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, Vogel's declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As we have noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

[12]In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing.*" (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740, 216 Cal.Rptr. 300, italics added.) Vogel's declaration crossed that threshold.

We do not hold that every section 473 motion supported by a colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, we can hold only that *this one* should ****273** have been granted. As we have said, Vogel was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on another case* – would have prevented her from meeting it), and ***141** she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson, supra*, 67 Cal.App.3d at p. 616, 136 Cal.Rptr. 783 [noting short period of time to respond, press of business, limited office hours during a holiday period and defense **counsel's** preoccupation with other litigated matters made failure to timely file an answer "excusable"].) We hope the next **attorney** in these straits will not have such a compelling set of facts to offer ... and that opposing **counsel** will act with "dignity, **courtesy**, and integrity."

CONCLUSION AND DISPOSITION

Supreme **Court** Chief Justice Warren Burger long ago observed, "[L]awyers who know how to think but have not learned how to behave are a menace and a liability ... to the administration of justice.... [¶] ... [T]he necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every **court** and their worst conduct will be emulated perhaps more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215.) In recognition of this fact, section 583.130 says it is the policy of this state that "all parties shall cooperate in bringing the action to trial or other disposition." **Attorneys** who do not do so are practicing in contravention of the policy of the state and menacing the future of the profession.

The judgment is reversed. Appellant will recover her costs on appeal.

Moore, J., and Ikola, J., concurred.

All Citations

36 Cal.App.5th 127, 248 Cal.Rptr.3d 263, 19 Cal. Daily Op. Serv. 5414, 2019 Daily Journal D.A.R. 5093

Footnotes

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] Hamlet, Act I, Scene 4, ll. 15-16.

[3] It took Vogel four days because she initially contacted an **attorney** who had just decided to represent one of the codefendants – other **attorneys** who had represented Lasalle, but are not parties to this appeal.

[4] "I am an **attorney** at law, and the defendant in this matter. [¶] When I was served with the summons and complaint, I was in the middle of a number of family law matters in **court** as the **attorney**. [¶] I was also involved in my own divorce, wherein I had just discovered my husband had failed to pay the taxes on our property, and it had gone into default. Also he failed to pay the mortgage on the family residence and it went into default. [¶] I received the summons and complaint and the discovery and had met with an **attorney** to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter. [¶] I therefore, determined to find a new **attorney** and contacted the plaintiff's **attorney** to request a brief extension to respond to the complaint. While waiting to hear back and without having the **courtesy** of the extension, I received the notice of default. [¶] I was served with discovery before I even answered the complaint, and had begun to work on that as well. [¶] I am a single mother and between taking care of the family, the practice of law, and trying to revive [sic] the files of from the plaintiff, I did fail to timely file my answer. [¶] As soon as I could, I contacted [the **attorney** who filed the motion] and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint. [¶] I have attached hereto my proposed answer. [¶] I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's **counsel** at the time is not Vogel's appellant's **counsel** on appeal.

[5] Indeed, some cases go so far as to say " 'very slight evidence will be required to justify a **court** in setting aside the default.' [Citation.]" (*Miller v. City of Hermosa Beach*, supra, at p. 1136, 17 Cal.Rptr.2d 408.) More on this point below.

[6] Disapproved on other grounds in *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 551, 343 P.2d 36.

[7] The incivility lamentations we quoted earlier began in 1989, although this case certainly falls into the voice-crying-in-the-desert type of entreaty that grew louder a few years later.

[8] The default judgment obtained against Lasalle by respondent was exactly $ 1,000,000.

[9] Subdivision (a) of which provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." By their terms all four statutory exceptions are limited to criminal actions.

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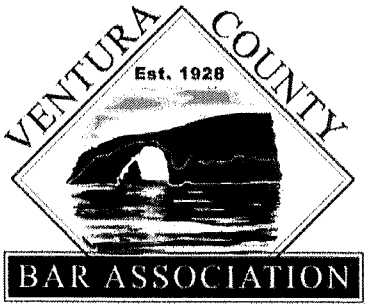

Barristers BTG – January 20, 2024

Session 2

Case Study 3

Hawk v. Superior Court

42 Cal.App.3d 108
Court of Appeal, First District, Division 2, California.

Richard E. HAWK, Petitioner,
v.
The SUPERIOR COURT of the State of California IN AND FOR the COUNTY OF SOLAND, Respondent;
PEOPLE of the State of California, Real Party in Interest.
In re Richard E. Hawk on habeas corpus.

Civ. 32716 and Cr. 11545.
|
Sept. 27, 1974.
|
As Modified Oct. 9, 1974.
|
Rehearing Denied Oct. 25, 1974.
|
Hearing Denied Dec. 11, 1974.

Synopsis
Petitioner was found in contempt by the superior court, and, on application for habeas corpus relief, the Court of Appeal, Kane, J., held that persistence of counsel in interjecting prejudicial comments into voir dire examination, after having been warned by the court to refrain from so doing, will constitute contempt of authority of court. Various statements during trial after warnings also will constitute contempt. Certain other remarks were found, however, to be not contemptuous.

Certain judgments annulled; judgments relating to other contempts sustained; petition for writ of habeas corpus granted in part and denied in part.

West Headnotes (40)

[1] **Contempt**⚖Decisions reviewable
Contempt⚖Certiorari
Habeas Corpus⚖Contempt

Judgment of contempt which is made final and conclusive by statute is not appealable, but may be reviewed by certiorari or, where appropriate, by habeas corpus. West's Ann.Code Civ.Proc. §§ 904.1(a)(2), 1211, 1222.

2 Cases that cite this headnote

[2] **Constitutional Law**⚖Contempt

Petitioner adjudged in contempt by order made final and conclusive by statute is afforded safeguard of review of proceedings below and is not denied equal protection of laws because statutes do not provide for appeal or for stay or for right to bail. West's Ann.Code Civ.Proc. §§ 904.1(a)(2), 1211, 1222.

1 Case that cites this headnote

[3] **Contempt**⚖Facts constituting contempt

Orders reciting facts pertinent to acts committed in immediate view and presence of court established jurisdiction of court to issue order adjudging attorney in direct contempt. West's Ann.Code Civ.Proc. § 1211.

4 Cases that cite this headnote

[4] **Contempt**⚖Review

Jurisdiction established, responsibility of Court of Appeal on review of contempt order was merely to ascertain whether there was sufficient evidence before trial court to sustain judgment and order; power to weigh evidence rested with trial court. West's Ann.Code Civ.Proc. § 1211.

2 Cases that cite this headnote

[5] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings

Lawyer is not to disregard or advise his client to disregard standing rule of tribunal or ruling of tribunal made in course of proceeding, but he may take appropriate steps in good faith to test validity of such rule or ruling. Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076; West's Ann.Code Civ.Proc. § 1211.

[6] **Self-Incrimination**⇨Handwriting

Order compelling defendant to produce handwriting exemplars was lawful order.

[7] **Contempt**⇨Persons liable

Attorney who advises his client to violate lawful order of court may be held in contempt. West's Ann.Code Civ.Proc. § 1211.

1 Case that cites this headnote

[8] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings

Attorney who willfully disobeys or violates order of court requiring him to do or forbear act connected with or in course of his profession, which he ought in good faith to do or forbear, subject to disbarment or suspension. West's Ann.Bus. & Prof.Code, § 6103.

[9] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings

Advising client to violate lawful order of court for production of handwriting exemplars by defendant would constitute violation of attorney's duty to maintain respect due to courts of justice and judicial officers and an unlawful interference with court proceedings. West's Ann.Code Civ.Proc. §§ 128, subds. 4, 5, 177, subd. 2, 1209, subds. 3, 8; West's Ann.Bus. & Prof.Code, §§ 6068(b), 6103.

[10] **Attorneys and Legal Services**⇨Particular Standards and Obligations

"Unprofessional conduct" within statutes, rules, etc., promulgating standards of professional conduct for attorneys denotes conduct which it is recommended be made subject to disciplinary sanctions. Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

[11] **Contempt**⇨Contempts in presence of court

If contempt order is based on attorney's "words wholly innocuous" or on language which is in itself not insolent, contemptuous or disorderly, judge is required first to warn petitioner before taking disciplinary action against him. Rules of Professional Conduct, rule 1, West's Ann. Bus. & Prof.Code following section 6076; West's Ann.Code Civ.Proc. § 1211.

2 Cases that cite this headnote

[12] **Attorneys and Legal Services**⇨Conduct as to Courts and Administration of Justice in General

An attorney should not assert his personal belief in his client's innocence or justice of his cause,

and counsel who asserts personal belief of another in his client's innocence circumvents the rule. Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

[13] **Jury**⇐Extent of examination

Court has power to restrict juror examination that is designed for partisan advantage rather than for elimination of unqualified juror.

[14] **Contempt**⇐Misconduct as officer of court

An attorney's persistence in interjecting prejudicial comments into voir dire examination, after having been warned by court to refrain from so doing, will constitute contempt of authority of court. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[15] **Contempt**⇐Misconduct as officer of court

It is unnecessary that the court continually repeat admonitions with respect to misconduct of counsel; warning, once given, should be sufficient notice that subsequent acts of misconduct in defiance of the warning will constitute contempt of the authority of court. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[16] **Contempt**⇐Misconduct as officer of court
Jury⇐Bias and prejudice

Jurors may properly be interrogated upon subject of racial prejudice, but an attorney's reference to prosecution's lawful exercise of peremptory challenge as "act of racism," after repeated admonishments by court not to attempt to influence prospective jurors by interjection of prejudicial comments into jury selection proceedings will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[17] **Contempt**⇐Misconduct as officer of court

Where attorney, in stating to jury his intention to introduce medical evidence that defendant had suffered heart attack as result of being accused and incarcerated, was referring to evidence which he believed in good faith would be available and admissible, statement was not an insinuation, made in violation of court's admonitions, that officers who arrested defendant had treated him improperly and unfairly, and thus making of such statement was not contemptuous. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[18] **Contempt**⇐Disobedience to Mandate, Order, or Judgment

Attorney's defiance of court's order to refrain from calling his client by his first name and from making reference to his friendship for his client will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

1 Case that cites this headnote

[19] **Contempt**⇐Defenses

In view of prior warnings, judge is not required to accept apology instead of finding attorney in

contempt. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[20] **Contempt**⚖Misconduct as officer of court

Attorney's statement that defendant was stripped of his presumption of innocence by press with help of sheriff's office, after having been admonished that such statements and insinuations were improper, will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[21] **Contempt**⚖Misconduct as officer of court

Reference, in opening statement, to friendship with judge, other than trial judge, did not constitute contempt in absence of previous court order or warning with respect to such remarks. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211.

[22] **Contempt**⚖Facts constituting contempt

In case of direct contempt, order adjudging person guilty must be stated with sufficient particularity, description and detail to show without aid of speculation or reference to any extrinsic document that contempt actually occurred. West's Ann.Code Civ.Proc. § 1211.

2 Cases that cite this headnote

[23] **Contempt**⚖Judgment or Order

In cases of direct contempt, judge should draw his order with meticulous care and should not delegate it to counsel or depend upon his clerk, no matter how experienced. West's Ann.Code Civ.Proc. § 1211.

[24] **Contempt**⚖Misconduct as officer of court
Witnesses⚖Form in general

Attorney's asking witness on cross-examination "Have you ever done any flying? " and stating to witness "I recommend that you don't," in reference to witness' alleged inability to determine directions on an exhibit at trial does not constitute legitimate cross-examination and, under some surrounding circumstances and following prior warning, will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subd. 5, 1211; West's Ann.Evid.Code, § 765.

[25] **Attorneys and Legal Services**⚖Conduct as to Client

"Bounds of law," within rule that lawyer has duty to represent client zealously within bounds of law, include disciplinary rules and enforceable professional obligations. Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

5 Cases that cite this headnote

[26] **Attorneys and Legal Services**⚖Standards as providing minimum level of conduct

Disciplinary rules which state minimum level of conduct below which no lawyer can fall without being subject to disciplinary action are mandatory in character. Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

2 Cases that cite this headnote

[27] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings

It is imperative duty of attorney to respectfully yield to rulings of court whether right or wrong; if ruling is adverse, attorney's only right is respectfully to preserve his appeal. West's Ann.Code Civ.Proc. §§ 128, subd. 3, 1044, 1211; Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

8 Cases that cite this headnote

[28] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings
Contempt⇨Disobedience to Mandate, Order, or Judgment

Attorney's conduct in refusing to accede to court's ruling, despite admonitions from court, will constitute violation of attorney's duty to maintain respect due to courts of justice and judicial officers, as well as disobedience of lawful order of court in contempt of court's authority. West's Ann.Bus. & Prof.Code, § 6068(b); West's Ann.Code Civ.Proc. §§ 1209, subds. 3, 5, 1211.

1 Case that cites this headnote

[29] **Criminal Law**⇨Presentation of evidence and examination of witnesses

Statement attributed by defense counsel to prosecutor, that prosecutor had reasonable doubt as to defendant's guilt, was inadmissible.

3 Cases that cite this headnote

[30] **Attorneys and Legal Services**⇨Conduct as to jurors
Contempt⇨Misconduct as officer of court

Defense counsel's statement in presence of jury that prosecutor had reasonable doubt as to defendant's guilt is unprofessional conduct, though prosecutor has made such a statement, and such statement by defense counsel will be properly punished as contempt of court's authority without regard to previous admonition. West's Ann.Code Civ.Proc. §§ 1209, subd. 3, 1211; West's Ann.Bus. & Prof.Code, §§ 6067, 6068(b).

2 Cases that cite this headnote

[31] **Attorneys and Legal Services**⇨Conduct as to witnesses

Deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct. West's Ann.Evid.Code, §§ 787, 788; Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

[32] **Witnesses**⇨Felonies or misdemeanors

To impeach witness by showing prior conviction, it must be shown that he was convicted of felony, rather than misdemeanor. West's Ann.Evid.Code, §§ 787, 788.

[33] **Witnesses**⇨Felonies or misdemeanors

Questions on cross-examination designed to bring before jury fact that witness who has not been convicted of felony is residing in jail

evade, by indirection, rule that impeachment by showing prior conviction must show prior conviction of felony, and such questions are highly improper. West's Ann.Evid.Code, §§ 787, 788; Rules of Professional Conduct, rule 1, West's Ann.Bus. & Prof.Code following section 6076.

2 Cases that cite this headnote

[34] **Contempt**⇨Misconduct as officer of court

Defense counsel's conduct, in violation of established rules of procedure and of evidence, after prior warning by court, in asking questions before jury to show that witness, convicted of misdemeanor, is residing in jail is highly improper and will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subds. 3, 5, 1211.

3 Cases that cite this headnote

[35] **Attorneys and Legal Services**⇨Obedience to court rules, orders, and rulings
Contempt⇨Misconduct as officer of court

Attorney's reference to opponent as "high priced lawyer" is behavior calculated to irritate opponent and annoy court and is violation of duty to abstain from all offensive personality and, where such conduct follows warning, it will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subds. 3, 5, 1211; West's Ann.Bus. & Prof.Code, §§ 6067, 6068(f).

1 Case that cites this headnote

[36] **Contempt**⇨Misconduct as officer of court

Counsel's comment, after prosecution's objection that matter went beyond scope of direct examination has been sustained, that question was "not beyond the scope of common sense" is not respectful request for reconsideration of the adverse ruling, or respectful means of preserving point for appeal, and, though court accepts petitioner's explanation that he did not intend to affront court or indicate that court, by sustaining objection, displayed lack of common sense, counsel's failure to yield respectfully to rulings of court, following repeated warnings, will constitute contempt of court's authority. West's Ann.Code Civ.Proc. §§ 1209, subds. 3, 5, 1211.

4 Cases that cite this headnote

[37] **Constitutional Law**⇨Proceedings

Where it appeared from all circumstances that trial judge's involvement in contempt proceedings was to protect process of fair trial and was not personal, and where judge convicted and sentenced counsel for various acts of contempt as they occurred, due process did not require trial of contempt charges before another judge. West's Ann.Code Civ.Proc. §§ 1209, subd. 1, 1211.

3 Cases that cite this headnote

[38] **Jury**⇨Contempt proceedings

Contempt charged under Code of Civil Procedure is petty offense, and petitioner has no constitutional right to jury trial. West's Ann.Code Civ.Proc. §§ 1209, 1211.

2 Cases that cite this headnote

[39] **Contempt**⇨Punishment of contempt as criminal

Where separate contemptuous acts are committed, contemner may be punished for each

separate offense. West's Ann.Code Civ.Proc. §§ 1209, 1211.

1 Case that cites this headnote

[40] **Contempt**⇐Review

Where trial court has jurisdiction, sentence imposing punishment for contempt within statutory limits for each offense will not be disturbed by reviewing court. West's Ann.Code Civ.Proc. §§ 1209, 1211.

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Opinion

KANE, Associate Justice.

In these proceedings by way of habeas corpus and certiorari, petitioner, an attorney, seeks to annul orders of the Solano County Superior *115 Court adjudging him in direct contempt and imposing sentences totaling 54 days in jail and fines totaling $3,200.[1]

The conduct found to be contemptuous occurred in the immediate view and presence of the court between August 14, 1972, and November 10, 1972, during the period petitioner was representing a defendant in a criminal case wherein the defendant was charged with 25 counts of murder.[2]

[1] [2] [3] [4] The power of the court to punish summarily for a direct contempt is contained in Code of Civil Procedure, section 1211, which provides: 'When a contempt is committed in the immediate view and presence of the court . . . it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed.'[3] The orders, which recite facts pertinent to acts committed in the immediate view and presence of the court, establish the jurisdiction **718 of the court to issue the order (In re Grossman (1972) 24 Cal.App.3d 624, 631, 101 Cal.Rptr. 176). Jurisdiction having been established, our responsibility on review of a contempt order "is merely to ascertain whether there was sufficient evidence before the trial court to sustain the judgment and order. The power to weigh the evidence rests with the trial court.' (Citations.)' (In re Buckley (1973) 10 Cal.3d 237, 247, 110 Cal.Rptr. 121, 127, 514 P.2d 1201, 1207.)

We have examined the record with respect to each instance of conduct *116 found to be contemptuous in light of the principles enunciated in the Buckley case and have reached the following conclusions:[4]

Contempt No. 1: Advising his client to disobey a lawful order of the court.

The judgment of contempt of court issued *nunc pro tunc* August 14, 1972, states that upon motion of the People an order was duly made directing that the defendant provide exemplars of his handwriting to the People, that contemner acquired knowledge of the order by reason of the fact that the order was audibly pronounced in open court in the presence of the contemner and his client, and that said contemner 'wilfully stated to the Court that he had instructed and was instructing his client, JUAN VELLEJO CORONA, not to provide the handwriting exemplars therefore (sic) ordered by the Court, and the said JUAN VALLEJO CORONA did in fact refuse to provide the same;'[5]

[5] A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling (Code of Professional Responsibility of the American Bar Association (hereafter CPR of ABA), DR 7—106(A)).[6] Petitioner had been adjudged in contempt for advising his client to disobey a lawful order of the court on July 17, 1972, and, having been denied appellate relief, had served a 48-hour term of imprisonment (see fn. 4).

*117 [6] [7] The order compelling the defendant to produce handwriting exemplars was a lawful order (Gilbert v. California (1967) 388 U.S. 263, 266—267, 87 S.Ct. 1951, 18 L.Ed.2d 1178; United States v. Mara (1973) 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99; People v. Hess (1970) 10 Cal.App.3d 1071, 1076—1077, 90 Cal.Rptr. 268; People v. Paine (1973) 33 Cal.App.3d 1048, 1049, 109 Cal.Rptr. 496; Witkin, Cal.Evidence (2d ed.) 1972 Supp. pp. 441—442). An attorney who advises his client to violate a lawful order of the court may be held in contempt (Ex parte Vance (1891) 88 Cal. 281, 282—283, 26 P. 118; McFarland v. Superior Court (1924) 194 Cal. 407, 423, 228 P. 1033).[7]

**719 [8] [9] A court has power to compel obedience to its orders (Code Civ.Proc. ss 128, subd. 4, 177, subd. 2), and 'To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;' (Code Civ.Proc. s 128, subd. 5). The order adjudging petitioner in contempt states that petitioner wilfully stated to the court that he had instructed and was instructing his client not to provide the handwriting exemplars ordered by the court. Petitioner's conduct in advising his client to violate a lawful order of the court constituted a violation of petitioner's duty to 'maintain the respect due to the courts of justice and judicial officers' (Bus. & Prof.Code, s 6068, subd. (b)), as well as an unlawful interference with the proceedings of the court (Code Civ.Proc., s 1209, subd. 3, 8).

Contempt No. 2: Misconduct during voir dire examination of the jurors.

The judgment of contempt of court entered *nunc pro tunc* September 15, 1972, states that 'during the examination of . . . a prospective juror . . . and after repeated admonishment by the Court not to attempt to influence prospective jurors by the interjection of personal opinions or prejudicial comments into the jury selection proceedings, RICHARD E. HAWK, attorney for the defendant and contemner herein, did ask the following question: 'Now, he (the prosecutor) made some reference to a psychologist being here, and this man sitting here, his name is Harvey Ross from Los Angeles. He is a psychologist. Do you have any objection to someone coming up from Los Angeles for a couple *118 of days free of charge to Mr. Corona to help Mr. Corona select a jury because he believes Mr. Corona is innocent?''

The court found that the contemner's references to the appearance of the psychologist at no cost to the defendant and to the psychologist's belief in the defendant's innocence constituted improper and prejudicial attempts to influence prospective jurors in violation of the professional ethics of contemner as an attorney at law, and an improper interference with the administration of justice and the trial of the case.

[10] It is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury, to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury (Standard 7.5(b) of the American Bar Association Standards Relating to the Defense Function (hereafter ABA Standards-Defense Function)).[8]

[11] Petitioner contends, however, that 'no showing was made that there had been any prior order not to make *the statement in question*, or even any prior order cautioning Mr. Hawk about potentially improper comment.'[9] (Italics added.) **720 Petitioner's contention cannot be sustained. The People have provided us with a copy of the court's minute order of September 13, 1972, entered two days before the contempt, which reveals that on that date in chambers the court admonished Mr. Hawk about certain *voir dire* of the prospective jurors and warned him of the possibility of contempt if he persisted along those lines.[10]

*119 [12] An attorney should not assert his *personal belief* in his client's innocence or the justice of his cause (1 Witkin, Cal.Procedure (2d ed.), Attorneys, s 239, p. 250). This rule has been codified (Rule DR 7—106(C)(4), CPR of ABA). Counsel who asserts the personal belief of *another* in his client's innocence circumvents the rule.

[13] [14] [15] A court has power to restrict examination that is designed for partisan advantage rather than for the elimination of an unqualified juror (People v. Crowe (1973) 8 Cal.3d 815, 828, 106 Cal.Rptr. 369, 506 P.2d 193; People v. Semone (1934) 140 Cal.App. 318, 326, 35 P.2d 379). Petitioner's persistence in interjecting prejudicial comments into the *voir dire* examination, after having been warned by the court to refrain from so doing, constituted a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 5).[11]

Contempt No. 3: Misconduct during voir dire of the jury.

The judgment of contempt of court issued *nunc pro tunc* September 18, 1972, states that contemner on numerous occasions, while examining prospective jurors, stated and insinuated in certain questions asked by him that the prosecution intended to introduce into evidence photographs of a gruesome or revolting nature depicting deceased human bodies or portions thereof, which photographs contemner did further state and insinuate were not necessary to be introduced in evidence; that he, contemner, would attempt to keep such photographs from being admitted into evidence; that the court had repeatedly admonished contemner that such statements and insinuations were improper; yet on September 18, 1972, during the examination of a prospective juror, contemner asked the following question: 'Now, understanding what our position is, do you see any reason in the world why you should look at all these gory photographs?'

The court found that the contemner's reference to the necessity of such evidence and its character constituted improper and prejudicial attempts ***120** to influence prospective jurors, a violation of the professional ethics of contemner as an attorney at law, and an improper interference with the administration of justice and the trial of the case.

For the reasons stated in our discussion of Contempt Number 2, and because the court had the power to restrict the examination of jurors within reasonable bounds, petitioner's persistence in interjecting prejudicial comments into the *voir dire* examination, after having been warned by the court to refrain from so doing, constituted a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 5).

Contempt No. 4: Misconduct during voir dire of the jury.

The judgment of contempt of court issued *nunc pro tunc* September 20, 1972, ****721** states that following the examination of a prospective juror, and after the prosecution had peremptorily challenged another prospective juror, and after repeated admonishments not to attempt to influence prospective jurors by the interjection of prejudicial comments into the jury selection proceedings, petitioner made the following statement: 'Your Honor, for the record, I want to say that they passed that woman one time and now they exercise their peremptory challenge; and to me that's an act of absolute white racism. I would like the record to show that the District Attorney is trying to systematically exclude minority groups. He excluded Mrs. Bailey because her husband is black; and now he excludes Mrs. Jackson, who is black also. I think it is improper.'

The court found that the contemner's references to white racism and systematic exclusion of minority groups from the jury constituted improper and prejudicial attempts to influence prospective jurors, a violation of the professional ethics of contemner as an attorney at law, and an improper interference with the administration of justice and the trial of the case.

[16] Although *jurors* may properly be interrogated upon the subject of racial prejudice (Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46), petitioner's reference to the prosecution's lawful exercise of a peremptory challenge as an 'act of absolute white racism,' after repeated admonishments by the court not to attempt to influence prospective jurors by the interjection of prejudicial comments into the jury ***121** selection proceedings, constituted a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 5).[12]

Contempt No. 5: Referring in his opening statement to two heart attacks suffered by the defendant 'as the result of his arrest and incarceration.'

The judgment of contempt of court issued *nunc pro tunc* October 3, 1972, shows that contemner, on numerous occasions, while examining prospective jurors, insinuated in certain questions asked by him that the defendant had been treated improperly and unfairly by the officers who arrested him; that the court had repeatedly admonished contemner that said statements and insinuations were improper; that, nevertheless, in his opening statement for defendant, contemner did state 'I would expect the county doctor to testify that Juan Corona suffered two heart attacks as the result of his arrest and incarceration.'

The court found that contemner's reference to the heart attacks was an effort to create sympathy in the minds of the jury for defendant and to create a prejudice against the prosecution, and that the reference constituted an improper and prejudicial attempt to influence the jurors at the trial of the action.

In his opening statement a lawyer should confine his

remarks to a brief statement of the issues in the case and evidence he intends to offer which he believes in good faith will be available and admissible. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence (Standard 7.4 ABA Standards-Defense Function).

[17] At the contempt proceedings in chambers, petitioner related to the court that he expected to introduce medical testimony that the defendant had suffered a **722 heart attack 'as a result of the accusation, being incarcerated—at least there will be medical evidence before the jury that a man who suffers a heart attack from being in custody would certainly have suffered a heart attack from digging 25 graves . . .'

*122 It appears to us that petitioner was referring to evidence which he believed in good faith would be available and admissible, and thus we find it difficult to adopt the court's characterization of the statement as an 'insinuation that the officers who arrested the defendant had treated him improperly and unfairly,' made in defiance of an admonition that such insinuations were improper. We conclude, therefore, that the evidence does not support this charge of contempt and that the judgment of contempt in this instance must be annulled.

Contempt No. 6: Referring to his client by his first name and making reference to his friendship for his client.

The judgment of contempt of court issued *nunc pro tunc* October 3, 1972, shows that contemner, while examining prospective jurors, on numerous occasions referred to the defendant by his first name and on various occasions referred to his friendship for his client; that by such references contemner intended to, and did, imply to the jury that he vouched for the character of his client; that the court repeatedly admonished contemner that said appellation and references were improper; that, nevertheless, while making the defendant's opening statement to the jury, contemner referred to his client as 'Juan' and engaged in the following colloquy: 'MR. HAWK: Okay. Let me tell you about the man that I smuggled cupcakes into his cell up in Yuba City on his birthday in February of 1971 contrary to the Sheriff's office regulations about bringing in foodstuffs, which I did anyway. THE COURT: Mark the record for me, please, Mr. Reporter. MR. HAWK: Let me tell you about Juan, the Christian. MR. WILLIAMS . . .: Objection. . . .'

The court found that contemner's continual references to his friendship and affection for the defendant constituted improper and prejudicial attempts to influence the jurors, a violation of the professional ethics of contemner as an attorney at law, and an improper interference with the administration of justice in the trial of the case.[13]

*123 As an officer of the court the lawyer should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses and jurors (Standard 7.1(a) ABA Standards-Defense Function).

[18] [19] A court has authority to control courtroom conduct of an attorney that is in flagrant disregard of elementary standards of proper conduct and to temper his speech in order 'to insure that courts of law accomplish that for which they were created—dispensing justice in a reasonable, efficient and fair manner.' (In re Buckley, supra, 10 Cal.3d pp. 253, 254, fns. 21, 22, 110 Cal.Rptr. p. 132, 514 P.2d p. 1212). The record discloses that petitioner stubbornly defied the court's order to refrain from calling his client by his **723 first name and from making reference to his friendship for his client.[14] Petitioner's conduct, following numerous warnings, constituted a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 5).[15]

Contempt No. 7: Stating before the jury that the defendant 'was stripped of his presumption of innocence by the press with the help of the Sheriff's Office.'

[20] The judgment of contempt of court entered *nunc pro tunc* October 3, 1972, shows that contemner had been admonished on numerous occasions that certain of his statements and insinuations about the Sutter County Sheriff's Officer were improper; that, nevertheless, in his opening statement on behalf of defendant, contemner made the following statement: "Under oath it was alleged by one of the officers of the Sutter County Sheriff's Office, on which search warrants were had, and information *124 which was passed out to the press, where Mr. Corona was stripped of his presumption of innocence by the press with the help of the Sheriff's Office."

The court found the references to be improper and prejudicial attempts to influence jurors, a violation of the professional ethics of contemner as an attorney at law,

and an improper interference with the administration of justice and the trial of the case.

As we have noted, it is unprofessional conduct for a lawyer knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to make impermissible comments in the presence of the judge or jury.

Petitioner's statement that the defendant 'was stripped of his presumption of innocence by the press with the help of the Sheriff's Office,' after having been admonished that such statements and insinuations were improper, constituted a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 5).

Contempt No. 8: Making reference in his opening statement to his friendship with Judge Richard Arnason.

[21] [22] [23] The judgment of contempt of court issued *nunc pro tunc* October 5, 1972, states that contemner, while making the defendant's opening statement, made the following statement: "It is something that I got from Richard Arnason who was a judge in Martinez. You may recall this, as he was the presiding judge in the Angela Davis trial. He is an old friend of mine."

The judge found that contemner, by said reference, intended to, and did, imply to the jury that Judge Richard Arnason did vouch for the character and integrity of contemner, and that the statement constituted contemptuous and insolent behavior and prejudicial misconduct on the part of contemner.
We have concluded that this judgment of contempt must be annulled. The language ****724** used was wholly innocuous and did not constitute contemptuous and insolent behavior toward Judge Patton, the judge conducting the trial, within the meaning of Code of Civil Procedure, section 1209, subdivision 1. Further, the order of contempt contains no *finding* that petitioner disobeyed any previous court order or warning with respect to such conduct, so as to constitute contempt under ***125** subdivision 5 of section 1209 (In re Hallinan (1969) 71 Cal.2d 1179, 1184, 81 Cal.Rptr. 1, 459 P.2d 255; In re Buckley, supra.,10 Cal.3d p. 250, 110 Cal.Rptr. 121, 514 P.2d 1201).[16]

Contempt No. 9: Humiliation of a witness.

[24] The judgment of contempt of court issued *nunc pro tunc* October 5, 1972, shows that on that date petitioner, after having been admonished to refrain from interjecting into his examination statements, comments and observations, while cross-examining a prosecution witness engaged in the following colloquy: 'MR. HAWK: 'Have you ever done any flying'? (THE WITNESS): 'No.' MR. HAWK: 'I recommend that you don't."

The court found that the question and statement, each of which referred to the witness's alleged inability to determine directions on an exhibit at the trial, constituted contemptuous and insolent behavior and prejudicial misconduct on the part of the contemner.

A court has a duty to exercise reasonable control over the mode of interrogation of a witness (Evid.Code, s 765). The interrogation of all witnesses should be conducted fairly, objectively and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily. Proper cross-examination can be conducted without violating rules of decorum (Standard 7.6(a), ABA Standard-Defense Function).

Petitioner's conduct toward the witness did not constitute legitimate cross-examination and justified the interposition of the court (People v. Durrant (1897) 116 Cal. 179, 212, 48 P. 75; Evid.Code, s 765; DR 7—106(C)(2) CPR of ABA). Considered in connection with all the surrounding circumstances (In re Buckley, supra, 10 Cal.3d p. 250, fn. 16, 110 Cal.Rptr. 121, 514 P.2d 1201), and following a prior warning, petitioner's conduct in cross-examining this witness constituted a contempt of the authority of the court (In re Hallinan, supra, 71 Cal.2d at pp. 1184—1185, 81 Cal.Rptr. 1, 459 P.2d 255;

Code Civ.Proc. s 1209, subd. 5). ***126** *Contempt No. 10: Repeating questions after an objection had been sustained*

The judgment of contempt of court issued *nunc pro tunc* October 5, 1972, shows that contemner on numerous occasions, while examining witnesses, persisted in repeating questions as to a certain subject of inquiry after the court had sustained objections thereto; that the court

had admonished contemner not to repeat questions to which the court had sustained an objection; nevertheless, that on October 5, 1972, while examining a prosecution witness, contemner 'persisted, over objections by the prosecution, in asking questions about certain tire tracks, after objections to such questions had been sustained . . ..'

The court found that the contemner's continual and repetitive questions constituted improper and prejudicial attempts to influence jurors, a violation of the professional ethics of contemner as an attorney at law, and an improper interference with the administration of justice and the trial of the case.

****725** [25] [26] [27] Although our adversary system is built upon the belief that truth will best be served if defense counsel is given the maximum possible leeway to urge in a respectful but nonetheless determined manner, the questions, objections, or argument he deems necessary to the defendant's case (Smith v. Superior Court (1968) 68 Cal.2d 547, 560, 68 Cal.Rptr. 1, 440 P.2d 65; In re Buckley, supra, 10 Cal.3d p. 249, 110 Cal.Rptr. 121, 514 P.2d 1201), an attorney, as an officer of the court, owes a duty of respect for the court as well as fidelity to his client (People v. Massey (1955) 137 Cal.App.2d 623, 626, 290 P.2d 906; Bus. & Prof. Code, s 6068, subd. (b); 1 Witkin, Cal. Procedure (2d ed.), Attorneys, s 2, p. 11; Standard 7.1(a) ABA Standards-Defense Function). The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously *within the bounds of the law* (DR 7—101(A)(1), DR 7—102(A)(8), CPR of ABA).[17] It is the imperative duty of an attorney to respectfully yield to the rulings of the court, *whether right or wrong* (In re Grossman (1930) 109 Cal.App. 625, 631, 293 P. 683; DR 7—106(A), CPR of ABA). '(I)f the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.' (Sacher v. United States (1952) 343 U.S. 1, 9, 72 S.Ct. 451, 455, 96 L.Ed. 717; In re Buckley, supra, 10 Cal.3d pp. 253, fn. 21, 255, 110 Cal.Rptr. 121, 514 P.2d 1201; Standard 7.1(d) ABA Standards-Defense Function). In addition to its ***127** Inherent power to control judicial proceedings in order to insure the orderly administration of justice (Cooper v. Superior Court (1961) 55 Cal.2d 291, 301, 10 Cal.Rptr. 842, 359 P.2d 274; People v. Smith (1970) 13 Cal.App.3d 897, 907, 91 Cal.Rptr. 786; Mowrer v. Superior Court (1969) 3 Cal.App.3d 223, 230, 83 Cal.Rptr. 125), a court has Statutory authority to 'provide for the orderly conduct of proceedings before it, or its officers;' (Code Civ.Proc. s 128, subd. 3. See also Pen.Code, s 1044).

[28] Petitioner's conduct in refusing to accede to the court's ruling, despite admonitions from the court, constituted a violation of petitioner's duty to 'maintain the respect due to the courts of justice and judicial officers' (Bus. & Prof.Code, s 6068, subd. (b)), as well as a disobedience of a lawful order of the court in contempt of the authority of the court (Code Civ.Proc. s 1209, subds. 3, 5).

Contempt No. 11: Stating in the presence of the jury that the prosecutor had a reasonable doubt as to the defendant's guilt.

The judgment of contempt of court entered *nunc pro tunc* October 11, 1972, shows that contemner, on that date, in the presence of the trial jury, made the following statement: "Your Honor, in view of Mr. Williams' (the Deputy District Attorney) statement that he has reasonable doubt as to Juan Corona's guilt—(interruption)."

The court found that it was the intention of contemner to convey the alleged statement of Mr. Williams to the jury with the intention to thereby influence the jury in its deliberation and verdict, and that the statement constituted contemptuous and insolent behavior and prejudicial misconduct on the part of the contemner.

[29] In appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence (DR 7—106(C)(1), CPR of ABA). The statement attributed by petitioner to the prosecutor was clearly inadmissible (DR 7—106(C)(4), CPR of ABA).[18]

****726** [30] Attorneys, by reason of their position and training, have a duty to insure order in our judicial system (In re Buckley, supra, 10 Cal.3d p. 254, fn. 21, 110 Cal.Rptr. 121, 514 P.2d 1201; ***128** Bus. & Prof.Code, ss 6067, 6068, subd. (b)). It was unprofessional conduct for petitioner to state, in the presence of the jury, that the prosecutor had a reasonable doubt as to the defendant's guilt (Standard 7.5(b), ABA Standards-Defense Function). Conduct such as this could only have the purpose of inflaming the jury or causing the trial judge to declare a mistrial. 'Where such a course of conduct is involved, no admonition that it is wrong is required as a prerequisite to a finding of contempt. A lawyer admitted to practice must be held already to know that such

flagrant misconduct is improper.' (DeGeorge v. Superior Court, supra, 40 Cal.App.3d 305, 315, 114 Cal.Rptr. 860, 866). Petitioner's conduct was properly punished as a contempt of the authority of the court (Code Civ.Proc. s 1209, subd. 3).

Contempt No. 12: Improper impeachment of a witness.

The judgment of contempt of court issued *nunc pro tunc* October 31, 1972, shows that contemner, despite admonishments, while cross-examining a prosecution witness before the jury, engaged in the following colloquy: 'MR. HAWK: No, I am trying to point out the fact that he gave a phony address. He lives at the Yuba City Jail. MR. WILLIAMS: I will object. That's improper. MR. HAWK: I can't show where he lives? THE COURT: That (sic) is the purpose of it, to show that? MR. HAWK: I am asking if this is where he is living at the current time. THE COURT: As an inmate? MR. HAWK: Yes, he is a thief; he is doing a year in jail. I am entitled to show that.'

The court found that the statements by contemner were made with the object of bringing the criminal record of the witness to the attention of the jury for the purpose of affecting the credibility of the witness in the eyes of the jury, the contemner knowing that his statements and proposed inquiry were not a proper means to impeach the witness.

[31] In appearing in his professional capacity before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence (DR 7—106(C)(7), CPA of ABA). The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct (People v. Fusaro (1971) 18 Cal.App.3d 877, 886, 96 Cal.Rptr 368, cert. den., 407 U.S. 912, 92 S.Ct. 2445, 32 L.Ed.2d 686).

[32] [33] Section 787 of the Evidence Code expressly precludes attacking a witness' credibility by showing prior *arrests* for misdemeanors or felonies, or prior misdemeanor convictions (***129** Grudt v. City of Los Angeles (1970) 2 Cal.3d 575, 591, 86 Cal.Rptr. 465, 468 P.2d 825). A witness may be impeached, however, by a showing that he has been convicted of a felony (Evid.Code, s 788). The proof must show *conviction of a felony*, not a misdemeanor (Witkin, Cal.Evidence (2d ed.), s 1244, p. 1147). Questions designed to bring before a jury the fact that a witness who has not been convicted of a felony is residing in jail evade the rule by indirection and are highly improper (People v. Sutton (1964) 231 Cal.App.2d 511, 514, 41 Cal.Rptr. 912).

[34] The record discloses that petitioner questioned a witness in a manner designed to bring before the jury evidence that was inadmissible under Evidence Code, section 787. Petitioner's conduct, in violation of established rules of procedure and of evidence, was highly improper and, following a prior warning of the court, constituted a contempt of the authority of ****727** the court (Code Civ.Proc. s 1209, subds. 3, 5).[19]

Contempt No. 13: Display of offensive personality.

[35] The judgment of contempt of court issued *nunc pro tunc* November 3, 1972, shows that contemner, despite numerous admonishments not to make personal comment about opposing counsel, did, in the presence of the jury, refer to Ronald W. Fahey, one of the opposing counsel, as follows: 'I am sorry if I offended the high-priced lawyer.'

In appearing in his professional capacity before a tribunal, a lawyer shall not engage in undignified or discourteous conduct which is degrading to a tribunal (DR 7—106(C)(6), CPR of ABA). It is unprofessional conduct for a lawyer to engage in behavior or tactics purposely calculated to irritate or annoy the court or the prosecutor (Standard 7.1(c) ABA Standards-Defense Function).

An attorney who is a member of the California State Bar has a duty to 'abstain from all offensive personality.' (Bus. & Prof.Code, s 6068, subd. (f)).[20] Petitioner's reference to the prosecutor as a 'high-priced ***130** lawyer' was behavior calculated to irritate the prosecutor and to annoy the court, and was a violation of his duty to abstain from all offensive personality. For this violation of his duties, after having been warned to refrain from such conduct, petitioner was properly held in contempt of the authority of the court (Code Civ.Proc. s 1209, subds. 3, 5).

Contempt No. 14: Failure to yield respectfully to the rulings of the court.

[36] The judgment of contempt of court entered *nunc pro tunc* November 10, 1972, shows that contemner, despite admonishments, engaged in the following colloquy while examining a prosecution witness: 'MR. HAWK: 'Was an investigation ever conducted of Ray Duron to find out where his whereabouts were on the critical dates?' MR. TEJA: 'Objection, Your Honor, that goes beyond the scope of direct examination.' THE COURT: 'Sustained.' MR. HAWK: 'It is not beyond the scope of common sense.''

A lawyer should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judicial conduct which he considers prejudicial to his client's interests and he has a right to make respectful requests for reconsideration of adverse rulings. (Standard 7.1, ABA Standards-Defense Function.)

Petitioner's comment, after an objection of the prosecution had been sustained, that his question was 'not beyond the scope of common sense' was not a respectful request for reconsideration of an adverse ruling, nor was it a respectful means of preserving his point for appeal (See In re Buckley, supra, 10 Cal.3d p. 253, fn. 21, 110 Cal.Rptr. 121, 514 P.2d 1201; DR 7—106A, CPR of ABA).
Although the court accepted petitioner's explanation that he had not intended to affront the court nor to indicate that the court, by sustaining the objection, had displayed a lack of common sense, petitioner's failure to yield respectfully to the rulings of the court, following repeated warnings, constituted a contempt of the authority of **728 the court (Code Civ.Proc. s 1209, subds. 3, 5).[21]

With respect to petitioner's contention that the contempt orders are void because they were infected by allegedly unconstitutional 'gag' orders placing restrictions on petitioner's ability to speak with the press, we fail to see the connection between the court's orders limiting *extrajudicial* statements for public dissemination and petitioner's *trial conduct*, and we *131 shall not permit ourselves to be drawn into determining the constitutionality of those orders in these proceedings.

We now reach petitioner's contention that the trial judge was so 'personally embroiled' that due process required trial of the contempt charges before another judge.

In Mayberry v. Pennsylvania (1971), 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532, it was held that due process requires a new and impartial judge where there is evidence that the trial judge 'has become so 'personally embroiled' with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.' (p. 465, 91 S.Ct. p. 505; In re Buckley, supra, 10 Cal.3d at p. 256, 110 Cal.Rptr. 121, 514 P.2d 1201; In re Grossman, supra, 24 Cal.App.3d at p. 632, 101 Cal.Rptr. 176; DeGeorge v. Superior Court, supra, 40 Cal.App.3d at p. 315, 114 Cal.Rptr. 860). In Buckley, however, our Supreme Court concluded that Mayberry did not apply because (1) unlike Mayberry, the trial court did not wait to adjudge petitioner in contempt, but immediately cited him and soon thereafter signed the order of commitment, and (2) the attack there did not consist of 'fighting words' which the court found in Mayberry carried such a potential for bias as to require disqualification (In re Buckley, supra, 10 Cal.3d at p. 256, 110 Cal.Rptr. 121, 514 P.2d 1201).

In this case, unlike Mayberry, where the defendant was sentenced for each of eleven contempts after the trial ended, and unlike Taylor v. Hayes (1974), 418 U.S. 488, —, 94 S.Ct. 2697, 41 L.Ed.2d 897, where the trial judge postponed final adjudication and sentence of nine contempts until after the conclusion of trial, the trial judge did not wait until the end of the trial to adjudicate petitioner in contempt. Instead, the trial judge dealt with each contempt as a discrete and separate matter at a different point during the trial. In each instance, the trial judge conducted contempt proceedings in chambers following the allegedly contemptuous conduct, where petitioner was given an opportunity to be heard in defense or mitigation, and where petitioner was convicted and sentenced, with execution of the sentence suspended until such time as the jury was discharged, a procedure approved in People v. Fusaro, supra, 18 Cal.App.3d at pages 888—891, 96 Cal.Rptr. 368, and in In re Grossman, supra, 24 Cal.App.3d at pages 628—629, 101 Cal.Rptr. 176.

In Codispoti v. Pennsylvania (1974), 418 U.S. 506, —, 94 S.Ct. 2687, 2692, 41 L.Ed.2d 912, the court recognized that 'There are recurring situations where the trial judge, to maintain order in the courtroom and the integrity of the trial process in the face of an 'actual obstruction of justice,' (citations)' must necessarily convict and sentence the accused *132 or the attorneys for either side for various acts of contempt as they occur. The court noted, moreover, that a judge, when faced with the kind of conduct at issue in Mayberry, "could, with propriety, have instantly acted, holding petitioner in contempt . . .' (Mayberry v. Pennsylvania, supra,) 400 U.S., at p. 463, 91 S.Ct. 499, 27 L.Ed.2d 532.' 94 S.Ct. at 2692.
The record discloses, however, that petitioner at no time engaged in the kind of personal attack on the judge that,

regardless of his reaction or lack of it, he would be unlikely 'to maintain that calm detachment necessary for fair adjudication.' (Mayberry v. Pennsylvania, supra, 400 U.S. at p. 465, 91 S.Ct. at p. 505; **729 Taylor v. Hayes, supra, 418 U.S. at p. —, 94 S.Ct. 2697.) In Taylor v. Hayes, supra, however, it was held that 'contemptuous conduct, though short of personal attack, may still provoke a trial judge and so embroil him in controversy that he cannot 'hold the balance nice, clear and true between the state and the accused . . ..' Tumey v. Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).' The court stated that 'In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).' — U.S. at p. —, 94 S.Ct. at pp. 2704, 2705. We note that in Taylor v. Hayes it was not petitioner's conduct, considered alone, that required recusal; rather, the critical factor was the *character of respondent's response to misbehavior during the course of the trial.* (Fn. 10 — U.S. at p. —, 94 S.Ct. 2697.) With these considerations in mind, we have examined the record in this case. In light of all the circumstances shown, we are unable to characterize the judge's response to petitioner's behavior during the course of the trial as approaching the aggravated type of response found to exist in Taylor v. Hayes, supra, p. —, 94 S.Ct. 2697, or in Offutt v. United States (1954) 348 U.S. 11, at pages 15—17, 75 S.Ct. 11, 99 L.Ed. 11. Unquestionably, in the course of a trial of four months, the trial judge on occasion expressed irritation with petitioner.[22] However, as in DeGeorge v. Superior Court, supra, 'most *133 of the trial judge's irritation was expressed not in relation to petitioner's conduct, which was disrespectful, but rather in response to petitioner's misconduct in seeking an unfair advantage over his opponent.' (40 Cal.3d at p. 316, 114 Cal.Rptr. at p. 867.) The record on the whole reveals amazing patience on the part of the trial judge in his efforts to maintain order in the courtroom and the integrity of the trial process.[23]

[37] [38] [39] [40] We have concluded from all the circumstances shown in the record before us that the judge's involvement was one to protect the process of a fair trial and was not personal (see DeGeorge v. Superior Court, supra, at p. 316, 114 Cal.Rptr. 860).[24] Moreover, the judge convicted and sentenced petitioner for the various acts of contempt as they occurred. 'Undoubtedly, where the necessity of circumstances warrants, a contemner may be summarily tried for an act of contempt during trial and punished by a term of no more than six months.' (Codispoti v. Pennsylvania, supra, 94 S.Ct. at p. 2692; see also Mayberry v. Pennsylvania, supra, 400 U.S. at p. 463, 91 S.Ct. 499.)[25]

**730 Under the circumstances shown, we do not find 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' (Taylor v. Hayes, supra, 418 U.S. at p. —, 94 S.Ct. at p. 2704, quoting Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 11 L.Ed.2d 921.)

*134 The judgments relating to the contempts herein referred to as Contempts Nos. 5 and 8 are annulled; the judgments relating to the remaining contempts are sustained. The petition for a writ of habeas corpus is granted in part, and petitioner is ordered discharged from any custody based upon the judgment relating to contempts herein referred to as Contempts Nos. 5 and 8. To the extent petitioner seeks habeas corpus relief in addition to that provided for herein, the petition is denied and the order to show cause is discharged.

ROUSE, J., concurs.

Hearing denied; MOSK, J., dissenting.

All Citations

42 Cal.App.3d 108, 116 Cal.Rptr. 713

Footnotes

1 On February 6, 1973, the date the petitions were filed in this court, we stayed that portion of the trial court's order of February 5, 1973 directing execution of the judgments, pending our determination of the petition for writ of

habeas corpus and subject to further order of the court. On June 13, 1973, we issued a further order stating our intention to defer action on the matter until decisions had been rendered in two cases then pending in the California Supreme Court involving similar issues.

2 Although the judgments of contempt were entered during the course of the trial, after contempt proceedings had been conducted in chambers, the court stayed execution of the judgments pending the discharge of the jury.

3 A judgment of contempt which is made final and conclusive by section 1222 of the Code of Civil Procedure is not appealable (Code Civ.Proc. s 904.1, subd. (a)(2)), but may be reviewed by certiorari or, where appropriate, by habeas corpus (In re Buckley (1973) 10 Cal.3d 237, 259, 110 Cal.Rptr. 121, 514 P.2d 1201). These proceedings afford petitioner the safeguard of a review of the proceedings below; he is not denied equal protection of the laws because California statutes do not provide for an appeal from or for a stay of an order adjudicating a person in contempt of court (In re Buckley, supra, pp. 258—259, 110 Cal.Rptr. 121, 514 P.2d 1201), nor does he have a right to bail (but see Bell v. Hongisto (9th Cir. 1974) 501 F.2d 346).

4 We need not examine the judgment of contempt of court issued *nunc pro tunc* July 17, 1972. A petition for writ of review of that contempt judgment was summarily denied on July 28, 1972, and no petition for hearing was filed in the Supreme Court. On July 31, 1972, petitioner commenced serving the 48-hour term of imprisonment ordered by the court under the terms of the judgment. The July 17, 1972 judgment of contempt, therefore, is not included within the judge's order of February 5, 1973, which ordered execution of the judgments of contempt. Nor need we examine the judgments of contempt of court entered *nunc pro tunc* November 16, 21, 27, and December 21, 1972, for the court, after ordering petitioner remanded to the custody of the sheriff to serve 54 days in the county jail for contempts Nos. 1 through 14, ordered petitioner purged of the last four contempts and dismissed said judgments.

5 The court also adjudged defendant Corona in contempt of court for his conduct in refusing to provide the examplars and imposed a fine of $300, deferring execution thereon.

6 Rule 1 of the Rules of Professional Conduct of the State Bar of California reads as follows: 'The specification in these rules of certain conduct as unprofessional is not to be interpreted as an approval of conduct not specifically mentioned. *In that connection the Code of Professional Responsibility of the American Bar Association should be noted by the members of the State Bar.*' (Italics added.)

7 An attorney who willfully disobeys or violates an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, is also subject to disbarment or suspension (Bus. & Prof.Code, s 6103).

8 The term 'unprofessional conduct' denotes conduct which it is recommended be made subject to disciplinary sanctions (Standard 1.1(f), ABA Standards-Defense Function). The defense lawyer, in common with all members of the bar, is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other

standards of professional conduct (Standard 1.1(c) ABA Standards-Defense Function). It is his duty to know the standards of professional conduct as defined in codes and canons of the legal profession (Standard 1.1(e) ABA Standards-Defense Function).

9 If a contempt order is based on 'words wholly innocuous' (Gallagher v. Municipal Court (1948) 31 Cal.2d 784, 796, 192 P.2d 905), or on 'language of which is in itself not insolent, contemptuous or disorderly' (In re Hallinan (1969) 71 Cal.2d 1179, 1181, 81 Cal.Rptr. 1, 3, 459 P.2d 255, 257), the judge was required first to warn petitioner before taking disciplinary action against him (Gallagher v. Municipal Court, supra, 31 Cal.2d at p. 797, 192 P.2d 905; In re Hallinan, supra, 71 Cal.2d at p. 1183, 81 Cal.Rptr. 1, 459 P.2d 255; In re Buckley, supra at p. 250; see also Eaton v. City of Tulsa (1974) 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693; but see DeGeorge v. Superior Court (1974) 40 Cal.App.3d 305, 314—315, 114 Cal.Rptr. 860).

10 The transcript of the contempt proceedings held in chambers contains the following statement: 'THE COURT: This appears to be one of numerous statements by you, Mr. Hawk . . .. The obvious intent of which would be to inject extraneous matters into the record, to make statements of fact which have an obvious purpose solely to influence the prospective jurors, contains two particularly objectionable aspects. One, the reference to 'free of charge.' And second, that this psychologist 'believes that' your client is innocent. That is obviously so grossly improper as to be shocking.'

11 It is not necessary that a court continually repeat admonishments with respect to misconduct of counsel; the warning, once given, should be sufficient notice that subsequent acts of misconduct in defiance of the warning will constitute a contempt of the authority of the court. (Cf. DeGeorge v. Superior Court, supra, 40 Cal.App.3d pp. 314—315, 114 Cal.Rptr. 860.)

12 In the contempt proceedings held in chambers, petitioner justified his conduct as a matter of making a record of systematic exclusion of minority groups. The following colloquy occurred: 'THE COURT: In any event, the accusation, I believe, is, you used the word 'white racism.' I don't know what all you said. MR. HAWK: That is the way I put it. THE COURT: It went way beyond anything necessary to protect any record in this case. It is just another inflammatory remark. The Court finds you in contempt, Mr. Hawk.'

13 At the contempt proceeding in chambers, the following occurred: 'THE COURT: What does that possibly have to do with any opening statement? It is contemptuous, far out of line. It is ridiculous. MR. HAWK: I apologize for it. I don't know whether the Court believes me, but I do have an affection for Juan Corona, but it was not the thing to say in an opening statement. THE COURT: The Court finds you in contempt. Five days in the County Jail. This is outrageous. You persist in this sort of conduct and you talk about your affection for Mr. Corona. In this opening statement you alluded to your friendship which I admonished you before about. It is not proper. All you are intending to do by this, regardless of what your personal feelings may be, it insinuates that you are vouching for your client's credibility and it is not a professional way to do it. It is clearly improper. . . .'

14 In chambers, during *voir dire* of the jurors, the court issued the following warning: 'I want to warn you for the last time, that one other subtle insinuation which you are continuing to persist in, and that is your continuing to vouch

for Mr. Corona by reference to your friendship for him. If that slips out once more you will be back for sentence for the same thing.'

15 It has been held that in instances of direct contempt an apology to the judge should be given serious consideration (In re Buckley, supra, 10 Cal.3d 237, 257, 110 Cal.Rptr. 121, 514 P.2d 1201). 'A judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct' (People v. Turner (1850) 1 Cal. 152, 153). The effect to be given to such a mitigating factor, however, lies exclusively in the sound discretion of the judge (In re Buckley, supra, p. 257, 110 Cal.Rptr. 121, 514 P.2d 1201; Lyons v. Superior Court (1955) 43 Cal.2d 755, 763, 278 P.2d 681; City of Vernon v. Superior Court (1952) 38 Cal.2d 509, 520, 241 P.2d 243; In re Friday (1934) 138 Cal.App. 660, 664, 32 P.2d 1117). It seems apparent from the colloquy set forth in footnote 13, ante, that the judge could not accept the apology as satisfactory in view of the prior admonishment. Consequently, it cannot be said that the trial judge abused his discretion.

16 For the guidance of the trial bench we point out that in case of direct contempt, the order adjudging a person guilty must be stated with sufficient particularity, description and detail to show without aid of speculation or reference to any extrinsic document that a contempt actually occurred. (Raiden v. Superior Court (1949) 34 Cal.2d 83, 86, 206 P.2d 1081.)
The judge, therefore, must draw the order with meticulous care and should not delegate the draftsmanship to counsel or depend upon the clerk, no matter how experienced, to incorporate it into the minutes.

17 The 'bounds of the law' include disciplinary rules and enforceable professional obligations. The disciplinary rules, which state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action, are mandatory in character.

18 The prosecutor admitted in chambers that he had made such a statement (see CPR of ABA, DR 7—103(A) and (B) with respect to duties of public prosecutors). Nevertheless, despite a motion for mistrial on the part of the prosecution and a motion to dismiss by the defense, the court directed that the trial proceed.

19 The 'rap sheet' of this witness, belatedly produced by the prosecution in compliance with a discovery order (see Hill v. Superior Court (1974) 10 Cal.3d 812, 112 Cal.Rptr. 257, 518 P.2d 1353), showed that the witness had been, in fact, convicted of a felony. It is clear from the record, however, that petitioner was not prepared to prove the felony conviction at the time he was cross-examining the witness, and was in fact attempting to bring a misdemeanor conviction to the attention of the jury.

20 Upon admission to the California State Bar, petitioner took an oath 'faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability' (Bus. & Prof.Code, s 6067).

21 The disclaimer of an intent to commit contempt is no defense where a contempt clearly appears from the

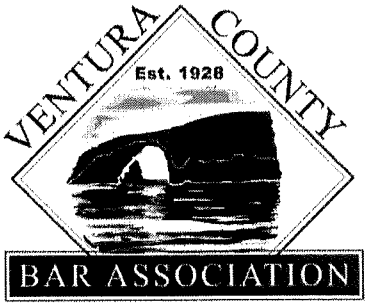
circumstances constituting the act (City of Vernon v. Superior Court, supra, 38 Cal.2d at p. 518, 241 P.2d 243).

22 In chambers, in admonishing petitioner for his misconduct, the judge portrayed petitioner's behavior on various occasions as 'shocking,' 'outrageous,' 'disgraceful,' and a 'disgrace to the administration of justice.'

23 The judge, of course, had the obligation to maintain order and decorum in the proceedings before him (Canon 3A(2), Canons of Judicial Ethics of the American Bar Association), and the power to punish any contempt in order to protect the rights of the defendant and the interests of the public by assuring that the administration of criminal justice shall not be thwarted (Standard 7.1, ABA Standards Relating to the Function of the Trial Judge; cf. People v. Haldeen (1968) 267 Cal.App.2d 478, 483, 73 Cal.Rptr. 102).

24 Petitioner himself asserts that none of his actions were '*Disorderly, contemptuous, or insolent* . . . toward the judge" (italics added) within the meaning of Code of Civil Procedure, section 1209, subdivision 1.

25 A contempt charged under the provisions of section 1209 of the Code of Civil Procedure is a petty offense and petitioner had no federal constitutional right to a jury trial (In re Morelli (1970) 11 Cal.App.3d 819, 850, 91 Cal.Rptr. 72; Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal.App.2d 370, 375, 72 Cal.Rptr. 177; Taylor v. Hayes, supra, 418 U.S. at p. —-, 94 S.Ct. 2697). Where separate contemptuous acts are committed, the contemner may be punished for each separate offense (Donovan v. Superior Court (1952) 39 Cal.2d 848, 855, 250 P.2d 246). And where the trial court has jurisdiction, a sentence imposing punishment within the statutory limits for each offense will not be disturbed by a reviewing court (In re Karpf (1970) 10 Cal.App.3d 355, 374, 88 Cal.Rptr. 895). None of the individual citations for contempt carried a penalty of more than five days in jail and a $500 fine. Thus, each fell within the 'petty' classification.



Barristers BTG – January 20, 2024

Session 2

Rule 3.3

Candor Toward the Tribunal

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California Rules of Professional Conduct (Refs & Annos)
Chapter 3. Advocate

Prof.Conduct, Rule 3.3
Formerly cited as CA ST RPC Rule 5-200
Rule 3.3. Candor Toward The Tribunal [1]
Currentness

(a) A lawyer shall not:

(1) knowingly* make a false statement of fact or law to a tribunal* or fail to correct a false statement of material fact or law previously made to the tribunal* by the lawyer;

(2) fail to disclose to the tribunal* legal authority in the controlling jurisdiction known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly* misquote to a tribunal* the language of a book, statute, decision or other authority; or

(3) offer evidence that the lawyer knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence, and the lawyer comes to know* of its falsity, the lawyer shall take reasonable* remedial measures, including, if necessary, disclosure to the tribunal,* unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes* is false.

(b) A lawyer who represents a client in a proceeding before a tribunal* and who knows* that a person* intends to engage, is engaging or has engaged in criminal or fraudulent* conduct related to the proceeding shall take reasonable* remedial measures to the extent permitted by Business and Professions Code section 6068, subdivision (e) and rule 1.6.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

(d) In an ex parte proceeding where notice to the opposing party in the proceeding is not required or given and the opposing party is not present, a lawyer shall inform the tribunal* of all material facts known* to the lawyer that will enable the tribunal* to make an informed decision, whether or not the facts are adverse to the position of the client

Credits

(Adopted, eff. Nov. 1, 2018. As amended, eff. Nov. 1, 2018.)

Editors' Notes

COMMENT

[1] This rule governs the conduct of a lawyer in proceedings of a tribunal,* including ancillary proceedings such as a deposition conducted pursuant to a tribunal's* authority. See rule 1.0.1(m) for the definition of "tribunal."

[2] The prohibition in paragraph (a)(1) against making false statements of law or failing to correct a material misstatement of law includes citing as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional, or failing to correct such a citation previously made to the tribunal* by the lawyer.

Legal Argument

[3] Legal authority in the controlling jurisdiction may include legal authority outside the jurisdiction in which the tribunal* sits, such as a federal statute or case that is determinative of an issue in a state court proceeding or a Supreme Court decision that is binding on a lower court.

[4] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. If a lawyer knows* that a client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered and, if unsuccessful, must refuse to offer the false evidence. If a criminal defendant insists on testifying, and the lawyer knows* that the testimony will be false, the lawyer may offer the testimony in a narrative form if the lawyer made reasonable* efforts to dissuade the client from the unlawful course of conduct and the lawyer has sought permission from the court to withdraw as required by rule 1.16. (See, e.g., *People v. Johnson* (1998) 62 Cal.App.4th 608 [72 Cal.Rptr.2d 805]; *People v. Jennings* (1999) 70 Cal.App.4th 899 [83 Cal.Rptr.2d 33].) The obligations of a lawyer under these rules and the State Bar Act are subordinate to applicable constitutional provisions.

Remedial Measures

[5] Reasonable* remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these rules and the State Bar Act, and which a reasonable* lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal.* (See, e.g., rules 1.2.1, 1.4(a)(4), 1.16(a), 8.4; Bus. & Prof. Code, §§ 6068, subd. (d), 6128.) Remedial measures also include explaining to the client the lawyer's obligations under this rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal* to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code section 6068, subdivision (e) and rule 1.6.

Duration of Obligation

[6] A proceeding has concluded within the meaning of this rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed. A prosecutor may have obligations that go beyond the scope of this rule. (See, e.g., rule 3.8(f) and (g).)

Ex Parte Communications

[7] Paragraph (d) does not apply to ex parte communications that are not otherwise prohibited by law or the tribunal.*

Withdrawal

[8] A lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation. The lawyer may, however, be required by rule 1.16 to seek permission of the tribunal* to withdraw if the lawyer's compliance with this rule results in a deterioration of the lawyer-client relationship such that the lawyer can no longer competently and diligently represent the client, or where continued employment will result in a violation of these rules. A lawyer must comply with Business and Professions Code section 6068, subdivision (e) and rule 1.6 with respect to a request to withdraw that is premised on a client's misconduct.

[9] In addition to this rule, lawyers remain bound by Business and Professions Code sections 6068, subdivision (d) and 6106.

Notes of Decisions (4)

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 3.3, CA ST RPC Rule 3.3
Current with amendments received through December 1, 2023. Some rules may be more current, see credits for details.

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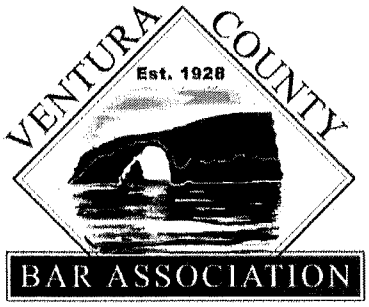

Barristers BTG – January 20, 2024

Session 2

Case Study 5

Williams v. Superior Court

46 Cal.App.4th 320, 53 Cal.Rptr.2d 832, 96 Cal. Daily Op. Serv. 4088, 96 Daily Journal D.A.R. 6596

MICHAEL WILLIAMS, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

No. B101152.
Court of Appeal, Second District, Division 5, California.
Jun 6, 1996.

SUMMARY

Defendant was charged with possession of a firearm by an ex-felon (Pen. Code, § 12021, subd. (a)(1)) and with two prior felony convictions (Pen. Code, § 1170.12, subds. (a)-(d), and Pen. Code, § 667, subds. (b)-(i)). The deputy public defender represented defendant through the preliminary examination. However, at defendant's arraignment, the trial court appointed a private panel attorney to represent defendant, after determining that the size and age of the public defender's pending caseload made him unavailable to represent defendant (Pen. Code, § 987.2), within the 60-day statutory time for trial following arraignment (Pen. Code, § 1382, subd. (a)(2)), even though the deputy represented that his pending caseload would not interfere with his trial readiness. (Superior Court of Los Angeles County, No. BA128788, John H. Reid, Judge.)

The Court of Appeal denied defendant's petition for a writ of mandate as rendered moot by the commencement of the trial. However, since the petition raised issues of significant public concern that were likely to recur, the court exercised its discretion to resolve those issues. The court held that a trial court is required to appoint the public defender to represent an indigent defendant when the public defender is "available," meaning that the public defender can be ready for trial and in court on the designated trial date. The court further held that the trial court erred when it refused to appoint the public defender to represent defendant at trial based solely on the number and age of the public defender's pending cases. Once the public defender represented that he could try the case within the time set, despite his existing caseload, the court should have allowed him an opportunity to present further evidence on his ability to be ready for trial, pursuant to Pen. Code, § 987.05, and duly considered that evidence in determining whether he was available for appointment. (Opinion by Godoy Perez, J., with Armstrong, J., concurring. Concurring and dissenting opinion by Turner, P. J.) *321

HEADNOTES

Classified to California Digest of Official Reports

(1)
Criminal Law § 82--Rights of Accused--Aid of Counsel--Defendant's Right of Selection--Trial Court's Discretion.
An indigent defendant's preference for a particular attorney, while it is to be considered by the trial court in making an appointment under Pen. Code, § 987.2, is not a determinative factor requiring the appointment of that attorney, even in combination with other relevant factors such as the subject attorney's competence and availability. The matter rests wholly within the sound discretion of the trial court, and the court's discretion may not be restricted by any fixed policy. In exercising its discretion, the trial court is required to review the entire record, analyzing the objective and subjective factors in appointing indigent defense counsel.

(2)
Criminal Law § 86--Rights of Accused--Aid of Counsel--Appointment of Public Defender--Trial Court's Discretion.
A trial court may exercise its discretion in appointing counsel in the absence of positive law or fixed rule. However, where there is positive law, the laws governing the priority appointment of the public defender are clearly set forth in Gov. Code, § 27706, and Pen. Code, § 987.2, eliminating any void compelling the application of discretion. Those statutes provide that a court must first utilize the services of the public defender in providing criminal defense services for indigent defendants, if the public defender is available to try the matter.

(3)
Criminal Law § 85--Rights of Accused--Aid of

Counsel--Appointment by Court--Governing Statutes--Availability for Appointment--Representation by Counsel.
The trial court is obligated to appoint only those attorneys who will be ready for trial on a given date (Pen. Code, § 987.05). There is no distinction between Pen. Code, § 987.2 (availability for appointment), and Pen. Code, § 987.05 (readiness for trial); these sections should be read to be compatible with one another. Whether an attorney can be ready for trial and in court on the trial date designated by the court is the standard used by the trial court in determining whether an attorney is available for appointment. Further, when counsel represents to the court that he or she is available for appointment, that is, that he or she will be in court and ready for trial on the appointed date, the court may, in its discretion, accept that representation. Such representation by counsel, as an officer of the court, should not be made lightly or without due consideration. ***322**

([4])
Attorneys at Law § 37--Discipline of Attorneys--Grounds--False Testimony--Misleading a Judge.
An attorney has a duty to employ, for the purpose of maintaining the causes confided to him or her, such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law (Bus. & Prof. Code, § 6068, subd. (d)). Further, a member of the California State Bar may not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law (Rules Prof. Conduct, rule 5-200(B)). Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense.

([5])
Criminal Law § 85--Rights of Accused--Aid of Counsel--Appointment by Court--Availability for Appointment--Representation of Readiness by Counsel.
Although a trial court may accept counsel's representation of availability for appointment, it is not obligated to accept an attorney's representation at face value. Pen. Code, § 987.05, allows for presentation of evidence in the determination of readiness. Thus, the court may make an independent evaluation in finding whether counsel can be ready at the time of trial, regardless of his or her representation to the court. In deciding whether counsel will be ready, the court may consider several factors, such as the number and trial age of cases an attorney already has, the expected length of those trials and their scheduled dates, as well as the dates of pending related motions. Another significant factor is the reliability of counsel's representation of readiness based upon past experience. However, these examples are given by way of illustration only, since exercise of the court's discretion in the appointment of counsel should not be restricted by an inflexible rule but, rather, should rest upon consideration of the particular facts and interests involved in the case before it. Moreover, the court should not be swayed by extraneous factors which divert it from its obligation to exercise proper judgment.

([6])
Criminal Law § 86--Rights of Accused--Aid of Counsel--Appointment of Public Defender--Availability--Representation of Readiness by Counsel-- Impartial Evaluation by Trial Court.
In a criminal prosecution, the trial court erred when it refused to appoint the deputy public defender to represent defendant at trial based solely on the number and age of the public defender's pending cases. Even though the public defender represented that his pending caseload would not interfere with his trial readiness, the trial court appointed a private panel attorney to represent defendant (Pen. Code, § 987.2), after ***323** determining that since the public defender had over 15 cases that were more than 120 days old, he would not be available to try defendant's case within the 60-day statutory time for trial following arraignment (Pen. Code, § 1382, subd. (a)(2)). A finding of unavailability may not be based solely upon the number and age of the public defender's pending caseload where counsel represents that it will not interfere with his or her trial readiness. Once the public defender represented that he could try the case within the time set, despite his existing caseload, the court should have allowed him an opportunity to present further evidence on his ability to be ready for trial, pursuant to Pen. Code, § 987.05, and duly considered that evidence in determining whether he was available for appointment. By refusing to give the public defender an opportunity to explain why he believed his calendar would not prevent him from being ready on the trial date, the court effectively foreclosed consideration of factors relevant in making an impartial decision and made an inflexible evaluation of counsel's trial readiness.

[See 5 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) §§ 2745-47.5 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) §§ 2745-47.]

([7])

Criminal Law § 84--Rights of Accused--Aid of Counsel--Discharge-- Discretion of Trial Court--Attorney's Misrepresentations as to Trial Readiness.
A trial court has the discretion to remove counsel who cannot try his or her client's case at the appointed time. Further, an attorney who represents that he or she will be ready for trial on a specified date, but is not prepared at that time, risks not only removal from the case but severe sanctions as well under Pen. Code, § 987.05.

COUNSEL
Michael P. Judge, Public Defender, Steven H. Hough, Peter C. Swarth and John Hamilton Scott, Deputy Public Defenders, for Petitioner.
Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Respondent.
No appearance for Real Party in Interest. ***324**

GODOY PEREZ, J.

Defendant and petitioner Michael Williams, also known as Michael Antoine Price, challenges an order of the respondent court refusing to appoint the Los Angeles County Public Defender to represent him. We hold that a trial court is required to appoint the public defender to represent an indigent defendant when the public defender is "available," meaning that the public defender can be ready for trial and in court on the designated trial date. In determining the public defender's availability, the court may either rely on the public defender's representation that he or she is available, or may elicit additional information from counsel which will aid the court in making that determination. A finding of unavailability, however, may not be based solely upon the number and age of the public defender's pending caseload where counsel represents it will not interfere with his or her trial readiness. Penal Code section 987.05 allows a court to impose substantial sanctions for counsel's failure to be ready, without good cause, as initially represented to the court.[1]

Factual and Procedural History

Defendant was charged with possession of a firearm by an ex-felon (§ 12021, subd. (a)(1)), and with two prior felony convictions, within the meaning of sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i). Deputy Public Defender Peter C. Swarth represented defendant through the preliminary examination. Defendant was held to answer and his arraignment in superior court was set for April 2, 1996.

Defendant and Mr. Swarth appeared for arraignment before respondent court. According to defendant, respondent court maintains a list of all pending felony cases, the length of time which has passed since arraignment, and the attorneys assigned to represent the defendants in each case. That list indicated that Mr. Swarth was representing 21 clients whose cases were beyond the 60-day statutory time for trial following arraignment,[2] with 16 of ***325** those cases older than 120 days from their arraignment.[3]

At defendant's arraignment, the court asked Mr. Swarth how he could "possibly handle this case in the next 60 days" in light of the other cases on his calendar. Mr. Swarth indicated there were no cases calendared for trial at the time of defendant's anticipated trial date which would interfere with his representation of defendant. Mr. Swarth added that the only thing he could foresee affecting his ability to handle this case would be the People's failure to timely comply with discovery. Mr. Swarth told the court, "I believe I can be ready and available." Respondent court disagreed, stating, "It does not appear from this court's reading of the number of cases that you have that you can be prepared in a timely fashion since obviously the other matters that you already have should get priority over this one." The court opined that each of the other 21 cases would take 3 days to try, putting defendant's case well beyond the 60-day limitation of section 1382, subdivision (a)(2). Again, Mr. Swarth told the court he could be ready for trial.

The court instructed Mr. Swarth to contact his office and inquire whether another deputy public defender could try the case; if there was no one from that office available, the court would appoint a private panel attorney to represent defendant. (§ 987.2.) When the hearing resumed, Mr. Swarth reported that the public defender determined he should try defendant's case, and asserted it would be in defendant's best interest for him to do so. The court disagreed, and appointed a panel attorney who said he could try defendant's case in 60 days.[4]

Defendant's trial began on May 30, 1996, while this petition was pending. Defendant was represented by the court-appointed panel attorney. Since defendant's objective in filing the petition was to have Mr. Swarth appointed as his counsel, the petition was rendered moot by the commencement of defendant's trial. However, because the petition raises issues of significant public concern which are likely to recur, we exercise our

discretion to resolve those issues. (See *In re William M.* (1970) 3 Cal.3d 16, 23-24 [89 Cal.Rptr. 33, 473 P.2d 737].) ***326**

Discussion

A. *Appointment of the Public Defender*

An indigent defendant has the right to a court-appointed attorney at the time of his arraignment. Section 987, subdivision (a), provides: "In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her." (*Alexander v. Superior Court* (1994) 22 Cal.App.4th 901, 910 [27 Cal.Rptr.2d 732].)[5]

Trial courts in Los Angeles County are required to appoint the public defender, subject to availability and in the absence of a conflict of interest. Section 987.2, subdivision (e) describes the process as follows: "In a county of the first, second, or third class,[6] the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants. In the event that the public defender is unavailable and the county has created a second public defender and contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record." This provision allows for a deviation in the requisite order of appointment of the second public defender or the county-contracted attorney, but not for the requirement that the public defender be utilized first.

Government Code section 27706, subdivision (a) specifies the obligations of the public defender: "The public defender shall perform the following duties: [¶] (a) Upon request of the defendant or upon order of the court, the ***327** public defender shall defend, without expense to the defendant, except as provided by Section 987.8 of the Penal Code, any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior, municipal or justice courts at all stages of the proceedings, including the preliminary examination. The public defender shall, upon request, give counsel and advice to such person about any charge against the person upon which the public defender is conducting the defense, and shall prosecute all appeals to a higher court or courts of any person who has been convicted, where, in the opinion of the public defender, the appeal will or might reasonably be expected to result in the reversal or modification of the judgment of conviction." Again, the statute requires the public defender to defend those indigent clients who request its services.

([1]) Cases addressing the issue of whether an indigent defendant is entitled to *private* counsel of his or her choice have held that although the appointment of counsel under section 987.2 rests within the sound discretion of the trial court, the court's discretion may not be restricted by any fixed policy. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1098 [47 Cal.Rptr.2d 516, 906 P.2d 478].) In *Harris v. Superior Court* (1977) 19 Cal.3d 786, 795 [140 Cal.Rptr. 318, 567 P.2d 750], after the public defender had declared a conflict of interest, both petitioners requested the appointment of specific private attorneys. After conducting a hearing and inquiring into the reasons for the requests, the trial court refused to make such appointments. The Supreme Court, reaffirming its holding in *Drumgo v. Superior Court* (1973) 8 Cal.3d 930 [106 Cal.Rptr. 631, 506 P.2d 1007, 66 A.L.R.3d 984], held that "[a]n indigent defendant's preference for a particular attorney, while it is to be considered by the trial court in making an appointment [citation] is not a determinative factor *requiring* the appointment of that attorney—even in combination with other relevant factors such as the subject attorney's competence and availability. As we have indicated, the matter rests wholly within the sound discretion of the trial court." (*Harris v. Superior Court, supra*, 19 Cal.3d at pp. 795-796, original italics, fn. omitted.) The court defined judicial discretion as " '... that power of decision exercised to the necessary end of awarding justice based upon reason and law but for which

decision there is no special governing statute or rule. Discretion implies that in the absence of positive law or fixed rule the judge is to decide a question by his view of expediency or of the demand of equity and justice.' ... [Citations.]" (*Id.* at p. 796.) The Supreme Court held that in exercising its discretion, the trial court is required to review the entire record, analyzing the objective and subjective factors in appointing indigent defense counsel. The court concluded that the trial court had abused its discretion in declining to appoint counsel requested by defendants in that case. ***328**

In *People v. Chavez* (1980) 26 Cal.3d 334 [161 Cal.Rptr. 762, 605 P.2d 401], after the public defender had declared a conflict of interest, the defendant requested the same conflict attorney who had represented him at the preliminary examination. The superior court summarily denied that request, stating, *"... we don't do that, Mr. Chavez. We appoint our own counsel at the Superior Court level."* (*Id.* at p. 341, original italics.) Finding an abuse of discretion, the Supreme Court held that the superior court had "improperly adhered to a fixed policy of appointing its 'own' counsel in every case. The exercise of the court's discretion in the appointment of counsel should not have been restricted by an inflexible rule, but rather should have rested upon consideration of the particular facts and interests involved in the case before it. By refusing to give defendant Chavez an opportunity to explain why he preferred that his former counsel represent him at trial, the court effectively foreclosed consideration of any arguments which defendant may have marshalled in support of continuing Attorney Ingber's appointment." (*Id.* at p. 346).

In *People v. Daniels* (1991) 52 Cal.3d 815 [277 Cal.Rptr. 122, 802 P.2d 906], defendant objected to the appointment of the public defender because he did not trust the public defender's office. He told the court that a deputy public defender who represented him in a previous case did not inform him that the deputy was negotiating for a position with the district attorney. Defendant requested a specific attorney, whom he trusted, to represent him. The court refused his request and appointed the public defender, who represented the defendant through the preliminary examination before declaring a conflict. Again, the trial court refused to appoint private counsel of defendant's choice. On appeal, the Supreme Court held that the trial court did not abuse its discretion in appointing the public defender initially, because "the public defender whose competence might have been under attack was no longer with that office," and defendant had "not shown any personal or professional relationship suggestive of a conflict of interest between the deputies actually representing him in this case and the departed deputy who had represented him ...." (*Id.* at p. 843.) As to the trial court's refusal to appoint counsel of choice after the public defender declared a conflict, the court, utilizing the abuse of discretion standard, held that the trial court acted within its discretion in refusing to appoint defendant's counsel of choice. (*Id.* at p. 845.)

The cases we have discussed, all involved the trial court's exercise of its discretion in the appointment of private counsel after the public defender declared a conflict. However, in *Charlton v. Superior Court* (1979) 93 Cal.App.3d 858 [156 Cal.Rptr. 107], the court addressed the issue before us, whether such trial court discretion exists when the public defender has not declared a conflict. ***329**

In *Charlton*, the petitioner, convicted of first degree murder, filed a petition for writ of habeas corpus and obtained an order to show cause, returnable to the superior court, to inquire into the validity of his contention that trial counsel in his murder case was incompetent. Petitioner requested that the attorney who filed the habeas corpus petition be appointed to represent him at the evidentiary hearing. The trial court refused to do so and appointed the public defender upon finding him available. The *Charlton* court first determined that the statutory implementation of an indigent defendant's right to appointed counsel in the context of a criminal trial was equally applicable in habeas corpus proceedings. Citing section 987.2, the court then concluded that, "in habeas corpus proceedings in which an indigent petitioner is entitled to and desires appointed counsel, the court is required to appoint the public defender if there is one, provided the public defender does not have a conflict of interest or cannot represent the petitioner for other good case." (*Charlton v. Superior Court*, *supra*, 93 Cal.App.3d at p. 863.)[7]

([2]) Our review of the applicable statutes causes us to agree with the analysis in *Charlton*. As our Supreme Court suggested in *Harris*, *supra*, a court may exercise its discretion in appointing counsel "in the absence of positive law or fixed rule ...." (*Harris*, v. *Superior Court*, *supra*, 19 Cal.3d at p. 796.) In this case, however, there is positive law. The laws governing the priority appointment of the public defender are clearly set forth in Government Code section 27706 and Penal Code section 987.2, eliminating any void compelling the application of discretion. Those statutes provide that a court must first utilize the services of the public defender in providing criminal defense services for indigent

defendants, if the public defender is available to try the matter.

B. ***Availability of the Public Defender***

([3]) Directing ourselves to the question of whether the public defender was available for appointment in this case, we note that the trial court is obligated to appoint only those attorneys who will be ready for trial on a given date. Section 987.05 provides: "In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code .... Both the prosecuting attorney and defense counsel shall have a right to present evidence and ***330** argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time."

While the public defender carefully distinguishes between an attorney being "available" for appointment under section 987.2 and being "ready for trial" under section 987.05, we find no such distinction. These sections should be read to be compatible with one another. If an attorney cannot be ready for trial within the prescribed time, it matters not that he or she is "available" in court. Whether an attorney can be ready for trial and in court on the trial date designated by the court is the standard we use in determining whether an attorney is available for appointment. That same standard should be used by the trial court.

When counsel represents to the court that he or she is available for appointment, that is, that he or she will be in court and ready for trial on the appointed date, the court may, in its discretion, accept that representation. Such representation by counsel, as an officer of the court, should not be made lightly or without due consideration. ([4]) An attorney has a duty "[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by any artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).) Further, a member of the State Bar "[s]hall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law." (Rules Prof. Conduct, rule 5-200(B).) " 'Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense.' " (*Paine v. State Bar* (1939) 14 Cal.2d 150, 154 [93 P.2d 103]; see also *Di Sabatino* v. *State Bar* (1980) 27 Cal.3d 159, 162-163 [162 Cal.Rptr. 458, 606 P.2d 765]; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 917 [180 Cal.Rptr. 831, 640 P.2d 1106].) "Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice." (*Furlong v. White* (1921) 51 Cal.App. 265, 271 [196 P. 903].)

Representations of readiness as required by section 987.05 are clearly intended to be made carefully. The statute allows counsel a reasonable time to familiarize himself or herself with a case before representing to the court that he or she can be ready for trial. The measure of an attorney is by his or her word. Frequent misrepresentations to the court, although the result of hasty miscalculations, can undermine an attorney's credibility and justifiably cause a court to give little weight to counsel's representations of availability for appointment. ***331**

([5]) Although the court may accept counsel's representation of availability, our review of the relevant law leads us to conclude that a trial court is not obligated to accept an attorney's representation at face value. Section 987.05 allows for presentation of evidence in the determination of readiness. This implies that the court may make an independent evaluation in finding whether counsel can be ready at the time of trial, regardless of his or her representation to the court. Moreover, as the Supreme Court stated in *Drumgo*, "We have repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than the one requested by defendant. [Citations.] The additional factor that requested counsel has indicated his willingness and availability to act does not raise any constitutional compulsion requiring his appointment...." (*Drumgo v. Superior Court*, *supra*, 8 Cal.3d at p. 934; *Alexander v. Superior Court*, *supra*, 22 Cal.App.4th at p. 915.)

In deciding whether counsel will be ready, the court may consider several factors, such as the number and trial age of cases an attorney already has, the expected length of those trials and their scheduled dates, as well as those of related pending motions. One other significant factor is the reliability of counsel's representation of readiness based upon past experience. These examples are given by way of illustration only; our intention is to allow the court

sufficient flexibility to consider whatever factors it deems relevant to its determination. What the court may not do, however, is improperly adhere to a fixed policy for appointment in every instance. The court should be sufficiently flexible to consider factors other than the two cited by the court in this case, particularly if counsel represents that those factors will not interfere with trial readiness. "The exercise of the court's discretion in the appointment of counsel should not have been restricted by an inflexible rule, but rather should have rested upon consideration of the particular facts and interests involved in the case before it.... " (*People v. Chavez*, *supra*, 26 Cal.3d at p. 346.) Moreover, the court should not be swayed by extraneous factors which divert the court from its obligation to exercise proper judgment. For example, in *Craig S. v. Superior Court* (1979) 95 Cal.App.3d 568 [157 Cal.Rptr. 285], Division Three of this court determined that the court abused its discretion in not appointing the public defender by finding her "unavailable" after the court received notice that she would make a late appearance. The public defender's appearance was recorded as 35 minutes after the court appointed another attorney. "To hold that the trial court's conduct in the fact situation before us did not constitute an abuse of discretion would be to acquiesce in a state of affairs fraught with the opportunity for ' " capricious disposition or whimsical thinking" ' [citation]. Here, there is a strong inference that the trial court was annoyed with the public defender for being late, and was not exercising the required ' "discriminating judgment " ' [citation] in taking into consideration all the relevant factors that should have been part of the decision as to whether to ***332** appoint the public defender or private counsel." (*Craig S. v. Superior Court*, *supra*, 95 Cal.App.3d at p. 575, fn. omitted.)

([6]) In the present case, the court would have been justified in viewing with skepticism Mr. Swarth's representation that he could try defendant's case within 60 days, given the fact that Mr. Swarth admittedly had over 15 cases which were more than 120 days old. However, defendant correctly contends that the court erred when it refused to appoint Mr. Swarth based solely on the *numbers* and age of his pending cases. Numbers and age do not always provide the relevant information in a court's determination of ability to be ready. Numbers do not reveal, for example, those cases that were set beyond the present trial date or may have to be continued for good cause and will not interfere with this trial in any way. Numbers also do not indicate which cases are possible pleas, court trials, one day trials, multiple cases for one defendant or probation violations. Moreover, once Mr. Swarth indicated that he could try this case within the time set, despite his existing caseload, the court should have inquired further to determine if that were the case. If, after hearing Mr. Swarth's explanation, the court was not persuaded, it could have stated the reasons for its decision and declined the appointment of Mr. Swarth.

While we are sympathetic to the fact that trial courts are busy and function under pressure to expedite cases and accommodate those awaiting judicial process, the facts before us appear to have allowed for an inflexible evaluation of counsel's trial readiness. By refusing to give Mr. Swarth an opportunity to explain why he believed his calendar would not prevent him from being ready on the trial date, the court effectively foreclosed consideration of factors relevant in making an impartial decision in this case.

([7]) It bears noting that a court has the discretion to remove counsel who cannot try his or her client's case at the appointed time. (See, e.g., *Stevens v. Superior Court* (1988) 198 Cal.App.3d 932 [244 Cal.Rptr. 94]; *People v. Lucev* (1986) 188 Cal.App.3d 551 [233 Cal.Rptr. 222] [counsel's trial scheduled caused repeated delays]; *People v. Strozier* (1993) 20 Cal.App.4th 55, 62 [24 Cal.Rptr.2d 362] [counsel requested a continuance but could not show good cause for the continuance]; *Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 850-851 [285 Cal.Rptr. 795] [medical emergency which renders counsel incapable of adequately representing the defendant].) Further, an attorney who represents that he or she will be ready for trial on a date certain, but is not prepared at that time, risks not only removal from the case but severe sanctions as well.[8] The consequences of not being prepared for trial should inspire counsel to give the court an honest assessment of counsel's ability to timely try the case. ***333**

Conclusion

We conclude that respondent court should have allowed Mr. Swarth an opportunity to present further evidence on his ability to be ready for trial in this case and duly considered that evidence in determining whether Mr. Swarth was available for appointment.[9]

Disposition

The petition for writ of mandate is denied as moot. Respondent's request for attorney fees pursuant to Code

of Civil Procedure section 1021.5 is denied.

Armstrong, J., concurred.

TURNER, P. J.,

Concurring and Dissenting.-I agree wholeheartedly with those portions of my colleagues' conclusions that: the present case involves an issue of assignment of counsel, not relieving an attorney (*Alexander v. Superior Court* (1994) 22 Cal.App.4th 901, 914 [27 Cal.Rptr.2d 732]); resolution of the present petition is subject to the deferential abuse of discretion standard (*People v. Horton* (1995) 11 Cal.4th 1068, 1099 [47 Cal.Rptr.2d 516, 906 P.2d 478]; *People v. Ortiz* (1990) 51 Cal.3d 975, 987 [275 Cal.Rptr. 191, 800 P.2d 547]; *People v. Chavez* (1980) 26 Cal.3d 334, 345 [161 Cal.Rptr. 762, 605 P.2d 401]; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 799 [140 Cal.Rptr. 318, 567 P.2d 750]; *Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 935 [106 Cal.Rptr. 631, 506 P.2d 1007, 66 A.L.R.3d 984]); the appointment of a deputy public defender falls within the assignment of counsel language in Penal Code section 987.05[1] ; and standing alone, section 987.05 does not authorize a trial judge to assign someone ***334** other than the public defender at the time of the arraignment. I concur in the determination of my colleagues to dismiss the mandate petition as moot. However, I respectfully dissent from that portion of the majority opinion that concludes the respondent court abused its discretion in concluding that the public defender would not be available to try the present case within the statutorily mandated 60 days of the April 2, 1996, arraignment. I believe that when properly construed, the entire constitutional and statutory scheme is such that when an arraigning judge is faced with the facts presented in this case, a decision to find the public defender to be unavailable and appoint private counsel is within the scope of allowable judicial discretion.[2] ***335**

The exercise of discretion in this case is tested by the entire statutory and constitutional scheme pertinent to speedy trial rights and appointment of the public defender. In construing provisions of the Constitution and statutes an appellate court applies the following standard of review: "We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] In the case of a constitutional provision adopted by the voters, their intent governs. [Citations.] To determine intent, ' "The court turns first to the words themselves for the answer." ' [Citations.] 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).' [Citation.]" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934]; accord, *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 826 [25 Cal.Rptr.2d 148, 863 P.2d 218].) However, the literal meaning of a statute must be in accord with its purpose as our Supreme Court noted in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659 [25 Cal.Rptr.2d 109, 863 P.2d 179], as follows: "We are not prohibited 'from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word ***336** or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the [statute.] ...' [Citation.]" In *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299], our Supreme Court added: "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.] An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in the light of the statutory scheme [citation] ...." In evaluating the issues of statutory interpretation raised by the parties, an appellate court may not second-guess the wisdom of the policy decisions made by the voters. (*Rhiner v. Workers' Comp. Appeals Bd.* (1993) 4 Cal.4th 1213, 1226 [18 Cal.Rptr.2d 129, 848 P.2d 244]; *Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 805.)

Subject to the foregoing rules of constitutional and statutory interpretation, the petition should be denied because: of the adoption of Proposition 115 by the voters in the June 5, 1990, primary election; the respondent court had the duty to ensure the prompt trial of the present case; the respondent court had inherent power to control the proceedings; and the public defender was not available to

try the present case within 60 days. The first pertinent body of constitutional and statutory law is Proposition 115. The preamble to Proposition 115 stated: "Section 1. (a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system. [¶] (b) In order to address these concerns and to accomplish these goals, we the people further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth. [¶] (c) The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, and to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society as a whole can be free from the fear of crime in our homes, neighborhoods, and schools. [¶] (d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (June 5, 1990) Text of Proposed Law, Prop. 115, p. 33.) As part of the initiative, ***337** the voters enacted article I, section 29 of the California Constitution which states, "In a criminal case, the People of the State of California have the right ... a speedy ... trial." Further, Proposition 115 enacted section 1049.5 which requires trials be commenced within 60 days of the arraignment absent a showing of good cause and which states: "In felony cases, the court shall set a date for trial which is within 60 days of the defendant's arraignment in the superior court unless, upon a showing of good cause as prescribed in Section 1050, the court lengthens the time. If the court, after a hearing as prescribed in Section 1050, finds that there is good cause to set the date for trial beyond the 60 days, it shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes." As will be noted, section 1049.5 is directly pertinent to the determination of public defender availability in this case.

Moreover, when a case is set beyond the 60-day time period set forth in section 1049.5, the voters provided for expedited extraordinary writ review in section 1511 which states: "If in a felony case the superior court sets the trial beyond the period of time specified in Section 1049.5, in violation of Section 1049.5, or continues the hearing of any matter without good cause, and good cause is required by law for such a continuance, either party may file a petition for writ of mandate or prohibition in the court of appeal seeking immediate appellate review of the ruling setting the trial or granting the continuance. Such a petition shall have precedence over all other cases in the court to which the petition is assigned, including, but not limited to, cases that originated in the juvenile court. If the court of appeal grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to that court if such action is necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the right of the parties to file a petition for review in the Supreme Court. When the court of appeal issues the writ and remittitur as provided herein, the writ shall command the superior court to proceed with the criminal case without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses. [¶] The Supreme Court may stay or recall the issuance of the writ and remittitur. The Supreme Court's failure to stay or recall the issuance of the writ and remittitur shall not deprive the respondent or the real party in interest of its right to file a petition for review in the Supreme Court."

Finally, in terms of the initiative, the Legislative Analyst's discussion in the voter pamphlet for Proposition 115 indicated: the proposition made "numerous significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases"; provided the "people of California with the right to ... a speedy ... trial"; required ***338** trial judges "to assign felony cases only to defense attorneys who will be ready to proceed within specified time limits"; and required "felony trials to be set within 60 days of the defendant's arraignment except upon a showing of good cause." (Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (June 5, 1990) p. 32.)

Apart from the provisions of Proposition 115, there are other provisions of law that are applicable to a determination as to whether there was an abuse of discretion in the present case. Section 1050 states: "The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. Excessive continuances contribute substantially to this congestion and cause substantial hardship to victims and other witnesses. Continuances

also lead to longer periods of presentence confinement for those defendants in custody and the concomitant overcrowding and increased expenses of local jails. It is therefore recognized that the people, the defendant, and the victims and other witnesses have the right to an expeditious disposition, and to that end it shall be the duty of all courts and judicial officers and of all counsel, both for the prosecution and the defense, to expedite these proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings." Rule 227.7 of the California Rules of Court provides that continuance motions in criminal cases are "disfavored." Canon 3(B)(8) of the California Code of Judicial Conduct provides, "A judge shall dispose of all judicial matters fairly, promptly, and efficiently."

Moreover, California judges have inherent powers to control proceedings. Code of Civil Procedure section 177 provides that judges have the authority to "preserve and enforce order" in her or his presence when engaged in official duties. Code of Civil Procedure section 128 subdivision (a) states in part: "(a) Every court shall have the power to do all of the following: [¶] (1) To preserve and enforce order in its immediate presence. [¶] (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority. [¶] (3) To provide for the orderly conduct of proceedings before it, or its officers.... [¶] (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." Our Supreme Court has described the inherent power of the judicial branch as follows: "We have ***339** often recognized the 'inherent powers of the court ... to insure the orderly administration of justice.' (*Hays v. Superior Court* (1940) 16 Cal.2d 260, 264 ...; see also *Bauguess v. Paine* (1978) 22 Cal.3d 626, 635-636 ... [discussing 'supervisory or administrative powers which all courts possess to enable them to carry out their duties']; *Millholen v. Riley* (1930) 211 Cal. 29, 33-34... .) Although some of these powers are set out by statute ([Code Civ. Proc.,] § 128, subd. (a)), it is established that the inherent powers of the courts are derived from the Constitution (art. VI, § 1 [reserving judicial power to courts]; see *Millholen, supra*, 211 Cal. at p. 34; *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 89 ...), and are not confined by or dependent on statute (see, e.g., *Bauguess, supra*, 22 Cal.3d at pp. 635-636; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 287 ..., cf. *James H. v. Superior Court* (1978) 77 Cal.App.3d 169, 175-175 ..., [court has inherent power to hold competency hearing despite absence of express statutory authorization for such hearing].)" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 266-267 [279 Cal.Rptr. 576, 807 P.2d 418]; accord, *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 147-148 [74 Cal.Rptr. 285, 449 P.2d 221]; *Lyons v. Superior Court* (1955) 43 Cal.2d 755, 757-758 [278 P.2d 681]; *Brydonjack v. State Bar* (1929) 208 Cal. 439, 442 [281 P. 1018, 66 A.L.R. 1507].)

In my view, given the foregoing body of law and the facts in this case, the respondent court did not abuse its discretion in concluding that the Office of the Los Angeles County Public Defender was in this one case unavailable to represent defendant within the statutorily mandated time for trial. Section 987.2, subdivision (e)[3] which, as my colleagues correctly note, is the provision of law which creates the duty to appoint the public defender in Los Angeles County provides for two exceptions. The first exception exists when the public defender is unavailable. Section 987.2, subdivision (e) states in part, "*In the event that the public defender is unavailable* and the county has created a second public defender and contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense ***340** services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel." (Italics added.) The second exception, which is contained in the third sentence of section 987.2, subdivision (e), involves the existence of a conflict of interest. The third sentence of section 987.2, subdivision (e) states, "Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest." The present case is controlled by the first or unavailability exception to the requirement that the public defender be appointed.

The respondent court could reasonably conclude that the public defender would not be available. To begin with, no other member of the public defender's office would be available to try the case. There is no dispute about that issue; defendant admits such. Further, the respondent court was obligated to set the case for trial within the 60 days. Section 1049.5 required the respondent court to set

the case for trial "within 60 days of the defendant's arraignment" in the absence of good cause. Our Supreme Court has described section 1049.5 as follows, "... § 1049.5 ... which provides felony trials shall take place within 60 days of arraignment." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299 [279 Cal.Rptr. 592, 807 P.2d 434].) On another occasion, our Supreme Court described section 1049.5 as follows: "Section 1049.5 is added to the Penal Code to provide for a trial of felony cases within 60 days of arraignment unless good cause is shown (and stated on the record) for lengthening the time." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 345 [276 Cal.Rptr. 326, 801 P.2d 1077].) There is no issue concerning the absence of good cause, Mr. Swarth indicated he expected to try the case within the 60 days. Section 1049.5 was part of the Proposition 115 which the Legislative Analyst described as making "significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases ...." Simply stated, this case was required by law to be tried within 60 days absent good cause which would permit trial beyond the statutory 60-day time period. There is not even any substantial evidence of good cause. Also, Mr. Swarth was assigned to try 21 cases to completion within the next 59 days. There was no evidence any of those cases were settleable without trial. There was no evidence a single case would be continued. In fact when asked how the cases would be tried, he responded, "But I'm ready to go. We're going to try them boom, boom, boom." When the respondent court calculated that the 21 cases could not be tried to completion within the 59-day time period, Mr. Swarth candidly admitted, "If that is your calculation, I'm not fast enough to do the math ***341** right now. So I cannot speak to that." The respondent court then requested that Mr. Swarth determine if another deputy public defender could try the case within 60 days. Only after Mr. Swarth stated no other deputy public defender could try the case within the 60-day time limit did the respondent court make its final determination of unavailability and assign private counsel. It bears emphasis, defendant never offered to waive his right to have his trial commence within the 60-day time limit imposed by section 1382, subdivision (a)(2).

Given this record, I cannot find an abuse of discretion.[4] This is not a case of a judge who relied on "numbers alone" to exercise discretion. Such a large number of cases could not possibly have been tried within 60 days which included weekends and the Memorial Day holiday. Despite given his full responsibility to do so, Mr. Swarth could not contradict the respondent court's mathematical calculation which indicated that 21 felony trials could not competently, within the mandate of the United States and California Constitutions, be professionally conducted in 60 calendar days. Not a single other deputy public defender would be available to try the case—not a one. This scenario, when confronted by a highly experienced and knowledgeable judge who is a former criminal litigator, is not the utilization of numbers alone to make a decision. Rather, it is the exercise of judicial discretion. An ***342** abuse of discretion exists under the following circumstances: "That discretion, however, ' "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. " ' [Citations.]" (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 898 [187 Cal.Rptr. 592, 654 P.2d 775]; accord, *People v. Warner* (1978) 20 Cal.3d 678, 682 [143 Cal.Rptr. 885, 574 P.2d 1237].) I cannot find the cautious and deliberate effort to comply with the statutory requirement that this case be tried within 60 days by ensuring that the public defender's office have a lawyer who would be available was: "capricious or arbitrary"; discretion exercised "*ex gratia*"; a decision rendered adverse to the spirit of the law; or a ruling which impeded or defeated the ends of substantial justice. Contrary to defendant's contention, that never happened.

For these reasons, I would deny the petition on the merits as well as on mootness grounds.

A petition for a rehearing was denied June 24, 1996, and petitioner's application for review by the Supreme Court was denied September 25, 1996. ***343**

Footnotes

1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Section 1382 provides: "(a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶] ... [¶] (2) When a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment or filing of the information ...."

Section 1049.5 provides: "In felony cases, the court shall set a date for trial which is within 60 days of the defendant's arraignment in the superior court unless, upon a showing of good cause as prescribed in Section 1050, the court lengthens the time. If the court, after a hearing as prescribed in Section 1050, finds that there is good cause to set the date for trial beyond the 60 days, it shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes."

3 Mr. Swarth disputed this number. According to his calculations, he had 17 cases beyond 60 days, with 15 over 120 days. This minor difference in numbers is not essential to our discussion.

4 Although the court did not inquire on the record about the panel attorney's pending caseload, defendant's counsel stated at oral argument that considerable activity occurred off the record in an effort to locate a panel attorney who would be available to try the case.

5 In *Alexander*, we determined that the superior court has the authority to appoint counsel for an indigent defendant at the time of arraignment and is not bound by an appointment made for the preliminary examination. We need not address that issue again in this opinion.

6 The class designation separates counties by population; Los Angeles County, with a population of over 4 million is considered a county of the first class. (Gov. Code, §§ 28022-28024.)

7 In *People v. Daniels, supra*, 52 Cal.3d at page 844, our Supreme Court acknowledged the conflict of whether *Harris* and other cases allowing for discretionary appointment of indigent counsel were applicable to situations where the public defender was available for appointment. It chose not to decide that question.

8 Section 987.05 provides for substantial sanctions.

9 Both defendant and respondent court have provided us with virtually a day-by-day update of Mr. Swarth's trial schedule and how it would have impacted this case. Although that information was of some benefit because it allowed us to follow the progress of defendant's case, it is irrelevant to our resolution of the issues presented here, since the court must evaluate counsel's availability based on information available to the court at the time of arraignment. Obviously, a court cannot base such a decision on events which may or may not occur.

FN1 Penal Code section 987.05 provides: "In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code for preliminary hearings and trials, except in those unusual cases where the court finds that, due to the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period if he or she were to begin preparing the case forthwith and continue to make diligent and constant efforts to be ready. In the case where the time of preparation for preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation. In making this determination, the court shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business. The court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready. In cases where counsel, after making representations that he or she will be ready for preliminary examination or trial, and without good cause is not ready on the date set, the court may relieve counsel from the case and may impose sanctions upon counsel, including, but not limited to, finding the assigned counsel in contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time." Unless otherwise indicated, all further statutory references are to the Penal Code.

2 I also agree with my colleagues' summary of what occurred before the respondent court on April 2, 1996. One point warrants emphasis and this relates to the accuracy of under-oath allegations appearing in the mandate petition. The verified petition, which was filed on April 9, 1996, in an effort to comply with rule 56(c) of the California Rules of Court, stated the following: "The court inquired whether Deputy Public Defender Swarth would be ready to try petitioner's matter within 60 days of petitioner's arraignment, in light of the 17 older cases in which Deputy Public Defender Swarth was counsel. This question was presumably asked pursuant to Penal Code section 987.05, although the court was not faced at that time with the obligation to appoint counsel since petitioner was then represented by the Public Defender. [¶] Deputy Public Defender Swarth replied that all of the cases to which the court had referred had been delayed for good cause, and not due to the unavailability of counsel. Moreover, some of the cases had already been set beyond a date 60 days after petitioner's arraignment. Further, there were no cases set in the time period approximately 50 days after petitioner's arraignment, when petitioner's case would probably be tried. Thus, counsel advised the court that there were no cases which would interfere with his representation of petitioner, and that he would be both prepared and available to commence petitioner's trial within 60 days. [¶] Deputy Public Defender Swarth stated he would be willing to more fully discuss the status of each of the 17 cases to which the court had made reference, demonstrating why none of those cases would interfere with his being prepared to try petitioner's matter within 60 days. The court refused to hear such a further explanation ...." As will be noted, the problem that has arisen relates to the latter under oath claim that Peter Swarth, the deputy public defender, had offered to provide background concerning the 21 pending cases and the respondent court refused to hear any explanation. As the presiding justice, I denied a stay request indicating in a brief order it was unclear whether there had been compliance with rule 56(c) of the California Rules of Court which requires a declaration detailing what occurred in the respondent court accompany the writ petition, unless a reporter's transcript is contemporaneously filed with the writ petition. On April 12, 1996, in an effort to promptly clarify matters, a deputy public defender other than the one who verified the petition filed an under-oath declaration. The April 12, 1996, declaration explained that the description of what occurred in the respondent court on April 2, 1996, in the body of the verified petition was intended to comply with rule 56(c) of the California Rules of Court. The under-oath declaration also added several minor points to what was related in the verified petition so as to fully comply with rule 56(c) of the court rules. Later, on April 16, 1996, the reporter's transcript of the April 2, 1996, proceedings was filed with this court. That transcript revealed that the respondent court exercised its discretion based on 21 pending cases, not the 17 adverted to in the body of the petition verified under oath by a deputy public defender. More importantly, the reporter's transcript reveals that the respondent court never cut off Mr. Swarth or otherwise refused to hear an explanation concerning the 21 cases. At oral argument, the question of why the verified petition which was intended to serve as the California Rules of Court rule 56(c) declaration differed from the transcript was raised. The

deputy public defender candidly indicated it was an inadvertent error made in the haste to prepare and file the petition. I am prepared, given the totality of the circumstances and the commendable candor of the deputy public defender at oral argument, to accept the explanation. However, verified writ petitions are filed under oath and their factual contents, particularly when presented in an effort to comply with rule 56(c) of the court rules, must be entirely without exception the complete truth. There are no exceptions to that rule, none. Practicing law is an uncompromisingly difficult profession. Conflicting demands of time and obligations to clients batter the personal and professional lives of lawyers. However, the press of business is never an excuse for inaccuracies in a lawyer's declaration. I am completely satisfied what occurred here was an inadvertence by two conscientious professionals, not an effort to mislead the court. If I thought otherwise, then professional, financial, and other legal sanctions may have been in order.

3 Section 987.2, subdivision (e) states: "In a county of the first, second, or third class, the court shall first utilize the services of the public defender to provide criminal defense services for indigent defendants. In the event that the public defender is unavailable and the county has created a second public defender and contracted with one or more responsible attorneys or with a panel of attorneys to provide criminal defense services for indigent defendants, and if the quality of representation provided by the second public defender is comparable to the quality of representation provided by the public defender, the court shall next utilize the services of the second public defender and then the services of the county-contracted attorneys prior to assigning any other private counsel. Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest. In the interest of justice, a court may depart from that portion of the procedure requiring appointment of the second public defender or a county-contracted attorney after making a finding of good cause and stating the reasons therefor on the record."

4 There is decisional authority concerning the power to remove counsel who cannot try the case at the appointed time. For example, in *People v. Dowell* (1928) 204 Cal. 109, 113-114 [266 P. 807], section 1050, as it was in effect at that time (Stats. 1927, ch. 600, § 1, p. 1036) required that the case be tried within 30 days of the entry of the defendant's plea. In this regard, it is similar to current section 1049.5. The Supreme Court held: the provisions of then section 1050 created a duty to set the case for trial within the statutorily mandated 30 days; there was "no merit whatsoever" to the contention that other counsel, who was properly prepared, should not be required to try the case; and the absence of the initially retained attorney did not injuriously affect any substantial rights of the defendant. (204 Cal. at pp. 113-114.) *Dowell* is pertinent because it holds that a time period specified in the Penal Code for trying a case creates a duty to do so and that no abuse of discretion occurs when retained counsel was relieved. Further, Court of Appeal decisions have upheld orders relieving defense counsel because of an inability to try the case at the appointed time. (E.g., *People v. Strozier* (1993) 20 Cal.App.4th 55, 62 [24 Cal.Rptr.2d 362] [trial court had discretion to remove privately retained counsel after "numerous continuances"]; *Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 849-850 [285 Cal.Rptr. 795] [injury to defense counsel warranted removal after seven year delay in bringing the case to trial]; *Stevens v. Superior Court* (1988) 198 Cal.App.3d 932, 936-937 [244 Cal.Rptr. 94] [appointed counsel's trial schedule caused repeated delays]; *People v. Lucev* (1986) 188 Cal.App.3d 551, 556-557 [233 Cal.Rptr. 222] [one-and-one-half-year delay after arraignment because of congested calendar of deputy public defender].) Each of these cases involves removal of counsel rather than the statutorily mandated duty of the trial court subject to the two exceptions described in the body of this dissenting opinion to appoint the public defender. Nonetheless, they are relevant insofar as they relate the power of a court when counsel is unavailable to relieve the attorney. None of the foregoing decisional authority undercuts the power of an arraigning judge to refuse to appoint a deputy public defender when she or he will be unable to try the case within the statutorily mandated period in section 1049.5.

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Barristers BTG – January 20, 2024

Session 2

Case Study 6

Levine v. Berschneider

56 Cal.App.5th 916
Court of Appeal, Second District, Division 6, California.

Kim LEVINE et al., Plaintiffs,
v.
Janet BERSCHNEIDER, Defendant and Respondent;
John B. Richards, Objector and Appellant.

2d Civil No. B300824
Filed 10/29/2020

Synopsis
Background: Tenants brought action against their landlord. After parties' settlement was approved, tenants' attorney filed ex parte application to shorten time on motion to enforce settlement agreement. Application was granted and landlord's attorney was held in contempt. The Superior Court, Santa Barbara County, No. 17CV03278, Donna D. Geck, J., granted landlord's attorney's ex parte application for relief, vacated sanctions against him, and found tenants' attorney in contempt and imposed sanctions against him. Tenants' attorney appealed.

Holdings: The Court of Appeal, Yegan, J., held that:

[1] trial court's order was directly appealable insofar at it sanctioned attorney;

[2] attorney breached his duty of candor to court;

[3] trial court had subject matter jurisdiction to award sanctions; and

[4] trial court did not abuse its broad discretion when it awarded sanctions.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Contempt; Motion for Sanctions.

West Headnotes (9)

[1] **Contempt**⇨Nature and form of remedy and jurisdiction
Contempt⇨Decisions reviewable

Trial court's judgment or order in contempt matter is final and conclusive, but it is not appealable; review of contempt order is available only by petition for extraordinary writ. Cal. Civ. Proc. Code §§ 904.1(a)(1), 1222.

[2] **Contempt**⇨Decisions reviewable

Trial court order finding attorney in contempt and directing payment of monetary sanctions was directly appealable insofar at it sanctioned attorney, where amount of sanction exceeded $5,000. Cal. Civ. Proc. Code § 904.1(a)(12).

1 Case that cites this headnote

[3] **Attorneys and Legal Services**⇨Attorney as officer of court

Plaintiffs' attorney breached his duty of candor to court after claiming that defendant failed to timely make payment pursuant to settlement agreement by failing to inform court that settlement had been paid, even though court never asked whether attorney had received settlement checks; concealment of that fact was intended to secure advantage, and court held defendant's attorney in contempt as result.

2 Cases that cite this headnote

[4] **Attorneys and Legal Services**⇨Attorney as officer of court

Attorney owes court duty of candor.

3 Cases that cite this headnote

[5] **Attorneys and Legal Services**⇨Attorney as officer of court

Attorney's duty of candor to court is not simply obligation to answer honestly when asked direct question by trial court; it includes affirmative duty to inform court when material statement of fact or law has become false or misleading in light of subsequent events.

5 Cases that cite this headnote

[6] **Attorneys and Legal Services**⇨Power to Impose; Jurisdiction

Trial court had subject matter jurisdiction pursuant to statute empowering trial court to award "reasonable expenses, including attorney's fees, incurred ... as a result of bad-faith actions or tactics" to award sanctions against attorney based on his concealment of material fact from trial court, even though he did not make misleading or false statements. Cal. Civ. Proc. Code § 128.5(a).

[7] **Attorneys and Legal Services**⇨Fraud, misrepresentation, or omission of facts

Trial court did not abuse its broad discretion when it awarded sanctions against plaintiffs' attorney based on his statement at hearing on his ex parte application to enforce settlement agreement that he had not "received word" from opposing counsel, even though they had exchanged numerous emails and settlement had been paid in full four days before hearing, and his failure to inform court that its order was moot because funds had already been received. Cal. Civ. Proc. Code § 128.5(a).

[8] **Contempt**⇨Notice or other process; attachment

By failing to object to alleged lack of notice in trial court, plaintiffs' attorney waived claim that defendant's attorney's application for ex parte order to hold him in contempt and to impose sanctions did not provide him with adequate notice of factual basis for requested order.

[9] **Appearance**⇨General or Special Appearance
Appearance⇨Objections to jurisdiction in general

Party whose participation in action is limited to challenging court's personal jurisdiction does not make general appearance; other forms of participation, however, such as opposing motion on merits, ordinarily constitute general appearance.

Witkin Library Reference: 1 Witkin, Cal. Procedure (5th ed. 2008) Attorneys, § 497 [Misleading Court.]

**769 Superior Court County of Santa Barbara, Donna D. Geck, Judge (Super. Ct. No. 17CV03278) (Santa Barbara County)

Attorneys and Law Firms

John B. Richards, in propria persona, for Appellant.

The Safarian Firm, Harry A. Safarian, Glendale, and Christina S. Karayan for Defendant and Respondent.

Opinion

YEGAN, J.

***918** John B. Richards, an attorney, purports to appeal from the trial court's order finding him in contempt. He also appeals from the order to "pay monetary sanctions in the amount of $5,310.00 for his lack of candor [with the trial court about the fact that] settlement funds had been paid." He contends the trial court lacked both personal and subject matter jurisdiction to impose sanctions against him. We dismiss the attempt to appeal from the contempt finding and affirm the sanctions order.

Facts

Appellant represented tenants in litigation against their landlord, respondent Janet Berschneider. Harry Safarian represented respondent. The lawsuit ***919** settled. Because one of the plaintiffs was a minor, the settlement required approval from the trial court. On April 17, 2019, the trial court approved the minor's compromise. On May 22, 2019, appellant filed an ex ****770** parte application to shorten time on a motion to enforce the settlement agreement. He contended respondent and her counsel were taking too long to pay plaintiffs the amounts agreed to in their settlement. The trial court set the matter for hearing on June 7, 2019. On June 3, 2019, appellant received checks from Safarian's office, paying the settlement in full.

Appellant nevertheless appeared at the June 7 hearing. He told the trial court, "I haven't received word from opposing counsel [Safarian]. I don't know – has there been any communication with the Court?" The court said there had not been. Appellant confirmed that he served opposing counsel by e-mail with the motion to enforce the settlement agreement.

The trial court granted the motion. Its order found Safarian "in contempt for willfully failing to comply with [the] April 17, 2019 order," and ordered respondent "to immediately disburse" the settlement funds. The trial court also ordered Safarian to pay monetary sanctions of $4,630.30 to plaintiffs within 10 days. At no time during the brief June 7 hearing did appellant inform the trial court that the settlement had already been paid in full.

Three days later, respondent filed an ex parte application for relief from the June 7 order pursuant to Code of Civil Procedure section 473;[1] for reconsideration of the order pursuant to section 1008; for an order to show cause against appellant for presenting false information to the court; and alternatively for an order staying the June 7 order pending hearing on a regularly noticed motion. Respondent's counsel explained that he did not attend the June 7 hearing because a staff member mistakenly informed him the hearing had been taken off calendar. Respondent requested the trial court reconsider its order and consider sanctioning appellant because he did not inform the court that he received the settlement checks before the June 7 hearing.

Appellant filed a written opposition to the ex parte application in which he contended there was no basis for relief under either section 473 or section 1008. He also contended that his statements at the June 7 hearing were not false because the trial court never asked him whether he had received the settlement checks.

Appellant made what he referred to as a special appearance at the June 12 hearing on respondent's ex parte application. He argued the trial court lacked personal jurisdiction over him because he had not been properly served with ***920** the ex parte application. He also argued the court lacked subject matter jurisdiction because there was no statutory basis for an award of sanctions against him.

The trial court took the matter under submission. On June 14, it entered an order vacating the sanctions against Safarian. It also issued an order to show cause against appellant "based upon his lack of candor with the Court," and set a hearing date and a briefing schedule.

On June 21, appellant filed an opposition to the motion for reconsideration, which the trial court had already granted, and to the order to show cause. He again argued that he was not subject to sanctions because he made no false statements to the trial court. Appellant did not repeat the jurisdictional arguments he made at the June 12 hearing.

On July 15, the trial court filed its order after hearing in which it found appellant in contempt based on his lack of candor at the June 7 hearing and ordered him to pay sanctions of $5,310 to Safarian. It found that it had personal jurisdiction over appellant ****771** because his June 21 written opposition to the order to show cause was a general appearance. (§ 410.50, subd. (a).) The trial court also concluded it had subject matter jurisdiction because appellant's lack of candor at the June 7 hearing was both contemptuous and conduct in bad faith within the meaning of sections 128.5 and 1209.

Discussion

Contempt Appealability.

[1]A trial court's judgment or order in a contempt matter is "final and conclusive." (§ 1222.) It is not, however, appealable. (§ 904.1, subd. (a)(1).) Review of a contempt order is available only by petition for extraordinary writ. (*In re Buckley* (1973) 10 Cal.3d 237, 240, 110 Cal.Rptr. 121, 514 P.2d 1201; *Davidson v. Superior Court* (1999) 70 Cal.App.4th 514, 522, 82 Cal.Rptr.2d 739.) We decline to construe the notice of appeal as a petition for an extraordinary writ. (*Imuta v. Nakano* (1991) 233 Cal.App.3d 1570, 1584, 285 Cal.Rptr. 681.)

Sanctions Appealability.

[2]The trial court imposed sanctions pursuant to section 128.5. An order directing payment of monetary sanctions is directly appealable, where, as here, the amount of the sanction exceeds $5,000. (§ 904.1, subd. (a)(12).)

***921** Counsel's Duty of Candor.

[3]In his briefs on appeal, and again at oral argument, appellant protested that he made no false or misleading statements to the trial court because the judge never asked whether he had received the settlement checks. He contends that he was entitled to sanctions against respondent's counsel, even if the settlement was paid, because he incurred fees to demand payment and to file the motion to enforce the settlement agreement. According to appellant, the trial court judge had a duty to ask whether the settlement had been paid, if that fact was important to the judge. We wholeheartedly reject this reasoning. It was not the trial court's duty to inquire whether any material fact had changed since appellant filed the motion. Instead, appellant's duty of candor required him to inform the court that the settlement had been paid.

[4]An attorney is an officer of the court and owes the court a duty of candor. (*In re Reno* (2012) 55 Cal.4th 428, 510, 146 Cal.Rptr.3d 297, 283 P.3d 1181; *Roche v. Hyde* (2020) 51 Cal.App.5th 757, 817, 265 Cal.Rptr.3d 301.) This means that, "A lawyer shall not ... knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." (Rules Prof. Conduct, rule 3.3(a)(1).) In a similar vein, section 6068 of the Business and Professions Code explains that every attorney has a duty "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, § 6068, subd. (d).)

[5]The duty of candor is not simply an obligation to answer honestly when asked a direct question by the trial court. It includes an affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events. (*In re Reno*, *supra*, 55 Cal.4th at pp. 510-511, 146 Cal.Rptr.3d 297, 283 P.3d 1181 [duty to inform court when a claim in a writ petition is subject to a procedural bar]; *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 990, 240 Cal.Rptr.3d 861 [duty to acknowledge contrary authority]; *Jackson v. State Bar of California* (1979) 23 Cal.3d 509, 513, 153 Cal.Rptr. 24, 591 P.2d 47 ["The representation ****772** to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court"].)

In *Grove v. State Bar of California* (1965) 63 Cal.2d 312, 46 Cal.Rptr. 513, 405 P.2d 553, our Supreme Court dealt with an attorney who was less than candid with the trial court. The attorney was twice informed by opposing counsel that he could not attend a certain hearing. The attorney allowed the trial court to believe that the matter was uncontested. The offending attorney "contends that the failure to convey ... [opposing counsel's] request for a continuance does not constitute misleading 'the judge or any judicial officer ***922** by an artifice or false statement of fact or law.' (Bus. & Prof. Code, section 6068, subd. (d).) There is no merit to this contention. The concealment of a request for a continuance misleads the judge as effectively as a false statement that there was no request. No distinction can therefore be drawn among concealment, half-truth, and false statement of fact. [Citation.] 'It is the endeavor to secure an advantage by means of falsity which is denounced.' [Citation.]" (*Id.* at p. 315, 46 Cal.Rptr. 513, 405 P.2d 553.)

So here. Counsel's decision to not tell the trial court that he had received "word" from opposing counsel was a concealment and a "half-truth." This violates the attorney's obligation as an officer of the court to be candid with the court. This was intended to secure an advantage and it worked, temporarily. Counsel had received the settlement checks. This is not an insignificant fact. Every trial court hearing a similar motion would want to be apprised of this development.

Subject Matter Jurisdiction.

[6]Appellant contends the trial court lacked subject matter jurisdiction to award sanctions against him because there is no statutory basis for the award and because he did not make misleading or false statements to the trial court. He is incorrect.

First, section 128.5 authorizes the trial court to order an attorney "to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bath faith, that are frivolous or solely intended to cause unnecessary delay." (*Id.*, subd. (a).)[2] A misrepresentation of material fact is subject to sanction under section 128.5. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 128, 260 Cal.Rptr. 369.)

[7]At the June 7 hearing, appellant told the trial court that he had not "received word" from his opposing counsel, even though they had exchanged numerous e-mails and the settlement was paid in full four days before the hearing. When the trial court ordered opposing counsel to immediately disburse the settlement funds, appellant failed to inform the court that its order was moot because the funds had already been received. The trial court did not abuse its broad discretion when it awarded sanctions against appellant based on these misrepresentations of material facts. (*Wallis v. PHL Associates, Inc.* (2008) 168 Cal.App.4th 882, 893, 86 Cal.Rptr.3d 297.)

***923** Notice Adequacy.

[8]Appellant contends respondent's application for ex parte order did not provide him with adequate notice of the factual basis for the requested order to show cause. But appellant never objected to the alleged lack of notice in the trial ****773** court. Instead, he opposed respondent's ex parte application on the merits, contending his statements were not false and that his receipt of the settlement funds did not moot his request for sanctions against Safarian. "In failing to raise the issue of inadequate notice, [appellant] waived any objection he may have had upon that ground." (*M. E. Gray Co. v. Gray* (1985) 163 Cal.App.3d 1025, 1034, 210 Cal.Rptr. 285.)

Had the contention not been waived, we would reject it. The June 10 ex parte application asked the trial court to issue an "order to show cause against attorney John Richards for presenting false information to the court ...." (Boldface & capitalization omitted.) It also offered a detailed factual basis for the requested sanctions. Appellant received adequate notice of the factual and legal bases upon which respondent sought sanctions against him.

Personal Jurisdiction.

[9]Appellant contends the trial court lacked personal jurisdiction over him because he was not personally served with the ex parte application and order to show cause. "A general appearance by a party is equivalent to personal service of summons on such party." (§ 410.50, subd. (a).) Appellant made a general appearance when he filed a written opposition to the ex parte application in which he addressed the merits of the application and order to show cause. "A party whose participation in an action is limited to challenging the court's personal jurisdiction does not make a general appearance. Other forms of participation, however, such as ... opposing a motion on the merits, ordinarily constitute a general appearance." (*Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014, 1029, 76 Cal.Rptr.3d 559.) The trial court properly exercised personal jurisdiction over appellant.

Conclusion

The judgment (order after hearing) dated July 15, 2019, is affirmed. Costs on appeal to respondent. Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), upon issuance of the remittitur, the clerk is directed to forward a copy of this opinion to the State Bar of California. ***924** Pursuant to Business and Professions Code section 6086.7, subdivision (b), the clerk is directed to notify appellant that this matter has been referred to the State Bar.

GILBERT, P. J., and TANGEMAN, J., concurred.

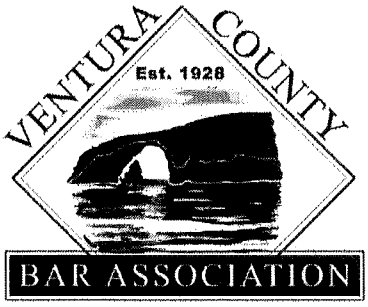
All Citations

56 Cal.App.5th 916, 270 Cal.Rptr.3d 768, 20 Cal. Daily Op. Serv. 11,258, 2020 Daily Journal D.A.R. 11,787

Footnotes

[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] The statute clarifies that an action is "frivolous" where it is "totally and completely without merit or for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).)



Barristers BTG – January 20, 2024

Session 2

Case Study 7

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Williams v. Big Picture Loans, LLC, E.D.Va., September 22, 2023

130 S.Ct. 1605
Supreme Court of the United States

Karen L. JERMAN, Petitioner,
v.
CARLISLE, McNELLIE, RINI, KRAMER & ULRICH LPA, et al.

No. 08–1200.
|
Argued Jan. 13, 2010.
|
Decided April 21, 2010.

Synopsis
Background: Debtor brought action against debt collector, alleging violations of the federal Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Sales Practices Act (OCSPA). The United States District Court for the Northern District of Ohio, Patricia A. Gaughan, J., 502 F.Supp.2d 686, granted debt collector's motion for summary judgment. Debtor appealed. The United States Court of Appeals for the Sixth Circuit, Cole, Circuit Judge, 538 F.3d 469, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Sotomayor, held that bona fide error defense in FDCPA does not apply to violation of FDCPA resulting from a debt collector's incorrect interpretation of legal requirements of the Act.

Reversed and remanded.

Justice Breyer filed a concurring opinion.

Justice Scalia filed an opinion concurring in part and concurring in the judgment.

Justice Kennedy filed a dissenting opinion, in which Justice Alito joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (2)

[1] **Finance, Banking, and Credit**⇨Debt collection practices

Bona fide error defense to civil liability under the Fair Debt Collection Practices Act (FDCPA) does not apply to mistake of law, that is, a violation of FDCPA resulting from a debt collector's incorrect interpretation of the legal requirements of the Act. Fair Debt Collection Practices Act, § 813(c), 15 U.S.C.A. § 1692k(c).

807 Cases that cite this headnote

[2] **Attorneys and Legal Services**⇨Conduct as to Client

An attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct.

26 Cases that cite this headnote

****1606 *573** *Syllabus**
The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. A debt collector who "fails to comply with any [FDCPA] provision ... with respect to any person is liable to such person" for "actual damage[s]," costs, "a reasonable attorney's fee as determined by the court," and statutory "additional damages." § 1692k(a). In addition, violations of the FDCPA are deemed unfair or deceptive acts or practices under the Federal Trade Commission Act (FTC Act), § 41 *et seq.*, which is enforced by the Federal Trade Commission (FTC). See § 1692*l*. A debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties enforced by the FTC. §§ 45(m)(1)(A), (C). A

debt collector is not liable in any action brought under the FDCPA, however, if it "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

Respondents, a law firm and one of its attorneys (collectively Carlisle), filed a lawsuit in Ohio state court on behalf of a mortgage company to foreclose a mortgage on real property owned by petitioner Jerman. The complaint included a notice that the mortgage debt would be assumed valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and, when the mortgage company acknowledged that the debt had in fact been paid, Carlisle withdrew the suit. Jerman then filed this action, contending that by sending the notice requiring her to dispute the debt in writing, Carlisle had violated § 1692g(a) of the FDCPA, which governs the contents of notices to debtors. The District Court, acknowledging a division of authority on the question, held that Carlisle had violated § 1692g(a) but ultimately granted Carlisle summary judgment under § 1692k(c)'s "bona fide error" defense. The Sixth Circuit affirmed, holding that the defense in § 1692k(c) is not limited to clerical or factual errors, but extends to mistakes of law.

***574** *Held:* The bona fide error defense in § 1692k(c) does not apply to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. Pp. 1611 – 1625.

(a) A violation resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA cannot be "not intentional" under § 1692k(c). It is a common maxim that "ignorance of the law will not excuse any person, either civilly or criminally." ****1607** *Barlow v. United States,* 7 Pet. 404, 411, 8 L.Ed. 728. When Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here. In particular, the administrative-penalty provisions of the FTC Act, which are expressly incorporated into the FDCPA, apply only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that the FDCPA prohibited its action. §§ 45(m)(1)(A), (C). Given the absence of similar language in § 1692k(c), it is fair to infer that Congress permitted injured consumers to recover damages for "intentional" conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected knowledge that the conduct was prohibited. Congress also did not confine FDCPA liability to "willful" violations, a term more often understood in the civil context to exclude mistakes of law. See, *e.g.,* *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125–126, 105 S.Ct. 613, 83 L.Ed.2d 523. Section 1692k(c)'s requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error" also more naturally evokes procedures to avoid mistakes like clerical or factual errors. Pp. 1611 – 1615.

(b) Additional support for this reading is found in the statute's context and history. The FDCPA's separate protection from liability for "any act done or omitted in good faith in conformity with any [FTC] advisory opinion," § 1692k(e), is more obviously tailored to the concern at issue (excusing civil liability when the FDCPA's prohibitions are uncertain) than the bona fide error defense. Moreover, in enacting the FDCPA in 1977, Congress copied the pertinent portions of the bona fide error defense from the Truth in Lending Act (TILA), § 1640(c). At that time, the three Federal Courts of Appeals to have considered the question interpreted the TILA provision as referring to clerical errors, and there is no reason to suppose Congress disagreed with those interpretations when it incorporated TILA's language into the FDCPA. Although in 1980 Congress amended the defense in TILA, but not in the FDCPA, to exclude errors of legal judgment, it is not obvious that amendment changed the scope of the TILA defense in a way material here, given the prior uniform judicial interpretation of that provision. It is also unclear why Congress would have intended the FDCPA's defense ***575** to be broader than TILA's, and Congress has not expressly *included* mistakes of law in any of the parallel bona fide error defenses elsewhere in the U.S.Code. Carlisle's reading is not supported by *Heintz v. Jenkins,* 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395, which had no occasion to address the overall scope of the FDCPA bona fide error defense, and which did not depend on the premise that a misinterpretation of the requirements of the FDCPA would fall under that provision. Pp. 1615 – 1620.

(c) Today's decision does not place unmanageable burdens on debt-collecting lawyers. The FDCPA contains several provisions expressly guarding against abusive lawsuits, and gives courts discretion in calculating additional damages and attorney's fees. Lawyers have recourse to the bona fide error defense in § 1692k(c) when a violation results from a qualifying factual error. To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is not unique; lawyers have a duty, for instance, to comply with the law and standards of professional conduct. Numerous state consumer protection and debt collection statutes contain

bona fide error defenses that are either silent as to, or expressly exclude, legal ****1608** errors. To the extent lawyers face liability for mistaken interpretations of the FDCPA, Carlisle and its *amici* have not shown that "the result [will be] so absurd as to warrant" disregarding the weight of textual authority. *Heintz, supra,* at 295, 115 S.Ct. 1489. Absent such a showing, arguments that the FDCPA strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress. Pp. 1620 – 1625.

538 F.3d 469, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C.J., and STEVENS, THOMAS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which ALITO, J., joined.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Attorneys and Law Firms

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

***576** The Fair Debt Collection Practices Act (FDCPA or Act) imposes civil liability on "debt collector[s]" for certain prohibited debt collection practices. Section 813(c) of the Act, 15 U.S.C. § 1692k(c), provides that a debt collector is not liable in an action brought under the Act if she can show "the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." This case presents ***577** the question whether the "bona fide error" defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. We conclude it does not.

I

A

Congress enacted the FDCPA in 1977, 91 Stat. 874, to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers. 15 U.S.C. § 1692(e). The Act regulates interactions between consumer debtors and "debt collector[s]," defined to include any person who "regularly collects ... debts owed or due or asserted to be owed or due another." §§ 1692a(5), (6). Among other things, the Act prohibits debt collectors from making false representations as to a debt's character, amount, or legal status, § 1692e(2)(A); communicating with consumers at an "unusual time or place" likely to be inconvenient ****1609** to the consumer, § 1692c(a)(1); or using obscene or profane language or violence or the threat thereof, §§ 1692d(1), (2). See generally §§ 1692b–1692j; *Heintz v. Jenkins,* 514 U.S. 291, 292–293, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

The Act is enforced through administrative action and private lawsuits. With some exceptions not relevant here, violations of the FDCPA are deemed to be unfair or deceptive acts or practices under the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 41 *et seq.*, and are enforced by the Federal Trade Commission (FTC). See § 1692*l*. As a result, a debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties of up to $16,000 per day. §§ 45(m)(1)(A), (C); 74 Fed.Reg. 858 (2009) (amending 16 CFR § 1.98(d)).

***578** The FDCPA also provides that "any debt collector who fails to comply with any provision of th[e][Act] with respect to any person is liable to such person." 15 U.S.C. § 1692k(a). Successful plaintiffs are entitled to " actual damage [s]," plus costs and "a reasonable attorney's fee as determined by the court." *Ibid.* A court may also award "additional damages," subject to a statutory cap of $1,000 for individual actions, or, for class actions, "the lesser of $500,000 or 1 per centum of the net worth of the debt collector." § 1692k(a)(2). In awarding additional damages, the court must consider "the frequency and persistence of [the debt collector's] noncompliance," "the nature of such noncompliance," and "the extent to which such noncompliance was intentional." § 1692k(b).

The Act contains two exceptions to provisions imposing liability on debt collectors. Section 1692k(c), at issue here, provides that

> "[a] debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."

The Act also states that none of its provisions imposing liability shall apply to "any act done or omitted in good faith in conformity with any advisory opinion of the [Federal Trade] Commission." § 1692k(e).

B

Respondents in this case are a law firm, Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A., and one of its attorneys, Adrienne S. Foster (collectively Carlisle). In April 2006, Carlisle filed a complaint in Ohio state court on behalf of a client, Countrywide Home Loans, Inc. Carlisle sought foreclosure of a mortgage held by Countrywide in real property owned by petitioner Karen L. Jerman. The complaint included ***579** a "Notice," later served on Jerman, stating that the mortgage debt would be assumed to be valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt, and Carlisle sought verification from Countrywide. When Countrywide acknowledged that Jerman had, in fact, already paid the debt in full, Carlisle withdrew the foreclosure lawsuit.

Jerman then filed her own lawsuit seeking class certification and damages under the FDCPA, contending that Carlisle violated § 1692g by stating that her debt would be assumed valid unless she disputed it in writing.[1] While acknowledging ****1610** a division of authority on the question, the District Court held that Carlisle had violated § 1692g by requiring Jerman to dispute the debt in writing. 464 F.Supp.2d 720, 722–725 (N.D.Ohio 2006).[2] The court ultimately granted summary judgment to Carlisle, however, concluding that § 1692k(c) shielded it from liability because the violation was not intentional, resulted from a bona fide error, and occurred despite the maintenance of procedures reasonably adapted to avoid any such error. 502 F.Supp.2d 686, 695–697 (N.D.Ohio 2007). The Court of Appeals for the Sixth Circuit affirmed. 538 F.3d 469 (2008). Acknowledging that the ***580** Courts of Appeals are divided regarding the scope of the bona fide error defense, and that the "majority view is that the defense is available for clerical and factual errors only," the Sixth Circuit nonetheless held that § 1692k(c) extends to "mistakes of law." *Id.*, at 473–476 (internal quotation marks omitted). The Court of Appeals found "nothing unusual" about attorney debt collectors maintaining "procedures" within the meaning of § 1692k(c) to avoid mistakes of law. *Id.*, at 476. Noting that a parallel bona fide error defense in the Truth in Lending Act (TILA), 15 U.S.C. § 1640(c), expressly excludes legal errors, the court observed that Congress has amended the FDCPA several times since 1977 without excluding mistakes of law from § 1692k(c). 538 F.3d, at 476.[3]

We granted certiorari to resolve the conflict of authority as to the scope of the FDCPA's bona fide error defense,[4] ***581 **1611** 557 U.S. ——, 129 S.Ct. 2863, 174 L.Ed.2d 575 (2009), and now reverse the judgment of the Sixth Circuit.

II

A

[1] The parties disagree about whether a "violation" resulting from a debt collector's misinterpretation of the legal requirements of the FDCPA can ever be "not intentional" under § 1692k(c). Jerman contends that when a debt collector intentionally commits the act giving rise to the violation (here, sending a notice that included the "in writing" language), a misunderstanding about what the Act requires cannot render the violation "not intentional," given the general rule that mistake or ignorance of law is no defense. Carlisle and the dissent, in contrast, argue that nothing in the statutory text excludes legal errors from the category of "bona fide error[s]" covered by § 1692k(c) and note that the Act refers not to an unintentional "act" but rather an unintentional "violation." The latter term, they contend, evinces Congress' intent to impose liability only when a party knows its conduct is unlawful. Carlisle urges us, therefore, to read § 1692k(c) to encompass "all types of error," including mistakes of law. Brief for Respondents 7.

We decline to adopt the expansive reading of § 1692k(c) that Carlisle proposes. We have long recognized the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States,* 7 Pet. 404, 411, 8 L.Ed. 728 (1833) (opinion for the Court by Story, J.); see also *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution ***582** is deeply rooted in the American legal system").[5] ****1612** Our law is therefore no stranger to the possibility that an act may be "intentional" for purposes of civil liability, even if the actor ***583** lacked actual knowledge that her conduct violated the law. In *Kolstad v. American Dental Assn.,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999), for instance, we addressed a provision of the Civil Rights Act of 1991 authorizing compensatory and punitive damages for "intentional discrimination," 42 U.S.C. § 1981a, but limiting punitive damages to conduct undertaken "with malice or with reckless indifference to the federally protected rights of an aggrieved individual," § 1981a(b)(1). We observed that in some circumstances "intentional discrimination" could occur without giving rise to punitive damages liability, such as where an employer is " unaware of the relevant federal prohibition" or acts with the "distinct belief that its discrimination is lawful." 527 U.S., at 536–537, 119 S.Ct. 2118. See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 110 (5th ed. 1984) ("[I]f one intentionally interferes with the interests of others, he is often subject to liability notwithstanding the invasion was made under an erroneous belief as to some ... legal matter that would have justified the conduct"); Restatement (Second) of Torts § 164, and Comment *e* (1963–1964) (intentional tort of trespass can be committed despite the actor's mistaken belief that she has a legal right to enter the property).[6]

Likely for this reason, when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here. In particular, the FTC Act's administrative-penalty provisions—which, as noted above, Congress expressly incorporated into the FDCPA—apply ***584** only when a debt collector acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that its action was "prohibited by [the FDCPA]." 15 U.S.C. §§ 45(m)(1)(A), (C). Given the absence of similar language in § 1692k(c), it is a fair inference that Congress chose to permit injured consumers to recover actual damages, costs, fees, and modest statutory damages for "intentional" conduct, including violations resulting from mistaken interpretation of the FDCPA, while reserving the more onerous penalties of the FTC Act for debt collectors whose intentional actions also reflected "knowledge fairly implied on the basis of objective circumstances" that the conduct was prohibited. Cf. 29 U.S.C. § 260 (authorizing courts to reduce liquidated damages under the Portal–to–Portal Act of 1947 if an employer ****1613** demonstrates that "the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938"); 17 U.S.C. § 1203(c)(5)(A) (provision of Digital Millennium Copyright Act authorizing court to reduce damages where "the violator was not aware and had no reason to believe that its acts constituted a violation").

Congress also did not confine liability under the FDCPA to "willful" violations, a term more often understood in the civil context to excuse mistakes of law. See, *e.g.,* *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125–126, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (civil damages for "willful violations" of Age Discrimination in Employment Act of 1967 require a showing that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited" (internal quotation marks omitted)); cf. *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 57, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007) (although " 'willfully' " is a " 'word of many meanings' " dependent on context, "we have generally taken it [when used as a statutory condition of civil liability] to cover not only knowing violations of a

standard, but reckless ones as well") (quoting *Bryan v. United States,* 524 U.S. 184, 191, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)). For this reason, the dissent missteps in relying on *Thurston* and *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988), as both cases involved the statutory phrase "willful violation." *Post,* at 1629.

The dissent reaches a contrary conclusion based on the interaction of the words "violation" and "not intentional" in § 1692k(c). *Post,* at 1629 – 1630. But even in the criminal context, cf. n. 6, *supra,* reference to a "knowing" or "intentional" "violation" or cognate terms has not necessarily implied a defense for legal errors. See *Bryan v. United States,* 524 U.S. 184, 192, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998) (" '[T]he knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law' ") (quoting *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 345, 72 S.Ct. 329, 96 L.Ed. 367 (1952) (Jackson, J., dissenting)); *United States v. International Minerals & Chemical Corp.,* 402 U.S. 558, 559, 563, 91 S.Ct. 1697, 29 L.Ed.2d 178 (1971) (statute imposing criminal liability on those who " 'knowingly violat[e]' " regulations governing transportation of corrosive chemicals does not require "proof of [the defendant's] knowledge of the law"); *Ellis v. United States,* 206 U.S. 246, 255, 257, 27 S.Ct. 600, 51 L.Ed. 1047 (1907) (rejecting argument that criminal penalty applicable to those who "intentionally violate" a statute "requires knowledge of the law").

The dissent advances a novel interpretative rule under which the combination of a "*mens rea* requirement" and the word " 'violation' " (as opposed to language specifying "the conduct giving rise to the violation") creates a mistake-of-law defense. *Post,* at 1629 – 1630. Such a rule would be remarkable in its breadth, applicable to the many scores of civil and criminal provisions throughout the U.S.Code that employ such a combination of terms. The dissent's theory draws no distinction between "knowing," "intentional," or "willful" and would abandon the care we have traditionally taken to construe such words in their particular statutory context. See, *e.g., Safeco, supra,* at 57, 127 S.Ct. 2201. More fundamentally, the dissent's categorical rule is at odds with precedents such as *Bryan, supra,* at 192, 118 S.Ct. 1939, and ***586** *International Minerals, supra,* at 559, 563, 91 S.Ct. 1697, in which we rejected a mistake-of-law ****1614** defense when a statute imposed liability for a "knowing violation" or on those who "knowingly violat[e]" the law.[7]

The dissent posits that the word "intentional," in the civil context, requires a higher showing of *mens rea* than "willful" and thus that it should be easier to avoid liability for intentional, rather than willful, violations. *Post,* at 1630. Even if the dissent is correct that the phrase "intentional violation," standing alone in a civil liability statute, might be read to excuse mistakes of law, the FDCPA juxtaposes the term "not intentional" "violation" in § 1692k(c) with the more specific language of § 45(m)(1)(A), which refers to "actual knowledge or knowledge fairly implied on the basis of objective circumstances" that particular conduct was unlawful. The dissent's reading gives short shrift to that textual distinction.

***587** We draw additional support for the conclusion that bona fide errors in § 1692k(c) do not include mistaken interpretations of the FDCPA, from the requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error." The dictionary defines "procedure" as "a series of steps followed in a regular orderly definite way." Webster's Third New International Dictionary 1807 (1976). In that light, the statutory phrase is more naturally read to apply to processes that have mechanical or other such "regular orderly" steps to avoid mistakes—for instance, the kind of internal controls a debt collector might adopt to ensure its employees do not communicate with consumers at the wrong time of day, § 1692c(a)(1), or make false representations as to the amount of a debt, § 1692e(2). The dissent, like the Court of Appeals, finds nothing unusual in attorney debt collectors maintaining procedures to avoid legal error. *Post,* at 1637 – 1638; 538 F.3d, at 476. We do not dispute that some entities may maintain procedures to avoid legal errors. But legal reasoning is not a mechanical or strictly linear process. For this reason, we find force in the suggestion by the Government (as *amicus curiae* supporting Jerman) that the broad statutory requirement of procedures reasonably designed to avoid "any" bona fide error indicates that the relevant procedures are ones that help to avoid errors like clerical or factual mistakes. ****1615** Such procedures are more likely to avoid error than those applicable to legal reasoning, particularly in the context of a comprehensive and complex federal statute such as the FDCPA that imposes open-ended prohibitions on, *inter alia,* "false, deceptive," § 1692e, or "unfair" practices, § 1692f. See Brief for United States as *Amicus Curiae* 16–18.

Even if the text of § 1692k(c), read in isolation, leaves room for doubt, the context and history of the FDCPA provide further reinforcement for construing that

provision not to shield violations resulting from misinterpretations of the requirements of the Act. See *Dada v. Mukasey,* 554 U.S. 1, ——, 128 S.Ct. 2307, 2317, 171 L.Ed.2d 178 (2008) ("In reading a statute we must not look merely to ***588** a particular clause, but consider in connection with it the whole statute" (internal quotation marks omitted)). As described above, Congress included in the FDCPA not only the bona fide error defense but also a separate protection from liability for "any act done or omitted in good faith in conformity with any advisory opinion of the [FTC]." § 1692k(e). In our view, the Court of Appeals' reading is at odds with the role Congress evidently contemplated for the FTC in resolving ambiguities in the Act. Debt collectors would rarely need to consult the FTC if § 1692k(c) were read to offer immunity for good-faith reliance on advice from private counsel. Indeed, debt collectors might have an affirmative incentive not to seek an advisory opinion to resolve ambiguity in the law, as receipt of such advice would prevent them from claiming good-faith immunity for violations and would potentially trigger civil penalties for knowing violations under the FTC Act.[8] More importantly, the existence of a separate provision that, by its plain terms, is more obviously tailored to the concern at issue (excusing civil liability when the Act's prohibitions are uncertain) weighs against stretching the language of the bona fide error defense to accommodate Carlisle's expansive reading.[9]

Any remaining doubt about the proper interpretation of § 1692k(c) is dispelled by evidence of the meaning attached ***589** to the language Congress copied into the FDCPA's bona fide error defense from a parallel provision in an existing statute. TILA, 82 Stat. 146, was the first of several statutes collectively known as the Consumer Credit Protection Act (CCPA) that now include the FDCPA. As enacted in 1968, § 130(c) of TILA provided an affirmative defense that was in pertinent part identical to the provision Congress later enacted into the FDCPA: "A creditor may not be held liable in any action brought under [TILA] if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to ****1616** avoid any such error." 82 Stat. 157 (codified at 15 U.S.C. § 1640(c)).

During the 9–year period between the enactment of TILA and passage of the FDCPA, the three Federal Courts of Appeals to consider the question interpreted TILA's bona fide error defense as referring to clerical errors; no such court interpreted TILA to extend to violations resulting from a mistaken legal interpretation of that Act.[10] We have often ***590** observed that when "judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well." *Bragdon v. Abbott,* 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998); see also *Rowe v. New Hampshire Motor Transp. Assn.,* 552 U.S. 364, 370, 128 S.Ct. 989, 169 L.Ed.2d 933 (2008). While the interpretations of three Federal Courts of Appeals may not have "settled" the meaning of TILA's bona fide error defense, there is no reason to suppose that Congress disagreed with those interpretations when it enacted the FDCPA. Congress copied verbatim the pertinent portions of TILA's bona fide error defense into the FDCPA. Compare 15 U.S.C. § 1640(c) (1976 ed.) with § 813(c), 91 Stat. 881. This close textual correspondence supports an inference that Congress understood the statutory formula it chose for the FDCPA consistent with Federal Court of Appeals interpretations of TILA.[11]

****1617** ***591** Carlisle and the dissent urge reliance, consistent with the approach taken by the Court of Appeals, on a 1980 amendment to TILA that added the following sentence to that statute's bona fide error defense: "Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and program[m]ing, and printing errors, except that an error of legal judgment with respect to a person's obligations under [TILA] is not a bona fide error." See Truth in Lending Simplification and Reform Act, § 615, 94 Stat. 181. The absence of a corresponding amendment to the FDCPA, Carlisle reasons, is evidence of Congress' intent to give a more expansive scope to the FDCPA defense. For several reasons, we decline to give the 1980 TILA amendment such interpretative weight. For one, it is not obvious that the amendment changed the scope of TILA's bona fide error defense in a way material to our analysis, given the uniform interpretations of three Courts of Appeals holding that the TILA defense does not extend to mistakes of law.[12] ***592** (Contrary to the dissent's suggestion, *post,* at 1639, this reading does not render the 1980 amendment surplusage. Congress may simply have intended to codify existing judicial interpretations ****1618** to remove any potential for doubt in jurisdictions where courts had not yet addressed the issue.) It is also unclear why Congress would have intended the FDCPA's defense to be broader than the one in TILA, which presents at least as significant a set of concerns about imposing liability for uncertain legal obligations. See, *e.g., Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980) (TILA is " 'highly technical' "). Our reluctance to give controlling weight to the TILA amendment in construing the FDCPA is reinforced ***593** by the fact that Congress has not

expressly *included* mistakes of law in any of the numerous bona fide error defenses, worded in pertinent part identically to § 1692k(c), elsewhere in the U.S.Code. Compare, *e.g.*, 12 U.S.C. § 4010(c)(2) (bona fide error defense in Expedited Funds Availability Act expressly excluding "an error of legal judgment with respect to [obligations under that Act]") with 15 U.S.C. §§ 1693m(c), 1693h(c) (bona fide error provisions in the Electronic Fund Transfer Act that are silent as to errors of legal judgment).[13] Although Carlisle points out that Congress has amended the FDCPA on several occasions without expressly restricting the scope of § 1692k(c), that does not suggest Congress viewed the statute as having the expansive reading Carlisle advances, particularly as not until recently had a Court of Appeals interpreted the bona fide error defense to include a violation of the FDCPA resulting from a mistake of law. See *Johnson v. Riddle,* 305 F.3d 1107, 1121–1124, and nn. 14–15 (CA10 2002).

Carlisle's reliance on *Heintz,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395, is also unavailing. We held in that case that the FDCPA's definition of "debt collector" includes lawyers who regularly, through litigation, attempt to collect consumer debts. *Id.,* at 292, 115 S.Ct. 1489. We ***594** addressed a concern raised by the petitioner (as here, a lawyer collecting a debt on behalf of a client) that our reading would automatically render liable "any litigating lawyer who brought, and then lost, a claim against a debtor," on the ground that § 1692e(5) prohibits a debt collector from making any " 'threat to take action that cannot legally be taken.' " *Id.,* at 295, 115 S.Ct. 1489. We expressed skepticism that § 1692e(5) itself demanded such a result. But even assuming the correctness of petitioner's reading of § 1692e(5), we suggested that the availability of the bona fide error defense meant that the prospect of liability for litigating lawyers was not "so absurd" as to warrant implying a categorical exemption unsupported by the statutory text. *Ibid.* We had no occasion in *Heintz* to address the overall scope of the bona fide error defense. Our discussion of § 1692e(5) did not depend on the premise that a misinterpretation of the requirements of the Act would fall under the bona fide error defense. In the mine-run lawsuit, ****1619** a lawyer is at least as likely to be unsuccessful because of factual deficiencies as opposed to legal error. Lawyers can, of course, invoke § 1692k(c) for violations resulting from qualifying factual errors.

Carlisle's remaining arguments do not change our view of § 1692k(c). Carlisle perceives an inconsistency between our reading of the term "intentional" in that provision and the instruction in § 1692k(b) that a court look to whether "noncompliance was intentional" in assessing statutory additional damages. But assuming § 1692k(b) encompasses errors of law, we see no conflict, only congruence, in reading the Act to permit a court to adjust statutory damages for a good-faith misinterpretation of law, even where a debt collector is not entitled to the categorical protection of the bona fide error defense. Carlisle is also concerned that under our reading, § 1692k(c) would be unavailable to a debt collector who violates a provision of the FDCPA applying to acts taken with particular intent because in such instances the relevant act ***595** would not be unintentional. See, *e.g.,* § 1692d(5) (prohibiting a debt collector from "[c]ausing a telephone to ring ... continuously with intent to annoy, abuse, or harass"). Including mistakes as to the scope of such a prohibition, Carlisle urges, would ensure that § 1692k(c) applied throughout the FDCPA. We see no reason, however, why the bona fide error defense must cover every provision of the Act.

The parties and *amici* make arguments concerning the legislative history that we address for the sake of completeness. Carlisle points to a sentence in a Senate Committee Report stating that "[a] debt collector has no liability ... if he violates the act in any manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations." S.Rep. No. 95–382, p. 5 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1695, 1699; see also *post,* at 1627 – 1628 (opinion of SCALIA, J.) (discussing report). But by its own terms, the quoted sentence does not unambiguously support Carlisle's reading. Even if a bona fide mistake "with regard to the act's coverage" could be read in isolation to contemplate a mistake of law, that reading does not exclude mistakes of fact. A mistake "with regard to the act's coverage" may derive wholly from a debt collector's factually mistaken belief, for example, that a particular debt arose out of a nonconsumer transaction and was therefore not "covered" by the Act. There is no reason to read this passing statement in the Senate Report as contemplating an exemption for legal error that is the product of an attorney's erroneous interpretation of the FDCPA—particularly when attorneys were excluded from the Act's definition of "debt collector" until 1986. 100 Stat. 768. Moreover, the reference to "any manner" of violation is expressly qualified by the requirements that the violation be "unintentional" and occur despite maintenance of appropriate procedures. In any event, we need not choose between these possible readings of the Senate Report, as the legislative record taken as a whole does not lend ***596** strong support to Carlisle's view.[14] ****1620** We therefore decline to give controlling weight to this isolated passage.

B

Carlisle, its *amici,* and the dissent raise the additional concern that our reading will have unworkable practical consequences for debt collecting lawyers. See, *e.g.,* Brief for Respondents 40–41, 45–48; NARCA Brief 4–16; *post,* at 1630 – 1636. Carlisle claims the FDCPA's private enforcement provisions have fostered a "cottage industry" of professional plaintiffs ***597** who sue debt collectors for trivial violations of the Act. See Brief for Respondents 40–41. If debt collecting attorneys can be held personally liable for their reasonable misinterpretations of the requirements of the Act, Carlisle and its *amici* foresee a flood of lawsuits against creditors' lawyers by plaintiffs (and their attorneys) seeking damages and attorney's fees. The threat of such liability, in the dissent's view, creates an irreconcilable conflict between an attorney's personal financial interest and her ethical obligation of zealous advocacy on behalf of a client: An attorney uncertain about what the FDCPA requires must choose between, on the one hand, exposing herself to liability and, on the other, resolving the legal ambiguity against her client's interest or advising the client to settle—even where there is substantial legal authority for a position favoring the client. *Post,* at 1633 – 1636.[15]

We do not believe our holding today portends such grave consequences. For one, the FDCPA contains several provisions that expressly guard against abusive lawsuits, thereby mitigating the financial risk to creditors' attorneys. When an alleged ****1621** violation is trivial, the "actual damage[s]" sustained, § 1692k(a)(1), will likely be *de minimis* or even zero. ***598** The Act sets a cap on "additional" damages, § 1692k(a)(2), and vests courts with discretion to adjust such damages where a violation is based on a good-faith error, § 1692k(b). One *amicus* suggests that attorney's fees may shape financial incentives even where actual and statutory damages are modest. NARCA Brief 11. The statute does contemplate an award of costs and "a reasonable attorney's fee as determined by the court" in the case of "any successful action to enforce the foregoing liability." § 1692k(a)(3). But courts have discretion in calculating reasonable attorney's fees under this statute,[16] and § 1692k(a)(3) authorizes courts to ***599** award attorney's fees to the defendant if a plaintiff's suit "was brought in bad faith and for the purpose of harassment."

Lawyers also have recourse to the affirmative defense in § 1692k(c). Not every uncertainty presented in litigation stems from interpretation of the requirements of the Act itself; lawyers may invoke the bona fide error defense, for instance, where a violation results from a qualifying factual error. Jerman and the Government suggest that lawyers can entirely avoid the risk of misinterpreting the Act by obtaining an advisory opinion from the FTC under § 1692k(e). Carlisle fairly observes that the FTC has not frequently issued such opinions, and that the average processing time may present practical difficulties. Indeed, the Government informed us at oral argument that the FTC has issued only four opinions in the past decade (in response to seven requests), and the FTC's response time has typically been three or four months. Tr. of Oral Arg. 27–28, 30. Without disregarding the possibility that the FTC advisory opinion process might be useful in some cases, evidence of present administrative practice makes us reluctant to place significant weight on § 1692k(e) as a practical remedy for the concerns Carlisle has identified.

We are unpersuaded by what seems an implicit premise of Carlisle's arguments: ****1622** that the bona fide error defense is a debt collector's sole recourse to avoid potential liability. We addressed a similar argument in *Heintz,* in which the petitioner urged that certain of the Act's substantive provisions would generate " 'anomalies' " if the term "debt collector" was read to include litigating lawyers. 514 U.S., at 295, 115 S.Ct. 1489. Among other things, the petitioner in *Heintz* contended that § 1692c(c)'s bar on further communication with a consumer who notifies a debt collector that she is refusing to pay the debt would prohibit a lawyer from filing a lawsuit to collect the debt. *Id.,* at 296–297, 115 S.Ct. 1489. We agreed it would be "odd" if the Act interfered in this way with "an ordinary debt-collecting ***600** lawsuit" but suggested § 1692c(c) did not demand such a reading in light of several exceptions in the text of that provision itself. *Ibid.* As in *Heintz,* we need not authoritatively interpret the Act's conduct-regulating provisions to observe that those provisions should not be assumed to compel absurd results when applied to debt collecting attorneys.

[2] To the extent the FDCPA imposes some constraints on a lawyer's advocacy on behalf of a client, it is hardly unique in our law. "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." *Nix v. Whiteside,* 475 U.S. 157, 168, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986). Lawyers face sanctions, among other things, for suits presented "for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. Rules Civ. Proc. 11(b), (c). Model rules of professional

conduct adopted by many States impose outer bounds on an attorney's pursuit of a client's interests. See, *e.g.*, ABA Model Rules of Professional Conduct 3.1 (2009) (requiring nonfrivolous basis in law and fact for claims asserted); 4.1 (truthfulness to third parties). In some circumstances, lawyers may face personal liability for conduct undertaken during representation of a client. See, *e.g.*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 191, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("Any person or entity, including a lawyer, ... who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under [Securities and Exchange Commission Rule] 10b–5").

Moreover, a lawyer's interest in avoiding FDCPA liability may not always be adverse to her client. Some courts have held clients vicariously liable for their lawyers' violations of the FDCPA. See, *e.g.*, *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (C.A.9 1994); see also *First Interstate Bank* ***601** *of Fort Collins, N.A. v. Soucie*, 924 P.2d 1200, 1202 (Colo.App. 1996).

The suggestion that our reading of § 1692k(c) will create unworkable consequences is also undermined by the existence of numerous state consumer protection and debt collection statutes that contain bona fide error defenses that are either silent as to, or expressly exclude, legal errors.[17] Several States have enacted debt collection statutes that contain neither an exemption for attorney debt collectors nor any bona fide error defense at all. See, *e.g.*, Mass. Gen. Laws, ch. 93, § 49 (West 2008); Md. Com. Law Code Ann. § 14–203 (Lexis 2005); Ore.Rev.Stat. § 646.641 (2007); ****1623** Wis. Stat. § 427.105 (2007–2008). More generally, a group of 21 States as *amici* supporting Jerman inform us they are aware of "no [judicial] decisions interpreting a parallel state bona fide error provision [in a civil regulatory statute] to immunize a defendant's mistake of law," except in a minority of statutes that expressly provide to the contrary.[18] See Brief for State of New York et al. as *Amici Curiae* 11, and n. 6. Neither Carlisle and its *amici* nor the dissent demonstrate that lawyers have suffered drastic consequences under these state regimes.

In the dissent's view, these policy concerns are evidence that "Congress could not have intended" the reading we adopt today. *Post,* at 1630. But the dissent's reading raises concerns of its own. The dissent focuses on the facts of this case, in which an attorney debt collector, in the dissent's ***602** view, "acted reasonably at every step" and committed a "technical violation" resulting in no "actual harm" to the debtor. *Post,* at 1634, 1631, 1632. But the dissent's legal theory does not limit the defense to attorney debt collectors or "technical" violations.[19] Under that approach, it appears, nonlawyer debt collectors could obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel. Moreover, many debt collectors are compensated with a percentage of money recovered, and so will have a financial incentive to press the boundaries of the Act's prohibitions on collection techniques. It is far from obvious why immunizing debt collectors who adopt aggressive but mistaken interpretations of the law would be consistent with the statute's broadly worded prohibitions on debt collector misconduct. Jerman and her *amici* express further concern that the dissent's reading would give a competitive advantage to debt collectors who press the boundaries of lawful conduct. They foresee a "race to the bottom" driving ethical collectors out of business. Brief for Petitioner 32; Brief for Public Citizen et al. as *Amici Curiae* 16–18. It is difficult to square such a result with Congress' express purpose "to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," § 1692(e).

The dissent's reading also invites litigation about a debt collector's subjective intent to violate the FDCPA and the adequacy of procedures maintained to avoid legal error. ***603** Cf. *Barlow,* 7 Pet., at 411, 8 L.Ed. 728 (maxim that ignorance of the law will not excuse civil or criminal liability "results from the extreme difficulty of ascertaining what is, bona fide, the interpretation of the party"). Courts that read § 1692k(c) to permit a mistake-of-law defense have adopted varying formulations of what legal procedures are "reasonably adapted to avoid any [legal] error."[20] ****1624** Among other uncertainties, the dissent does not explain whether it would read § 1692k(c) to impose a heightened standard for the procedures attorney debt collectors must maintain, as compared to nonattorney debt collectors. The increased cost to prospective plaintiffs in time, fees, and uncertainty of outcome may chill private suits under the statutory right of action, undermining the FDCPA's calibrated scheme of statutory incentives to encourage self-enforcement. Cf. FTC, Collecting Consumer Debts: The Challenge of Change 67 (2009) ("Because the Commission receives more than 70,000 third-party debt collection complaints per year, it is not feasible for federal government law enforcement to be the exclusive or primary means of deterring all possible law violations"). The state *amici* predict that, on the dissent's reading, consumers will have little incentive to bring enforcement actions "where the law [i]s at all unsettled, because in

such circumstances a debt collector could easily claim bona fide error of law"; in the States' view, the resulting "enforcement gap" would be "extensive" at both the federal and State levels. See Brief for State of ***604** New York et al. as *Amici Curiae* 7–10. In short, the policy concerns identified by the dissent tell only half the story.[21]

In sum, we do not foresee that our decision today will place unmanageable burdens on lawyers practicing in the debt collection industry. To the extent debt collecting lawyers face liability for mistaken interpretations of the requirements of the FDCPA, Carlisle, its *amici,* and the dissent have not shown that "the result [will be] so absurd as to warrant" disregarding the weight of textual authority discussed above. *Heintz,* 514 U.S., at 295, 115 S.Ct. 1489. Absent such a showing, arguments that the Act strikes an undesirable balance in assigning the risks of legal misinterpretation are properly addressed to Congress. To the extent Congress is persuaded that the policy concerns identified by the dissent require a recalibration of the FDCPA's liability scheme, it is, of course, free to amend the statute accordingly.[22] Congress has wide latitude, for instance, to revise § 1692k to excuse some or all mistakes of law or grant broader discretion to district courts to adjust a plaintiff's recovery. This Court may not, however, read more into § 1692k(c) than the statutory language naturally supports. We therefore hold that the bona fide error defense in § 1692k(c) does not apply to a violation of ***605** the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute.

****1625** * * *

For the reasons discussed above, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, concurring.

As respondents point out, the Court's interpretation of the Fair Debt Collection Practices Act may create a dilemma for lawyers who regularly engage in debt collection, including through litigation. See Brief for Respondents 44–48; *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). Can those lawyers act in the best interests of their clients if they face personal liability when they rely on good-faith interpretations of the Act that are later rejected by a court? Or will that threat of personal liability lead them to do less than their best for those clients?

As the majority points out, however, the statute offers a way out of—though not a panacea for—this dilemma. *Ante,* at 1615 – 1616, 1621 – 1622. Faced with legal uncertainty, a lawyer can turn to the Federal Trade Commission (FTC or Commission) for an advisory opinion. 16 CFR §§ 1.1 to 1.4 (2009). And once he receives that opinion and acts upon it the dilemma disappears: If he fails to follow the opinion, he has not acted in good faith and can fairly be held liable. If he follows the opinion, the statute frees him from any such liability. 15 U.S.C. § 1692k(e) (debt collectors immune from liability for "any act done or omitted in ... conformity with any advisory opinion of the [Federal Trade] Commission"). See also R. Hobbs et al., National Consumer Law Center, Fair Debt Collection §§ 6.12.2, 7.3 (6th ed.2008).

***606** The FTC, of course, may refuse to issue such an opinion. See, *e.g.,* 16 CFR § 1.1 (providing that the Commission will issue advisory opinions "where practicable" and only when "[t]he matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent" or "is of significant public interest"). Apparently, within the past decade, the FTC has received only seven requests and issued four opinions. See Tr. of Oral Arg. 27–28; see also Federal Trade Commission, Commission FDCPA Advisory Opinions, online at http://www.ftc.gov/os/statutes/fdcpajump.shtm (as visited Apr. 19, 2010, and available in Clerk of Court's case file). Yet, should the dilemma I have described above prove serious, I would expect the FTC to receive more requests and to respond to them, thereby reducing the scope of the problem to the point where other available tools, *e.g.,* damages caps and vicarious liability, will prove adequate. See *ante,* at 1620 – 1623. On this understanding, I agree with the Court and join its opinion.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the Court's opinion except for its reliance upon two legal fictions. A portion of the Court's reasoning consists of this: The language in the Fair Debt Collection Practices Act (FDCPA or Act) tracks language in the Truth in

Lending Act (TILA); and in the nine years between the enactment of TILA and the enactment of the FDCPA, three Courts of Appeals had "interpreted TILA's bona fide error defense as referring to clerical errors." *Ante,* at 1616. Relying on our statement in *Bragdon v. Abbott,* 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998), that Congress's repetition, in a new statute, of statutory language with a " 'settled' " judicial interpretation indicates " 'the intent to incorporate its ... judicial interpretations as well,' " the Court concludes that these ****1626** three Court of Appeals cases "suppor[t] an inference that Congress understood the statutory formula it chose for the FDCPA consistent ***607** with Federal Court of Appeals interpretations of TILA." *Ante,* at 1615 – 1617.

Let me assume (though I do not believe it) that what counts is what Congress "intended," even if that intent finds no expression in the enacted text. When a large majority of the Circuits, over a lengthy period of time, have uniformly reached a certain conclusion as to the meaning of a particular statutory text, it may be reasonable to assume that Congress was aware of those holdings, took them to be correct, and intended the same meaning in adopting that text.[1] It seems to me unreasonable, however, to assume that, when Congress has a bill before it that contains language used in an earlier statute, it is aware of, and approves as correct, a mere three Court of Appeals decisions interpreting that earlier statute over the previous nine years. Can one really believe that a majority in both Houses of Congress knew of those three cases, and accepted them as correct (even when, as was the case here, some District Court opinions and a State Supreme Court opinion had concluded, to the contrary, that the defense covered legal errors, see *ante,* at 1615 – 1616, n. 10)? This is a legal fiction, which has nothing to be said for it except that it can sometimes make our job easier. The Court acknowledges that "the interpretations of three Federal Courts of Appeals may not have 'settled' the meaning of TILA's bona fide error defense," but says "there is no reason to suppose that Congress disagreed with those interpretations." *Ante,* at 1616 – 1617. Perhaps not; but no reason to suppose that it knew of and agreed with them either—which is presumably the proposition for which the Court cites them.

***608** Even assuming, moreover, that Congress knew and approved of those cases, they would not support the Court's conclusion today. All three of them said that TILA's bona fide error defense covered only *clerical* errors. See *Ives v. W.T. Grant Co.,* 522 F.2d 749, 758 (C.A.2 1975) ("only available for clerical errors"); *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1167 (C.A.7 1974) ("basically only clerical errors"); *Palmer v. Wilson,* 502 F.2d 860, 861 (C.A.9 1974) ("[C]lerical errors ... are the only violations this section was designed to excuse"). Yet the Court specifically interprets the identical language in the FDCPA as providing a defense not only for clerical errors, but also for *factual* errors. See *ante,* at 1618, 1621; see also *ante,* at 1619 (suggesting the same). If the Court really finds the three Courts of Appeals' interpretations of TILA indicative of congressional intent in the FDCPA, it should restrict its decision accordingly. As for me, I support the Court's inclusion of factual errors, because there is nothing in the text of the FDCPA limiting the excusable "not intentional" violations to those based on clerical errors, and since there is a long tradition in the common law and in our construction of federal statutes distinguishing errors of fact from errors of law.

The Court's opinion also makes fulsome use of that other legal fiction, legislative history, ranging from a single Representative's ****1627** floor remarks on the House bill that became the FDCPA, *ante,* at 1616 – 1617, n. 11, to a single Representative's remarks in a Senate Subcommittee hearing on the House bill and three Senate bills, *ibid.,* to two 1979 Senate Committee Reports dealing not with the FDCPA but with the 1980 amendments to TILA, *ante,* at 1617, n. 12, to remarks in a Committee markup of the Senate bill on the FDCPA, *ante,* at 1619 – 1620, n. 14, to a House Report dealing with an earlier version of the FDCPA, *ibid.* Is the conscientious attorney really expected to dig out such mini-nuggets of "congressional intent" from floor remarks, committee hearings, committee markups, and committee reports covering many different ***609** bills over many years? When the Court addresses such far-afield legislative history merely "for the sake of completeness," *ante,* at 1619, it encourages and indeed prescribes such wasteful over-lawyering.

As it happens, moreover, one of the supposedly most "authoritative" snippets of legislative history, a Senate Committee Report dealing with the meaning of TILA, states very clearly that the 1980 amendment to TILA's bona fide error defense "clarified" the defense "to make clear that it applies to mechanical and computer errors," S.Rep. No. 96–73, pp. 7–8 (1979). Likewise, the 1999 American Law Report the Court cites, *ante,* at 1617, n. 12, which relies on another Senate Committee Report, describes the amendment as clarifying the "prevailing view" that the defense "applies to clerical errors," Lockhart, 153 A.L.R. Fed. 211–212, § 2[a] (1999).[2] Once again, the legal fiction contradicts the Court's conclusion that the language in the FDCPA, identical to the original TILA defense, applies to mistakes of fact.

But if legislative history is to be used, it should be used impartially. (Legislative history, after all, almost always has something for everyone!) The Court dismisses with a wave of the hand what seems to me the most persuasive legislative history (if legislative history could ever be persuasive) in the case. The respondents point to the Senate Committee Report on the FDCPA, which says that "[a] debt collector has no liability ... if he violates the act in any manner, *including with regard to the act's coverage,* when such violation is unintentional and occurred despite procedures designed to avoid such violations." S.Rep. No. 95–382, p. 5 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1695, 1699 (emphasis added). The Court claims that a mistake about "the act's coverage" in this passage might ***610** refer to factual mistakes, such as a debt collector's mistaken belief "that a particular debt arose out of a nonconsumer transaction and was therefore not 'covered' by the Act," *ante,* at 1619. The Court's explanation seems to me inadequate. No lawyer—indeed, no one speaking accurately—would equate a mistake regarding the Act's coverage with a mistake regarding whether a particular fact situation falls within the Act's coverage. What the Act covers ("the act's coverage") is one thing; whether a particular case falls *within* the Act's coverage is something else.

Even if (contrary to my perception) the phrase *could* be used to refer to *both* these things, by what principle does the Court reject the more plausible meaning? The fact that "attorneys were excluded from the Act's definition of 'debt collector' until 1986," *ibid.,* does not, as the Court ****1628** contends, support its conclusion that errors of law are not covered. Attorneys are not the only ones who would have been able to claim a legal-error defense; non-attorneys make legal mistakes too. They also sometimes receive and rely upon erroneous legal advice from attorneys. Indeed, if anyone could satisfy the defense's requirement of maintaining "procedures reasonably adapted to avoid" a legal error, it would be a non-attorney debt collector who follows the procedure of directing all legal questions to his attorney.

The Court also points to "equivocal" evidence from the Senate Committee's final markup session, *ante,* at 1619 – 1620, n. 14, but it minimizes a decidedly unhelpful discussion of the scope of the defense during the session. In response to concern that the defense would be construed, like the TILA defense, as "only protecting against a mathematical error," a staff member explained that, because of differences in the nature of the statutes, the FDCPA defense was broader than the TILA defense and "would apply to *any* violation of the act which was unintentional." See Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation 20–21 (July 26, 1977) ***611** (emphasis added). The Chairman then asked: "So it's not simply a mathematical error but *any* bona fide error without intent?" *Id.,* at 21 (emphasis added). To which the staff member responded: " That's correct." *Ibid.* The repeated use of "any"—"any violation" and " any bona fide error"—supports the natural reading of the Committee Report's statement regarding "the act's coverage" as including legal errors about the scope of the Act, rather than just factual errors.

The Court ultimately dismisses the Senate Committee Report on the ground that "the legislative record taken as a whole does not lend strong support to Carlisle's view." *Ante,* at 1619. I think it more reasonable to give zero weight to the other snippets of legislative history that the Court relies upon, for the reason that the Senate Committee Report on the very bill that became the FDCPA flatly contradicts them. It is almost invariably the case that our opinions benefit not at all from the make-weight use of legislative history. But today's opinion probably suffers from it. Better to spare us the results of legislative-history research, however painfully and exhaustively conducted it might have been.

The Court's textual analysis stands on its own, without need of (or indeed any assistance from) the two fictions I have discussed. Accordingly, I concur in the judgment of the Court.

Justice KENNEDY, with whom Justice ALITO joins, dissenting.

The statute under consideration is the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.* The statute excepts from liability a debt collector's "bona fide error[s]," provided that they were "not intentional" and reasonable procedures have been maintained to avoid them. § 1692k(c). The Court today interprets this exception to exclude legal errors. In doing so, it adopts a questionable ***612** interpretation and rejects a straightforward, quite reasonable interpretation of the statute's plain terms. Its decision aligns the judicial system with those who would use litigation to enrich themselves at the expense of attorneys who strictly follow and adhere to professional and ethical standards.

When the law is used to punish good-faith mistakes; when adopting reasonable safeguards is not enough to avoid liability; when the costs of discovery and litigation are

used to force settlement even absent **1629 fault or injury; when class-action suits transform technical legal violations into windfalls for plaintiffs or their attorneys, the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system. The interpretation of the FDCPA the Court today endorses will entrench, not eliminate, some of the most troubling aspects of our legal system. Convinced that Congress did not intend this result, I submit this respectful dissent.

I

A

The FDCPA addresses "abusive debt collection practices," § 1692(e), by regulating interactions between commercial debt collectors and consumers. See *ante,* at 1608 – 1609. The statute permits private suits against debt collectors who violate its provisions. § 1692k(a). An exception to liability is provided by the so-called bona fide error defense:

> "A debt collector may not be held liable in any action ... if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c).

*613 This language does not exclude mistakes of law and is most naturally read to include them. Certainly a mistaken belief about the law is, if held in good faith, a "bona fide error" as that phrase is normally understood. See Black's Law Dictionary 582 (8th ed.2004) (defining "error" as "a belief that what is false is true or that what is true is false," def. 1); *ibid.* (" [a] mistake of law or of fact in a tribunal's judgment, opinion, or order," def. 2); *ibid.* (listing categories of legal errors).

The choice of words provides further reinforcement for this view. The bona fide error exception in § 1692k(c) applies if "the violation was not intentional and resulted from a bona fide error." The term "violation" specifically denotes a legal infraction. See *id.,* at 1600 ("An infraction or breach of the law; a transgression," def. 1). The statutory term "violation" thus stands in direct contrast to other provisions of the FDCPA that describe conduct itself. This applies both to specific terms, *e.g.,* § 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt"), and to more general ones, *e.g.,* § 1692k(e) (referring to "any act done or omitted in good faith"). By linking the *mens rea* requirement ("not intentional") with the word "violation"—rather than with the conduct giving rise to the violation—the Act by its terms indicates that the bona fide error exception applies to legal errors as well as to factual ones.

The Court's precedents accord with this interpretation. Federal statutes that link the term "violation" with a *mens rea* requirement have been interpreted to excuse good-faith legal mistakes. See, *e.g.,* *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 129, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) (the phrase "arising out of a willful violation" in the Fair Labor Standards Act applies where an employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"); *614 *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125, 126, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (damages provision under the Age Discrimination in Employment Act, which applies "only in cases of willful violations," creates liability where an employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA" (internal quotation marks **1630 omitted)); cf. *Liparota v. United States,* 471 U.S. 419, 428, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) (prohibition on use of food stamps " 'knowing [them] to have been received ... in violation of' " federal law "undeniably requires a knowledge of illegality" (emphasis deleted)). The FDCPA's use of "violation" thus distinguishes it from most of the authorities relied upon by the Court to demonstrate that mistake-of-law defenses are disfavored. See, *e.g., ante,* at 1612 (citing *Kolstad v. American Dental Assn.,* 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999)).

The Court's response is that there is something distinctive about the word "willful" that suggests an excuse for mistakes of law. This may well be true for criminal statutes, in which the terms " 'knowing,' 'intentional' [and] 'willful' " have been distinguished in this regard. *Ante,* at 1613 (citing *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 57, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007)). But this distinction is specific to the criminal context:

> "It is different in the criminal law. When the term 'willful' or 'willfully' has been used in a criminal statute, we have regularly read the modifier as limiting liability to knowing violations. This reading of the term, however, is tailored to the criminal law, where it is characteristically used to require a criminal intent beyond the purpose otherwise required for guilt, or an additional 'bad purpose,' or specific intent to violate a known legal duty created by highly technical statutes." *Id.*, at 57–58, n. 9, 127 S.Ct. 2201 (citations omitted).

For this reason, the Court's citation to criminal cases, which are themselves inconsistent, see *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), is unavailing. See *ante*, at 1613 – 1614, and n. 7.

***615** In the civil context, by contrast, the word "willful" has been used to impose a *mens rea* threshold for liability that is lower, not higher, than an intentionality requirement. See *Safeco, supra*, at 57, 127 S.Ct. 2201 ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well"). Avoiding liability under a statute aimed at intentional violations should therefore be easier, not harder, than avoiding liability under a statute aimed at willful violations. And certainly there is nothing in *Thurston* or *McLaughlin*—both civil cases—suggesting that they would have come out differently had the relevant statutes used "intentional violation" rather than "willful violation."

B

These considerations suffice to show that § 1692k(c) is most reasonably read to include mistakes of law. Even if this were merely a permissible reading, however, it should be adopted to avoid the adverse consequences that must flow from the Court's contrary decision. The Court's reading leads to results Congress could not have intended.

1

The FDCPA is but one of many federal laws that Congress has enacted to protect consumers. A number of these statutes authorize the filing of private suits against those who use unfair or improper practices. See, *e.g.*, 15 U.S.C. § 1692k (FDCPA); § 1640 (Truth in Lending Act); § 1681n (Fair Credit Reporting Act); 49 U.S.C. § 32710 (Federal Odometer Disclosure Act); 11 U.S.C. § 526(c)(2) (Bankruptcy Abuse Prevention and Consumer Protection Act of 2005). Several of these provisions permit a successful plaintiff to recover—in addition to actual damages— ****1631** statutory damages, attorney's fees and costs, and in some cases punitive damages. *E.g.*, 15 U.S.C. § 1640(a)(2) (statutory damages); § 1640(a)(3) (attorney's fees and costs); § 1681n(a)(1)(B) (statutory ***616** and punitive damages); § 1681n(a)(1)(B) (3) (costs and attorney's fees); 49 U.S.C. § 32710(a) ("3 times the actual damages or $1,500, whichever is greater"); § 32710(b) (costs and attorney's fees); 11 U.S.C. § 526(c)(3)(A) (costs and attorney's fees). Some also explicitly permit class-action suits. *E.g.*, 15 U.S.C. § 1640 (a)(2)(B); § 1692k(a)(2)(B).

A collateral effect of these statutes may be to create incentives to file lawsuits even where no actual harm has occurred. This happens when the plaintiff can recover statutory damages for the violation and his or her attorney will receive fees if the suit is successful, no matter how slight the injury. A favorable verdict after trial is not necessarily the goal; often the plaintiff will be just as happy with a settlement, as will his or her attorney (who will receive fees regardless). The defendant, meanwhile, may conclude a quick settlement is preferable to the costs of discovery and a protracted trial. And if the suit attains class-action status, the financial stakes rise in magnitude. See, *e.g.*, § 1640(a)(2)(B) (class-action recovery of up to "the lesser of $500,000 or 1 per centum of the net worth of the [defendant]"); § 1692k(a)(2)(B) (same).

The present case offers an object lesson. Respondents filed a complaint in state court on behalf of a client that mistakenly believed Jerman owed money to it. Jerman's attorney then informed respondents that the debt had been paid in full. Respondents confirmed this fact with the client and withdrew the lawsuit.

This might have been the end of the story. But because respondents had informed Jerman that she was required to dispute the debt in writing, she filed a class-action complaint. It did not matter that Jerman had claimed no harm as a result of respondents' actions. Jerman sued for damages, attorney's fees, and costs—including class

damages of "$500,000 or 1% of defendants' net worth whichever is less." Amended Complaint in No. 1:06–CV–01397 (ND Ohio), p. 4. In addition to merits-related discovery, Jerman sought information from respondents concerning the income and net ***617** worth of each partner in the firm. At some point, Jerman proposed to settle with respondents for $15,000 in damages and $7,500 in attorney's fees. Amended Joint App. in No. 07–3964(CA6), pp. 256–262. The case illustrates how a technical violation of a complex federal statute can give rise to costly litigation with incentives to settle simply to avoid attorney's fees.

Today's holding gives new impetus to this already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit. See *Federal Home Loan Mortgage Corp. v. Lamar*, 503 F.3d 504, 513 (C.A.6 2007) (referring to the "cottage industry" of litigation that has arisen out of the FDCPA (internal quotation marks omitted)). It is clear that Congress, too, was troubled by this dynamic. That is precisely why it enacted a bona fide error defense. The Court's ruling, however, endorses and drives forward this dynamic, for today's holding leaves attorneys and their clients vulnerable to civil liability for adopting good-faith legal positions later determined to be mistaken, even if reasonable efforts were made to avoid mistakes.

The Court seeks to brush aside these concerns by noting that trivial violations will give rise to little in the way of actual damages and that trial courts "have discretion ****1632** in calculating reasonable attorney's fees under [the] statute." *Ante*, at 1620. It is not clear, however, that a court is permitted to adjust a fee award based on its assessment of the suit's utility. Cf. *Perdue v. Kenny A., post*, at 1633 (noting a " 'strong presumption' " of reasonableness that attaches to a lodestar calculation of attorney's fees). Though the Court, properly, does not address the question here, it acknowledges that some courts have deemed fee awards to victorious plaintiffs to be " 'mandatory,' " even if the plaintiff suffered no damage. *Ante*, at 1621, n. 16.

***618** The Court's second response is that the FDCPA guards against abusive suits and that suits brought " 'in bad faith and for the purpose of harassment' " can lead to a fee award for the defendant. *Ante*, at 1621 (quoting § 1692k(a)(3)). Yet these safeguards cannot deter suits based on technical—but harmless—violations of the statute. If the plaintiff obtains a favorable judgment or a settlement, then by definition the suit will not have been brought in bad faith. See *Emanuel v. American Credit Exch.*, 870 F.2d 805, 809 (C.A.2 1989) (FDCPA defendant's "claim for malicious prosecution cannot succeed unless the action subject of the claim is unsuccessful").

Again the present case is instructive. Jerman brought suit without pointing to any actual harm that resulted from respondents' actions. At the time her complaint was filed, it was an open question in the Sixth Circuit whether a debt collector could demand that a debt be disputed in writing, and the district courts in the Circuit had reached different answers. *Ante*, at 1610, n. 2. The trial court in this case happened to side with Jerman on the issue, 464 F.Supp.2d 720, 722–725 (N.D.Ohio 2006), but it seems unlikely that the court would have labeled her suit "abusive" or "in bad faith" even if it had gone the other way.

There is no good basis for optimism, then, when one contemplates the practical consequences of today's decision. Given the complexity of the FDCPA regime, see 16 CFR pt. 901 (2009) (FDCPA regulations), technical violations are likely to be common. Indeed, the Court acknowledges that they are inevitable. See *ante*, at 1614 – 1615. As long as legal mistakes occur, plaintiffs and their attorneys will have an incentive to bring suits for these infractions. It seems unlikely that Congress sought to create a system that encourages costly and time-consuming litigation over harmless violations committed in good faith despite reasonable safeguards.

When construing a federal statute, courts should be mindful of the effect of the interpretation on congressional purposes ***619** explicit in the statutory text. The FDCPA states an objective that today's decision frustrates. The statutory purpose was to "eliminate abusive debt collection practices" and to ensure that debt collectors who refrain from using those practices "are not competitively disadvantaged." 15 U.S.C. § 1692(e) ("Purposes"). The practices Congress addressed involved misconduct that is deliberate, see § 1692(a) ("abusive, deceptive, and unfair debt collection practices"); § 1692(c) ("misrepresentation or other abusive debt collection practices"), or unreasonable, see § 1692c(a)(1) (prohibiting debt collectors from communicating with debtors at times "which should be known" to be inconvenient); § 1692e(8) (prohibiting the communication of credit card information "which should be known to be false"). That explains the statutory objective not to disadvantage debt collectors who "refrain" from abusive practices—that is to say, debt collectors who do not intentionally or unreasonably adopt them. It further explains ****1633** why Congress included a good-faith error exception, which exempts violations that are not

intentional or unreasonable.

In referring to "abusive debt collection practices," however, surely Congress did not contemplate attorneys who act based on reasonable, albeit ultimately mistaken, legal interpretations. A debt collector does not gain a competitive advantage by making good-faith legal errors any more than by making good-faith factual errors. This is expressly so if the debt collector has implemented "procedures reasonably adapted to avoid" them. By reading § 1692k(c) to exclude good-faith mistakes of law, the Court fails to align its interpretation with the statutory objectives.

The Court urges, nevertheless, that there are policy concerns on the other side. The Court frets about debt collectors who "press the boundaries of the Act's prohibitions" and about a potential " 'race to the bottom.' " *Ante,* at 1623 (quoting Brief for Petitioner 32). For instance, in its view, interpreting § 1692k(c) to encompass legal mistakes might ***620** mean that "nonlawyer debt collectors could obtain blanket immunity for mistaken interpretations of the FDCPA simply by seeking the advice of legal counsel." *Ante,* at 1623. It must be remembered, however, that § 1692k(c) may only be invoked where the debt collector's error is "bona fide" and where "reasonable procedures" have been adopted to avoid errors. There is no valid or persuasive reason to assume that Congress would want to impose liability on a debt collector who relies in good faith on the reasonable advice of counsel. If anything, we should expect Congress to think that such behavior should be encouraged, not discouraged.

The Court also suggests that reading § 1692k(c) to include legal errors would encourage litigation over a number of issues: what subjective intent is necessary for liability; what procedures are necessary to avoid legal mistakes; what standard applies to procedures adopted by attorney debt collectors as compared to non-attorney debt collectors. Yet these questions are no different from ones already raised by the statute. Whether the debt collector is an attorney or not, his or her subjective intent must be assessed before liability can be determined. Procedures to avoid mistakes—whether legal or otherwise—must be "reasonable," which is always a context-specific inquiry. The Court provides no reason to think that legal errors raise concerns that differ in these respects from those raised by nonlegal errors.

2

There is a further and most serious reason to interpret § 1692k(c) to include good-faith legal mistakes. In *Heintz v. Jenkins,* 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), the Court held that attorneys engaged in debt-collection litigation may be "debt collectors" for purposes of the FDCPA. In reaching this conclusion the Court confronted the allegation that its interpretation would produce the anomalous result that attorneys could be liable for bringing legal claims against debtors if those claims ultimately proved unsuccessful. *Id.,* at 295, 115 S.Ct. 1489. The Court rejected ***621** this argument. In doing so it said that § 1692k(c) provides debt collectors with a defense for their bona fide errors. *Id.,* at 295, 115 S.Ct. 1489.

Today the Court relies on *Heintz* to allay concerns about the practical implications of its decision. *Ante,* at 1622. Yet the Court reads § 1692k(c) to exclude mistakes of law, thereby producing the very result that *Heintz* said would not come about. Attorneys may now be held liable for taking reasonable legal positions in good faith if those positions are ultimately rejected.

****1634** Attorneys are dutybound to represent their clients with diligence, creativity, and painstaking care, all within the confines of the law. When statutory provisions have not yet been interpreted in a definitive way, principled advocacy is to be prized, not punished. Surely this includes offering interpretations of a statute that are permissible, even if not yet settled. The FDCPA is a complex statute, and its provisions are subject to different interpretations. See, *e.g., ante,* at 1610 – 1611, n. 4 (identifying splits of authority on two different FDCPA issues); Brief for National Association of Retail Collection Attorneys as *Amicus Curiae* 5–6 (identifying another split); see also *ante,* at 1614 – 1615. Attorneys will often find themselves confronted with a statutory provision that is susceptible to different but still reasonable interpretations.

An attorney's obligation in the face of uncertainty is to give the client his or her best professional assessment of the law's mandate. Under the Court's interpretation of the FDCPA, however, even that might leave the attorney vulnerable to suit. For if the attorney proceeds based on an interpretation later rejected by the courts, today's decision deems that to be actionable as an intentional "violation," with personal financial liability soon to follow. Indeed, even where a particular practice is compelled by existing precedent, the attorney may be sued if that precedent is later overturned.

*622 These adverse consequences are evident in the instant case. When respondents filed a foreclosure complaint against Jerman on behalf of their client, they had no reason to doubt that the debt was valid. They had every reason, furthermore, to believe that they were on solid legal ground in asking her to dispute the amount owed in writing. See, *e.g.*, *Graziano v. Harrison*, 950 F.2d 107, 112 (C.A.3 1991) (written objection is necessary for coherent statutory scheme and protects the debtor by "creat[ing] a lasting record of the fact that the debt has been disputed"). When Jerman disputed the debt, respondents verified that the debt had been satisfied and withdrew the lawsuit. Respondents acted reasonably at every step, and yet may still find themselves liable for a harmless violation.

After today's ruling, attorneys can be punished for advocacy reasonably deemed to be in compliance with the law or even required by it. This distorts the legal process. Henceforth, creditors' attorneys of the highest ethical standing are encouraged to adopt a debtor-friendly interpretation of every question, lest the attorneys themselves incur personal financial risk. It is most disturbing that this Court now adopts a statutory interpretation that will interject an attorney's personal financial interests into the professional and ethical dynamics of the attorney-client relationship. These consequences demonstrate how untenable the Court's statutory interpretation is and counsel in favor of a different reading. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, ——, n. 5, 130 S.Ct. 1324, 1338 n. 5, 176 L.Ed.2d 79 (2010) (rejecting a reading of federal law that "would seriously undermine the attorney-client relationship").

The Court's response is that this possibility is nothing new, because attorneys are already duty-bound to comply with the law and with standards of professional conduct. Attorneys face sanctions for harassing behavior and frivolous litigation, and in some cases misconduct may give rise to personal liability. *Ante*, at 1621 – 1622.

*623 This response only underscores the problem with the Court's approach. By reading § 1692k(c) to exclude mistakes of law, the Court ensures that attorneys will **1635 face liability even when they have done nothing wrong—indeed, even when they have acted in accordance with their professional responsibilities. Here respondents' law firm did not harass Jerman; it did not file a frivolous suit against her; it did not intentionally mislead her; it caused her no damages or injury. The firm acted upon a reasonable legal interpretation that the District Court later thought to be mistaken. The District Court's position, as all concede, was in conflict with other published, reasoned opinions. *Ante*, at 1610, n. 2. (And in the instant case, neither the Court of Appeals nor this Court has decided the issue. See *ante*, at 1610, n. 3.) If the law firm can be punished for making a good-faith legal error, then to be safe an attorney must always stick to the most debtor-friendly interpretation of the statute, lest automatic liability follow if some later decision adopts a different rule. This dynamic creates serious concerns, not only for the attorney-client relationship but also for First Amendment rights. Cf. *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) (law restricting arguments available to attorneys "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"). We need not decide that these concerns rise to the level of an independent constitutional violation, see *ante*, at 1624, n. 21, to recognize that they counsel against a problematic interpretation of the statute. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Justice BREYER—although not the Court—argues that an attorney faced with legal uncertainty only needs to turn *624 to the Federal Trade Commission (FTC) for an advisory opinion. An attorney's actions in conformity with the opinion will be shielded from liability. *Ante*, at 1625 (concurring opinion) (citing 15 U.S.C. § 1692k(e)). This argument misconceives the practical realities of litigation. Filings and motions are made under pressing time constraints; arguments must be offered quickly in reply; and strategic decisions must be taken in the face of incomplete information. Lawyers in practice would not consider this alternative at all realistic, particularly where the defense is needed most.

And even were there time to generate a formal request to the FTC and wait an average of three or four months for a response (assuming the FTC responds at all), the argument assumes that an ambiguity in the statute is obvious, not latent, that the problem is at once apparent, and that a conscious decision to invoke FTC procedures can be made. But the problem in many instances is that interpretive alternatives are not at once apparent. All this may explain why, in the past decade, the FTC has issued only four opinions in response to just seven requests. See Tr. of Oral Arg. 27–28, 30. The FTC advisory process does not remedy the difficulties that the Court's opinion will cause.

Even if an FTC opinion is obtained, moreover, the ethical dilemma of counsel is not resolved. If the FTC adopts a position unfavorable to the client, the attorney may still believe the FTC is mistaken. Yet under today's decision, the attorney who in good faith continues to assert a reasonable position to the contrary does so at risk of personal liability. This alters the ethical balance central to the adversary system; and it is, again, a reason for the Court to ****1636** adopt a different, but still reasonable, interpretation to avoid systemic disruption.

II

The Court does not assert that its interpretation is clearly commanded by the text. Instead, its decision relies on an ***625** amalgam of arguments that, taken together, are said to establish the superiority of its preferred reading. This does not withstand scrutiny.

First, the Court relies on the maxim that " 'ignorance of the law will not excuse any person, either civilly or criminally.' " *Ante,* at 1611 (quoting *Barlow v. United States,* 7 Pet. 404, 411, 8 L.Ed. 728 (1833)). There is no doubt that this principle "is deeply rooted in the American legal system." *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Yet it is unhelpful to the Court's position. The maxim the Court cites is based on the premise "that the law is definite and knowable," so that all must be deemed to know its mandate. *Ibid.* See also O. Holmes, The Common Law 48 (1881) ("[T]o admit the excuse [of ignorance] at all would be to encourage ignorance where the law-maker has determined to make men know and obey"). In other words, citizens cannot avoid compliance with the law simply by demonstrating a failure to learn it.

The most straightforward application of this principle is to statutory provisions that delineate a category of prohibited conduct. These statutes will not be read to excuse legal mistakes absent some indication that the legislature meant to do so. See, *e.g., Armour Packing Co. v. United States,* 209 U.S. 56, 70, 85–86, 28 S.Ct. 428, 52 L.Ed. 681 (1908) (rejecting the defendant's attempt to read a mistake-of-law defense into a criminal statute forbidding shippers to "obtain or dispose of property at less than the regular rate established"); *ante,* at 1612 (discussing a federal statute imposing liability for "intentional discrimination").

In the present case, however, the Court is not asked whether a mistake of law should excuse respondents from a general prohibition that would otherwise cover their conduct. Rather, the issue is the scope of an express exception to a general prohibition. There is good reason to think the distinction matters. It is one thing to presume that Congress does not intend to create an exception to a general rule through silence; it is quite another to presume that an explicit ***626** statutory exception should be confined despite the existence of other sensible interpretations. Cf. *Kosak v. United States,* 465 U.S. 848, 853, n. 9, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984) (although the Federal Tort Claims Act waives sovereign immunity, "the proper objective of a court attempting to construe [an exception to the Act] is to identify those circumstances which are within the words and reason of the exception—no less and no more" (internal quotation marks omitted)). This is all the more true where the other possible interpretations are more consistent with the purposes of the regulatory scheme. By its terms, § 1692k(c) encompasses—without limitation—all violations that are "not intentional and resul[t] from a bona fide error." The Court provides no reason to read this language narrowly.

The Court responds that "our precedents have made clear for more than 175 years" that the presumption against mistake-of-law defenses applies even to explicit statutory exceptions. *Ante,* 1611 – 1612, n. 5. By this the Court means that one case applied the presumption to an exception more than 175 years ago. In *Barlow,* the Court declined to excuse an alleged mistake of law despite a statutory provision that excepted "false denomination [s] ****1637** ... [that] happened by mistake or accident, and not from any intention to defraud the revenue." 7 Pet., at 406, 8 L.Ed. 728. In construing this language, the *Barlow* Court noted that it demonstrated congressional intent to exclude mistakes of law:

> "The very association of mistake and accident, in this [connection], furnishes a strong ground to presume that the legislature had the same classes of cases in view .... Mistakes in the construction of the law, seem as little intended to be excepted by the proviso, as accidents in the construction of the law." *Id.,* at 411–412.

Unlike the provision at issue in *Barlow*, § 1692k(c) gives no indication that its broad reference to "bona fide error[s]" was meant to exclude legal mistakes.

***627** Even if statutory exceptions should normally be construed to exclude mistakes of law, moreover, that guideline would only apply absent intent to depart from the general rule. There is no doubt that Congress may

create a mistake-of-law defense; the question is whether it has done so here. See *Ratzlaf,* 510 U. S, at 149, 114 S.Ct. 655. As explained above, see Part I–A, *supra,* Congress has made its choice plain by using the word "violation" in § 1692k(c) to indicate that mistakes of law are to be included.

Second, the Court attempts to draw a contrast between § 1692k(c) and the administrative penalties in the Federal Trade Commission Act (FTC Act), 38 Stat. 717, 15 U.S.C. § 41 *et seq.* Under the FTC Act, a debt collector may face civil penalties of up to $16,000 per day for acting with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that [an] act is" prohibited under the FDCPA. §§ 45(m)(1)(A), (C); 74 Fed.Reg. 858 (2009) (amending 16 CFR § 1.98(d) (2009)). The Court reasons that the FTC provision is meant to provide relatively harsh penalties for intentional violations. By contrast, the argument continues, the penalties in the FDCPA itself must cover—and hence § 1692k(c) must not excuse—unintentional violations. *Ante,* at 1612 – 1613.

The argument rests on a mistaken premise—namely, that § 1692k(c) must immunize all legal errors or none. This misreads the statute. As the text states, it applies only to "bona fide" errors committed despite "the maintenance of procedures reasonably adapted to avoid" these mistakes. So under a sensible reading of the statute, (1) intentional violations are punishable under the heightened penalties of the FTC Act; (2) unintentional violations are generally subject to punishment under the FDCPA; and (3) a defendant may escape liability altogether by proving that a violation was based on a bona fide error and that reasonable error-prevention procedures were in place. There is nothing incongruous in this scheme. Indeed, for the reasons described ***628** in Part I, *supra,* it is far less peculiar than the Court's reading, which would subject attorneys to liability for good-faith legal advocacy, even advocacy based on an accurate assessment of then-existing case law.

Third, in construing § 1692k(c) to exclude legal errors, the Court points to the requirement that a debt collector maintain "procedures reasonably adapted to avoid any such error." The Court asserts that this phrase most naturally evokes procedures to avoid clerical or factual mistakes. There is nothing natural in reading this phrase contrary to its plain terms, which do not distinguish between different categories of mistakes. Nor is there anything unusual about procedures adopted to avoid legal mistakes. The present case is again instructive. According to the District Court, respondents designated a lead ****1638** FDCPA compliance attorney, who regularly attended conferences and seminars; subscribed to relevant periodicals; distributed leading FDCPA cases to all attorneys; trained new attorneys on their statutory obligations; and held regular firmwide meetings on FDCPA issues. See 538 F.3d 469, 477 (C.A.6 2008). These procedures are not only "reasonably adapted to avoid [legal] error[s]," but also accord with the FDCPA's purposes.

The Court argues, nonetheless, that the statute contemplates only clerical or factual errors, for these are the type of errors that can mostly naturally be addressed through " 'a series of steps followed in a regular orderly definite way.' " *Ante,* at 1614 (quoting Webster's Third New International Dictionary 1807 (1976)). As made clear by the steps that respondents have taken to ensure FDCPA compliance, this is simply not true. The Court also speculates that procedures to avoid clerical or factual errors will be easier to implement than procedures to avoid legal errors. Even if this were not pure conjecture, it has nothing to do with what the statute requires. The statute does not talk about procedures that eliminate all—or even most—errors. It merely requires procedures "reasonably adapted to avoid any such error." ***629** The statute adopts the sensible approach of requiring reasonable safeguards if liability is to be avoided. This approach, not the Court's interpretation, reflects the reality of debt-collection practices.

Fourth, the Court argues that construing § 1692k(c) to encompass a mistake-of-law defense "is at odds with" the role contemplated for the FTC. *Ante,* at 1615. This is so, it contends, because the FTC is authorized to issue advisory opinions, and the statute shields from liability "any act done or omitted in good faith in conformity" with such opinions. § 1692k(e). But why, asks the Court, would a debt collector seek an opinion from the FTC if immunity under § 1692k(c) could be obtained simply by relying in good faith on advice from private counsel? Going further, the Court suggests that debt collectors might "have an affirmative incentive not to seek an advisory opinion to resolve ambiguity in the law, as recipt of such advice would prevent them from claiming good-faith immunity for violations." *Ante,* at 1615.

There is little substance to this line of reasoning. As the Court itself acknowledges, debt collectors would have an incentive to invoke the FTC safe harbor even if § 1692k(c) is construed to include a mistake-of-law defense, because the safe harbor provides a "more categorical immunity." *Ante,* at 1615, n. 8. Additionally, if a debt collector avoids seeking an advisory opinion from the FTC out of concern that the answer will be unfavorable, that seems quite at odds with saying that his

or her ignorance is "bona fide."

It should be noted further that the Court's concern about encouraging ignorance could apply just as well to § 45(m)(1)(A). That provision subjects a debt collector to harsh penalties for violating an FTC rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." No one contends that this will encourage debt collectors to avoid learning the FTC's rules. ***630** Yet there is no doubt that § 45(m)(1)(A) permits a mistake-of-law defense.

All this assumes, of course, that obtaining an FTC advisory opinion will be a reasonably practical possibility. For the reasons stated above, see Part I–B–2, *supra,* this is to be doubted. Even the Court recognizes the limited role that the FTC has played. *Ante,* at 1621 ("[E]vidence of present administrative practice makes us ****1639** reluctant to place significant weight on § 1692k(e) as a practical remedy").

Fifth, the Court asserts that "[a]ny remaining doubt" about its preferred interpretation is dispelled by the FDCPA's statutory history. The Court points to the fact that § 1692k(c) mirrors a bona fide error defense provision in the earlier enacted Truth in Lending Act (TILA), arguing that Congress sought to incorporate into the FDCPA the view of the Courts of Appeals that the TILA defense applied only to clerical errors. *Ante,* at 1615 – 1616. As Justice SCALIA points out, the Court's claims of judicial uniformity are overstated. See *ante,* at 1626 – 1627 (opinion concurring in part and concurring in judgment). They rest on three Court of Appeals decisions, which are contradicted by several District Court opinions and a State Supreme Court opinion—hardly a consistent legal backdrop against which to divine legislative intent. The Court also ignores the fact that those three Courts of Appeals had construed the TILA provision to apply only to clerical errors. See *Ives v. W.T. Grant Co.,* 522 F.2d 749, 758 (C.A.2 1975); *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1167 (C.A.7 1974); *Palmer v. Wilson,* 502 F.2d 860, 861 (C.A.9 1974). The Court therefore cannot explain why it reads § 1692k(c) more broadly to encompass factual mistakes as well.

It is of even greater significance that in 1980 Congress amended the TILA's bona fide error exception explicitly to exclude "an error of legal judgment with respect to a person's obligations under [the TILA]." See Truth in Lending Simplification and Reform Act, § 615(c), 94 Stat. 181. This ***631** amendment would have been unnecessary if Congress had understood the pre–1980 language to exclude legal errors. The natural inference is that the pre-amendment TILA language—the same language later incorporated nearly verbatim into § 1692k(c)—was understood to cover those errors.

The Court's responses to this point are perplexing. The Court first says that the 1980 amendment did not "obvious[ly]" change the scope of the TILA's bona fide error defense, given the "uniform interpretation" that the defense had been given in the Courts of Appeals. *Ante,* at 1617. The Court thus prefers to make an entire statutory amendment surplusage rather than abandon its dubious assumption that Congress meant to ratify a nascent Court of Appeals consensus. Cf. *Corley v. United States,* 556 U.S. 303, ——, 129 S.Ct. 1558, 1560, 173 L.Ed.2d 443 (2009) ("[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (internal quotation marks omitted; second alteration in original)). (Without any evidence, the Court speculates that perhaps the amendment was intended to codify existing judicial interpretations that excluded legal errors. *Ante,* at 1617 – 1618. If those judicial interpretation were truly as uniform as the Court suggests—and the presumption against mistake-of-law defenses as ironclad—there would have been no need for such a recodification.)

The Court is hesitant as well to give the 1980 amendment weight because Congress "has not expressly *included* mistakes of law in any of the numerous bona fide error defenses, worded in pertinent part identically to § 1692k(c), elsewhere in the U.S.Code." *Ante,* at 1618 (emphasis in original). In other words, the Court refuses to read § 1692k(c) to cover mistakes of law because other bona fide error statutes do not expressly refer to such mistakes. But the reverse should be true: If other bona fide error provisions included mistake-of-law language but § 1692k(c) did ****1640** not, we might think that the omission in § 1692k(c) signaled Congress's intent to exclude ***632** mistakes of law. The absence of mistake-of-law language in § 1692k (c) is consequently less noteworthy because other statutes also omit such language.

The Court emphasizes that some bona fide error defenses, like the one in the current version of the TILA, expressly exclude legal errors from their scope. *Ante,* at 1617 – 1618 (citing 12 U.S.C. § 4010(c)(2)). Yet this also can prove the opposite of what the Court says it does: If a bona fide error defense were generally assumed not to include legal mistakes (as the Court argues), there would be no need to expressly exclude them. It is only if the defense would otherwise include such errors that

exclusionary language becomes necessary. By writing explicit exclusionary language into the TILA (and some other federal provisions), Congress has indicated that those provisions would otherwise cover good-faith legal errors.

For these reasons, § 1692k(c) is best read to encompass mistakes of law. I would affirm the judgment of the Court of Appeals.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Section 1692g(a)(3) requires a debt collector, within five days of an "initial communication" about the collection of a debt, to send the consumer a written notice containing, *inter alia,* "a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector."

2 The District Court distinguished, for instance, *Graziano v. Harrison,* 950 F.2d 107, 112 (C.A.3 1991), which held a consumer's dispute of a debt under § 1692g must be in writing to be effective. Noting that district courts within the Sixth Circuit had reached different results, and distinguishing one unpublished Sixth Circuit decision which Carlisle suggested approved a form with an in-writing requirement, the court adopted the reasoning from *Camacho v. Bridgeport Financial, Inc.,* 430 F.3d 1078, 1080–1082 (C.A.9 2005), and held that the plain language of § 1692g does not impose an "in writing" requirement on consumers. See 464 F.Supp.2d, at 725.

3 Because the question was not raised on appeal, the Court of Appeals did not address whether Carlisle's inclusion of the "in writing" requirement violated § 1692g. 538 F.3d, at 472, n. 2. We likewise express no view about whether inclusion of an "in writing" requirement in a notice to a consumer violates § 1692g, as that question was not presented in the petition for certiorari. Compare *Graziano, supra,* at 112 (reading § 1692g(a)(3) to require that "any dispute, to be effective, must be in writing"), with *Camacho, supra,* at 1082 (under § 1692g(a)(3), "disputes need not be made in writing").

4 Compare, *e.g.,* 538 F.3d, at 476 (case below), with *Baker v. G.C. Servs. Corp.,* 677 F.2d 775, 779 (C.A.9 1982), and *Hulshizer v. Global Credit Servs., Inc.,* 728 F.2d 1037, 1038 (C.A.8 1984) *(per curiam).*

The Courts of Appeals have also expressed different views about whether 15 U.S.C. § 1692k(c) applies to violations of the FDCPA resulting from a misinterpretation of the requirements of state law. Compare *Johnson v. Riddle,*

305 F.3d 1107, 1121 (C.A.10 2002) (concluding that § 1692k(c) applies where a debt collector's misinterpretation of a Utah dishonored check statute resulted in a violation of § 1692f(1), which prohibits collection of any amount not "permitted by law"), with *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451–452 (C.A.8 2001) (stating that § 1692k(c) does not preclude FDCPA liability resulting from a creditor's mistaken legal interpretation of a Minnesota garnishment statute). The parties disagree about whether § 1692k(c) applies when a violation results from a debt collector's misinterpretation of the legal requirements of state law or federal law other than the FDCPA. Compare Brief for Petitioner 47–49, with Brief for Respondents 60–62. Because this case involves only an alleged misinterpretation of the requirements of the FDCPA, we need not, and do not, reach those other questions.

5 The dissent discounts the relevance of the principle here, on grounds that this case involves the scope of a statutory exception to liability, rather than a provision "delineat[ing] a category of prohibited conduct." *Post,* at 1636 (opinion of KENNEDY, J.). That is a distinction without a difference, as our precedents have made clear for more than 175 years. *Barlow* involved a statute providing for forfeiture of any goods entered "by a false denomination" in the office of a customs collector "for the benefit of drawback or bounty upon the exportation"; the statute included, however, an exception under which "said forfeiture shall not be incurred, if it shall be made appear ... that such false denomination ... happened by mistake or accident, and not from any intention to defraud the revenue." 7 Pet., at 406, 8 L.Ed. 728; see also Act of Mar. 2, 1799, § 84, 1 Stat. 694. The Court concluded that the shipment at issue, entered as "refined sugars," was mislabeled under the prevailing meaning of that term and thus was subject to forfeiture "unless the [petitioner] c[ould] bring himself within the exceptio[n]." 7 Pet., at 409–410, 8 L.Ed. 728. As there had been no "accident" or "mistake" of fact, the "only mistake, if there ha[d] been any, [wa]s a mistake of law." *Id.,* at 410–411. The Court observed that the shipper's conduct, even if "entirely compatible with good faith, [wa]s not wholly free from the suspicion of an intention to overreach ... by passing off, as refined sugars, what he well knew were not admitted to be such." *Id.,* at 411. But the Court declined to resolve the case on the ground of the shipper's intent, instead invoking the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Ibid.* Notwithstanding the existence of a statutory exception—which did not expressly exclude legal errors from the category of "mistake[s]" made without "intention to defraud"—the Court saw "not the least reason to suppose that the legislature, in this enactment, had any intention to supersede the common principle." *Ibid.*
The dissent implies *Barlow* is too old to be relevant. *Post,* at 1636 – 1637. But at least in the context of *stare decisis,* this Court has suggested precedents tend to gain, not lose, respect with age. See *Montejo v. Louisiana,* 556 U.S. 778, ——, 129 S.Ct. 2079, 2088, 173 L.Ed.2d 955 (2009). In any event, Justice Story's opinion for a unanimous Court in *Barlow* is hardly a relic. As recently as 1994 this Court cited it for the "venerable principle" that ignorance of the law generally is no defense. *Ratzlaf v. United States,* 510 U.S. 135, 149, 114 S.Ct. 655, 126 L.Ed.2d 615; see also *Cheek v. United States,* 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (citing *Barlow* for a similar proposition).

6 Different considerations apply, of course, in interpreting criminal statutes. *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 57–58, n. 9, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007). But even in that context, we have not consistently required knowledge that the offending conduct is unlawful. See, *e.g., Ellis v. United States,* 206 U.S. 246, 255, 257, 27 S.Ct. 600, 51 L.Ed. 1047 (1907) (observing, in the context of a statute imposing liability for "intentiona[l] violat[ions]," that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent").

7 Indeed, in *International Minerals,* the Court faced, and evidently rejected, the distinction the dissent would draw

today between the term " 'violation' " and a reference to "the conduct giving rise to the violation." *Post,* at 1629. As noted, in *International Minerals,* the Court rejected a mistake-of-law defense for a statute that applied to those who "knowingly violat[e]" certain regulations. 402 U.S., at 559, 563, 91 S.Ct. 1697. In so doing, however, we expressly acknowledged the contrary view adopted by one lower court opinion that knowledge of the regulations was necessary. *Id.,* at 562, 91 S.Ct. 1697 (citing *St. Johnsbury Trucking Co. v. United States,* 220 F.2d 393, 397 (C.A.1 1955) (Magruder, C.J., concurring)). The dissenting opinion in *International Minerals* quoted extensively portions of the *St. Johnsbury* concurrence that reached its result by contrasting a statute making it an offense " ' "knowingly" to sell adulterated milk' " with one that makes it an offense " 'knowingly [to] violat[e] a regulation.' " 402 U.S., at 566, 91 S.Ct. 1697 (Stewart, J., dissenting) (quoting *St. Johnsbury, supra,* at 398).

Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), is also inapposite. Cf. *post,* at 1630 (KENNEDY, J., dissenting). Concluding that a mistake-of-law defense is available under a provision that specifies particular conduct undertaken while " 'knowing' " that food stamp coupons had been " 'used in any manner in violation of [law],' " 471 U.S., at 428, n. 12 [105 S.Ct. 2084], says little about the meaning of a "not intentional" "violation" in 15 U.S.C. § 1692k(c). Indeed, the statute in *Liparota* bears a closer resemblance to the administrative penalty provision in § 45(m)(1)(A). See *supra,* at 1612 – 1613.

8 One of Carlisle's *amici* suggests the FTC safe harbor would provide a more categorical immunity than § 1692k(c), obviating the need, *e.g.,* to maintain "procedures reasonably adapted to avoid any such error." Brief for National Association of Retail Collection Attorneys as *Amicus Curiae* 18–19 (NARCA Brief). Even if that is true, we need not conclude that the FTC safe harbor would be rendered entirely superfluous to reason that the existence of that provision counsels against extending the bona fide error defense to serve an overlapping function.

9 Carlisle raises concerns about whether, in light of contemporary administrative practice, the FTC safe harbor is a realistic way for debt collectors and their lawyers to seek guidance on the numerous time-sensitive legal issues that arise in litigation. These practical concerns, to which we return below, do not change our understanding of the statutory text itself or the likely intent of the enacting Congress.

10 See *Ives v. W.T. Grant Co.,* 522 F.2d 749, 757–758 (C.A.2 1975) (concluding that the bona fide error defense in § 1640(c) was unavailable despite creditor's reliance, in selecting language for credit contract forms, on a pamphlet issued by the Federal Reserve Board); *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1167 (C.A.7 1974) ("[Section] 1640(c) offers no shelter from liability for the defendant, whose error ... was judgmental with respect to legal requirements of the Act and not clerical in nature"); *Palmer v. Wilson,* 502 F.2d 860, 861 (C.A.9 1974) (similar).

Carlisle contends the meaning of TILA's defense was unsettled at the time of the FDCPA's enactment, relying first on several District Court opinions extending the defense to good-faith legal errors. See, *e.g., Welmaker v. W.T. Grant Co.,* 365 F.Supp. 531, 544 (N.D.Ga.1972). But even assuming Congress would have looked to district court, rather than court of appeals, opinions in discerning the meaning of the statutory language, applicable Circuit precedent had cast some doubt on those decisions by the time the FDCPA was enacted. See, *e.g., Turner v. Firestone Tire & Rubber Co.,* 537 F.2d 1296, 1298 (C.A.5 1976) *(per curiam)* (referring to § 1640(c) as the "so-called clerical error defense"). Carlisle also relies on the holding in *Thrift Funds of Baton Rouge, Inc. v. Jones,* 274 So.2d 150 (La.1973). But in that case, the Louisiana Supreme Court concluded only that a lender's mistaken interpretation of *state* usury law did not "amoun [t] to an intentional violation of [TILA's] disclosure requirements." *Id.,* at 161.

The Louisiana court had no occasion to address the question analogous to the one we consider today: whether TILA's bona fide error defense extended to violations resulting from mistaken interpretation of TILA itself. See n. 4, *supra*; see also *Starks v. Orleans Motors, Inc.*, 372 F.Supp. 928, 931 (E.D.La.) (distinguishing *Thrift Funds* on this basis), aff'd, 500 F.2d 1182 (C.A.5 1974). These precedents therefore do not convince us that Congress would have ascribed a different meaning to the statutory language it chose for the FDCPA. Compare *post,* at 1626 (SCALIA, J., concurring in part and concurring in judgment), with *Herman & MacLean v. Huddleston,* 459 U.S. 375, 384–386, and n. 21, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (concluding that Congress had "ratified" the "well-established judicial interpretation" of a statute by leaving it intact during a comprehensive revision, notwithstanding "[t]wo early district court decisions," not subsequently followed, that had adopted a contrary view).

11 That only three Courts of Appeals had occasion to address the question by the time the FDCPA was enacted does not render such an inference unreasonable. Contra, *post,* at 1625 – 1626 (opinion of SCALIA, J.). Whether or not we would take that view when such an inference serves as a court's sole interpretative guide, here our conclusion also relies on common principles of statutory interpretation, as well as the statute's text and structure. Moreover, the inference is supported by the fact that TILA and the FDCPA were enacted as complementary titles of the CCPA, a comprehensive consumer protection statute. While not necessary to our conclusion, evidence from the legislative record demonstrates that some Members of Congress understood the relationship between the FDCPA and existing provisions of the CCPA. See, *e.g.,* 123 Cong. Rec. 10242 (1977) (remarks of Rep. Annunzio) (civil penalty provisions in House version of bill were "consistent with those in the [CCPA]"); Fair Debt Collection Practices Act: Hearings on S. 656 et al. before the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs, 95th Cong., 1st Sess., 51, 707 (1977) (statement of Rep. Wylie) (describing "[c]ivil liability provisions" in the House bill as "the standard provisions that attach to all the titles of the [CCPA]").

12 Although again not necessary to our conclusion, evidence from the legislative record suggests some Members of Congress understood the amendment to "clarif[y]" the meaning of TILA's bona fide error defense "to make clear that it applies to mechanical and computer errors, provided they are not the result of erroneous legal judgments as to the act's requirements." S.Rep. No. 96–73, pp. 7–8 (1979), U.S.Code Cong. & Admin.News 1980, pp. 280, 284–86; see also Lockhart, 153 A.L.R. Fed. 211–212, § 2[a] (1999) (amendment "was intended merely to clarify what was then the prevailing view, that the bona fide error defense applies to clerical errors, not including errors of legal judgment") (relying on S.Rep. No. 96–368, p. 32 (1979), U.S.Code Cong. & Admin.News 1980, pp. 236, 267).

The concurring and dissenting opinions perceive an inconsistency between these references to clerical errors, as well as similar references in the pre-FDCPA precedents interpreting TILA, n. 10, *supra,* and reading the FDCPA's bona fide error defense to include factual mistakes. *Post,* at 1626 – 1627, and n. 2 (opinion of SCALIA, J.); *post,* at 1638 – 1639 (KENNEDY, J., dissenting). The quoted legislative history sources, however, while stating expressly that the TILA defense excludes *legal* errors, do not discuss a distinction between clerical and factual errors. Similarly, the cited cases interpreting TILA do not address a distinction between factual and clerical errors; rather, the courts were presented with claims that the defense applied to mistakes of law or other nonfactual errors that the courts found not to be bona fide. See *Ives,* 522 F.2d, at 756–757; *Haynes,* 503 F.2d, at 1166–1167; *Palmer,* 502 F.2d, at 861. While factual mistakes might, in some circumstances, constitute bona fide errors and give rise to violations that are "not intentional" within the meaning of § 1692k(c), we need not and do not decide today the precise distinction between clerical and factual errors, or what kinds of factual mistakes qualify under the FDCPA's bona fide error defense. Cf. generally R. Hobbs, National Consumer Law Center, Fair Debt Collection § 7.2 (6th ed.2008 and Supp.2009) (surveying case law on scope of § 1692k(c)).

13 The Government observes that several federal agencies have construed similar bona fide error defenses in statutes

they administer to exclude errors of law. See Brief for United States as *Amicus Curiae* 28–30. The Secretary of Housing and Urban Development, for instance, has promulgated regulations specifying that the bona fide error defense in the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)(3), does not apply to "[a]n error of legal judgment," 24 CFR § 3500.15(b)(1)(ii) (2009). While administrative interpretations of other statutes do not control our reading of the FDCPA, we find it telling that no agency has adopted the view of the Court of Appeals. Of course, nothing in our opinion today addresses the validity of such regulations or the authority of agencies interpreting bona fide error provisions in other statutes to adopt a different reading. See *National Cable & Telecommunications Assn. v. Brand X Internet Services,* 545 U.S. 967, 982–983, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005).

14 For instance, an amendment was proposed and rejected during the Senate Banking Committee's consideration of the FDCPA that would have required proof that a debt collector's violation was "knowin[g]." Senator Riegle, one of the Act's primary sponsors, opposed the change, explaining that the bill reflected the view that "certain things ought not to happen, period ....[W]hether somebody does it knowingly, willfully, you know, with a good heart, bad heart, is really quite incidental." See Senate Committee on Banking, Housing and Urban Affairs, Markup Session: S. 1130—Debt Collection Legislation 60 (July 26, 1977) (hereinafter Markup); see also *ibid.* ("We have left a way for these disputes to be adj[u]dicated if they are brought, where somebody can say, I didn't know that, or my computer malfunctioned, something happened, I didn't intend for the effect to be as it was"). To similar effect, a House Report on an earlier version of the bill explained the need for new legislation governing use of the mails for debt collection on grounds that existing statutes "frequently require[d]" a showing of "specific intent[,] which is difficult to prove." H.R.Rep. No. 95–131, p. 3 (1977). Elsewhere, to be sure, the legislative record contains statements more supportive of Carlisle's interpretation. In particular, a concern was raised in the July 26 markup session that the TILA bona fide error defense had been interpreted "as only protecting against a mathematical error," and that the FDCPA defense should "go beyond" TILA to "allow the courts discretion to dismiss a violation where it was a technical error." Markup 20. In response, a staffer explained that the FDCPA defense would "apply to any violation of the act which was unintentional," and answered affirmatively when the Chairman asked: "So it's not simply a mathematical error but any bona fide error without intent?" *Id.,* at 21. Whatever the precise balance of these statements may be, we can conclude that this equivocal evidence from legislative history does not displace the clear textual and contextual authority discussed above.

15 The dissent also cites several other consumer-protection statutes, such as TILA and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.,* which in its view create "incentives to file lawsuits even where no actual harm has occurred" and are illustrative of what the dissent perceives to be a "troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation." *Post,* at 1631. The dissent's concern is primarily with Congress' policy choice, embodied in statutory text, to authorize private rights of action and recovery of attorney's fees, costs, and in some cases, both actual and statutory damages. As noted, in one of the statutes the dissent cites, Congress explicitly barred reliance on a mistake-of-law defense notwithstanding the "highly technical" nature of the scheme. See 15 U.S.C. § 1640(c) (TILA); *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980). Similarly, the plain text of the FDCPA authorizes a private plaintiff to recover not only "actual damage[s]" for harm suffered but also "such additional damages as the court may allow," § 1692k(a).

16 The Courts of Appeals generally review a District Court's calculation of an attorney fee award under § 1692k for abuse of discretion. See, *e.g., Carroll v. Wolpoff & Abramson,* 53 F.3d 626, 628–629 (C.A.4 1995); *Emanuel v. American Credit Exchange,* 870 F.2d 805, 809 (C.A.2 1989). Many District Courts apply a lodestar method, permitting

downward adjustments in appropriate circumstances. See, *e.g.*, *Schlacher v. Law Offices of Phillip J. Rotche & Assoc., P. C.*, 574 F.3d 852 (C.A.7 2009) (relying on *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)); *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1148–1151, and n. 4 (C.A.9 2001) *(per curiam);* see generally Hobbs, Fair Debt Collection § 6.8.6. In *Schlacher,* for instance, the court affirmed a downward adjustment for the "unnecessary use of multiple attorneys ... in a straightforward, short-lived [FDCPA] case." 574 F.3d, at 854–855. In *Carroll,* the court found no abuse of discretion in a District Court's award of a $500 attorney's fee, rather than the lodestar amount, where the lawsuit had recovered only $50 in damages for "at most a technical violation" of the FDCPA. 53 F.3d, at 629–631.

Lower courts have taken different views about when, and whether, § 1692k requires an award of attorney's fees. Compare *Tolentino v. Friedman,* 46 F.3d 645 (C.A.7 1995) (award of fees to a successful plaintiff "mandatory"), and *Emanuel, supra,* at 808–809 (same, even where the plaintiff suffered no actual damages), with *Graziano,* 950 F.2d, at 114, and n. 13 (attorney's fees may be denied for plaintiff's "bad faith conduct"), and *Johnson v. Eaton,* 80 F.3d 148, 150–152 (C.A.5 1996) ("attorney's fees ... are only available [under § 1692k] where the plaintiff has succeeded in establishing that the defendant is liable for actual and/or additional damages"; this reading "will deter suits brought only as a means of generating attorney's fees"). We need not resolve these issues today to express doubt that our reading of § 1692k(c) will impose unmanageable burdens on debt collecting lawyers.

17 See Brief for Ohio Creditor's Attorneys Association et al. as *Amici Curiae* 4–6, and nn. 7–8 (identifying "134 state consumer protection and debt collection statutes," 42 of which expressly exclude legal errors from their defenses for bona fide errors).

18 See, *e.g.*, Kan. Stat. Ann. § 16a–5–201(7) (2007) (provision of Kansas Consumer Credit Code providing a defense for a "bona fide error of law or fact"); Ind.Code § 24–9–5–5 (West 2004) (defense for creditor's "bona fide error of law or fact" in Indiana Home Loan Practices Act).

19 The dissent also downplays the predicate fact that respondents in this case brought a foreclosure lawsuit against Jerman for a debt she had already repaid. Neither the lower courts nor this Court have been asked to consider, and thus we express no view about, whether Carlisle could be subject to liability under the FDCPA for that uncontested error—regardless of how reasonably Carlisle may have acted after the mistake was pointed out by Jerman's (privately retained) lawyer.

20 Compare *Hartman v. Great Senaca Financial Corp.*, 569 F.3d 606, 614–615 (C.A.6 2009) (suggesting that reasonable procedures might include "perform[ing] ongoing FDCPA training, procur[ing] the most recent case law, or hav[ing] an individual responsible for continuing compliance with the FDCPA"), with *Johnson v. Riddle,* 443 F.3d 723, 730–731 (C.A.10 2006) (suggesting that researching case law and filing a test case might be sufficient, but remanding for a jury determination of whether the "limited [legal] analysis" undertaken was sufficient and whether the test case was in fact a "sham").

21 The dissent adds in passing that today's decision "creates serious concerns ... for First Amendment rights." *Post,* at

1635 (citing *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 545, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001)). That claim was neither raised nor passed upon below, and was mentioned neither in the certiorari papers nor the parties' merits briefing to this Court. We decline to express any view on it. See *Cutter v. Wilkinson,* 544 U.S. 709, 718, n. 7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005).

22 The FDCPA has been amended some eight times since its enactment in 1977; the most recent amendment addressed a concern not unrelated to the question we consider today, specifying that a pleading in a civil action is not an "initial communication" triggering obligations under § 1692g requiring a written notice to the consumer. Financial Services Regulatory Relief Act of 2006, § 802(a), 120 Stat. 2006 (codified at 15 U.S.C. § 1692g(d)).

1 Of course where so many federal courts have read the language that way, the text was probably clear enough that resort to unexpressed congressional intent would be unnecessary. Or indeed it could be said that such uniform and longstanding judicial interpretation had established the public meaning of the text, whether the Members of Congress were aware of the cases or not. That would be the understanding of the text by reasonable people familiar with its legal context.

2 The page cited in the Senate Committee Report does not actually support the American Law Report's statement. It makes no mention of clarification or judicial interpretations; it merely states that the amendment is intended to "provide protection where errors are clerical or mechanical in nature," S.Rep. No. 96–368, p. 32 (1979), U.S.Code Cong. & Admin.News 1980, at p. 267.

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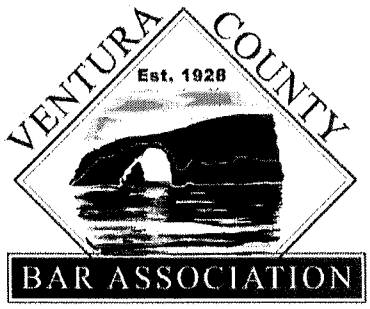

Barristers BTG – January 20, 2024

Session 2

Case Study 8

Love v. State Dept. of Educ.

29 Cal.App.5th 980
Court of Appeal, Third District, California.

Devon Torrey LOVE et al., Plaintiffs and Appellants,
v.
STATE DEPARTMENT OF EDUCATION et al., Defendants and Respondents.

C086030
|
Filed 11/20/2018

Synopsis
Background: Parents, their children, and interest group filed action against California Department of Education, California Department of Health, and related defendants, challenging constitutionality of statute that repealed the personal belief exemption to immunization requirements for enrolling children at public and private educational and child care facilities. The Superior Court, Placer County, No. SCV0039311, Charles D. Wachob, J., sustained defendants' demurrer to plaintiffs' complaint without leave to amend. Plaintiffs appealed.

Holdings: The Court of Appeal, Robie, Acting P.J., held that:

[1] statute promoted compelling governmental interest of ensuring health and safety by preventing spread of contagious diseases;

[2] statute was narrowly circumscribed, and thus did not violate substantive due process;

[3] statute did not violate right to privacy; and

[4] statute did not violate right to attend school.

Affirmed.

Procedural Posture(s): On Appeal; Demurrer to Complaint.

West Headnotes (23)

[1] **Appeal and Error**⇨Objections and exceptions; demurrer

For purposes of review of the sustaining of a demurrer to a complaint, the Court of Appeal accepts as true all material facts alleged in the complaint, but not contentions, deductions, or conclusions of fact or law.

[2] **Appeal and Error**⇨Taking judicial notice in reviewing court

Court of Appeal considers matters that may be judicially noticed in reviewing the sustaining of a demurrer to a complaint.

[3] **Appeal and Error**⇨Verdict, Findings, Sufficiency of Evidence, and Judgment

Court of Appeal may affirm a trial court judgment on any basis presented by the record whether or not relied upon by the trial court.

[4] **Appeal and Error**⇨Objections and exceptions; demurrer

When a demurrer is sustained without leave to amend, the Court of Appeal decides whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and the Court of Appeal will reverse; if not, the Court of Appeal will affirm.

[5] **Appeal and Error**⇨Objections and exceptions; demurrer

On review of the sustaining of a demurrer without leave to amend, plaintiffs have the burden to show a reasonable possibility the complaint can be amended to state a cause of action.

[6] **Constitutional Law**⇨Eligibility, admission, and placement
Education⇨Vaccination

Statute repealing personal belief exemption to immunization requirements for students as condition of enrollment in school promoted compelling government interest of ensuring health and safety by preventing spread of contagious diseases, for purposes of determining whether law violated substantive due process, though objectors, including parents and their children, asserted that law infringed on their rights to bodily autonomy and to refuse medical treatment, conditioned right to attend school on giving up those rights, and negated parental right to make decisions regarding children's upbringing; statute removed exemption that was not required under the law, and while such removal subjected children to mandatory vaccinations, State was well-within its powers to condition school enrollment on mandatory vaccination. Cal. Const. art. 1, § 7; Cal. Health & Safety Code §§ 120325(a), 120335(b).

4 Cases that cite this headnote

[7] **Constitutional Law**⇨Rights and interests protected; fundamental rights

To determine whether a person's liberty interest for purposes of substantive due process has been violated, the court must balance his or her liberty interest against the relevant state interests. Cal. Const. art. 1, § 7.

2 Cases that cite this headnote

[8] **Constitutional Law**⇨Reasonableness, rationality, and relationship to object
Constitutional Law⇨Levels of scrutiny; strict or heightened scrutiny

Where the state infringes on a fundamental constitutional right, strict scrutiny applies to determine whether substantive due process has been violated; otherwise, the rational basis test applies. Cal. Const. art. 1, § 7.

1 Case that cites this headnote

[9] **Constitutional Law**⇨Reasonableness, rationality, and relationship to object
Constitutional Law⇨Levels of scrutiny; strict or heightened scrutiny

A law subject to strict scrutiny is upheld as not violating substantive due process only if it is narrowly tailored to promote a compelling governmental interest; under rational-basis review, by contrast, a law need only bear a rational relationship to a legitimate governmental interest. Cal. Const. art. 1, § 7.

1 Case that cites this headnote

[10] **Constitutional Law**⇨Eligibility, admission, and placement
Education⇨Vaccination

Imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process. Cal. Const. art. 1, § 7.

[11] **Attorneys and Legal Services**⚖Candor in general; communications, representations, and disclosures in general

Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed. Cal. R. Prof. Conduct 5–200.

1 Case that cites this headnote

[12] **Appeal and Error**⚖Citation to facts and legal authority in general

Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned on appeal.

[13] **Courts**⚖Decisions of Courts of Other State

An Illinois court has no jurisdiction to narrow, overturn, or "dial back" a California Supreme Court decision.

[14] **Constitutional Law**⚖Eligibility, admission, and placement
Education⚖Vaccination

Statute repealing personal belief exemption to immunization requirements for students as condition of enrollment was narrowly circumscribed to address statutory goal of eventual achievement of total immunization of appropriate school-aged children, and thus did not violate substantive due process, though objectors asserted that there were alternative means to accomplish goal of higher vaccination rate, including education effort, distribution of free medication, provision of incentives to vaccinate, and quarantines; objective of total immunization was not served by exemptions, State opted for aggressive measures to meet aggressive goal, and compulsory immunization was "gold standard" for preventing spread of contagious diseases. Cal. Const. art. 1, § 7; Cal. Health & Safety Code §§ 120325(a), 120335(b).

4 Cases that cite this headnote

[15] **Constitutional Law**⚖Right to refuse treatment or medication
Education⚖Vaccination

Statute repealing personal belief exemption to immunization requirements for students as condition of enrollment did not violate state constitutional right to privacy, though objectors, including parents and their children, asserted that it required children to reveal personal medical information to attend free public school and required parents and children to forego control over integrity of children's bodies; compulsory immunization was "gold standard" for preventing spread of contagious diseases, and right of privacy, while sacred, could give way to State's compelling governmental interest in protecting health and safety of citizens, particularly school children, from spread of contagious diseases. Cal. Const. art. 1, § 1; Cal. Health & Safety Code §§ 120325(a), 120335(b).

7 Cases that cite this headnote

[16] **Constitutional Law**⚖Relation between state and federal rights

Right to privacy under state constitution protects a larger zone in the area of financial and personal affairs than the federal right. Cal. Const. art. 1, § 1.

1 Case that cites this headnote

[17] **Constitutional Law**⚖Medical records or

information

A person's medical history and information and the right to retain personal control over the integrity of one's body is protected under the state constitutional right to privacy. Cal. Const. art. 1, § 1.

4 Cases that cite this headnote

[18] **Constitutional Law**⚖Absolute, inviolable, or unlimited nature

Although the state constitutional right to privacy is important, it is not absolute; it must be balanced against other important interests and may be outweighed by supervening public concerns. Cal. Const. art. 1, § 1.

2 Cases that cite this headnote

[19] **Constitutional Law**⚖Reasonableness or rationality

When the state asserts important interests in safeguarding health, review is under the rational basis standard.

1 Case that cites this headnote

[20] **Constitutional Law**⚖Police power; health and safety

In the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of the constitutional right of privacy has occurred. Cal. Const. art. 1, § 1.

3 Cases that cite this headnote

[21] **Education**⚖Vaccination

Statute repealing personal belief exemption to immunization requirements for students as condition of enrollment did not violate constitutional right to attend school, though objectors, including parents and their children, claimed that law required families to incur substantial costs for multitude of doctors' visits, required students to relinquish right to determine what goes in their bodies, and conditioned fundamental right on giving up another; law did not interfere with right of child to attend school, provided that child complied with its provisions, mandatory vaccinations were within police power of state, and it was for legislature to say whether vaccination of school children was required. Cal. Const. art. 9, § 5; Cal. Health & Safety Code §§ 120325(a), 120335(b).

[22] **Constitutional Law**⚖Constitutional Rights in General

State legislative acts are subject to strict scrutiny, intermediate scrutiny, or rational-basis review, depending on the nature of the right involved.

[23] **Constitutional Law**⚖Immunization requirements
Education⚖Vaccination

Allegation in complaint by parents, their children, and interest group that children had previously been allowed to receive public school education without need for medical treatments if their parents declared religious or personal belief exemption, was insufficient to raise free exercise of religion challenge to constitutionality of law repealing personal belief exemption to immunization requirements for students as condition of enrollment. Cal. Const. art. 1, § 4; Cal. Health & Safety Code §§ 120325(a), 120335(b).

Witkin Library Reference: 7 Witkin, Summary of Cal. Law (11th ed. 2017) Constitutional Law, § 581 [Children.]

2 Cases that cite this headnote

****863** APPEAL from a judgment of the Superior Court of Placer County, Charles D. Wachob, Judge. Affirmed. (Super. Ct. No. SCV0039311)

Attorneys and Law Firms

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Xavier Becerra, Attorney General, Julie Weng-Gutierrez, Senior Assistant Attorney General, Richard T. Waldow, Supervising Attorney General, Jonathan E. Rich and Jacquelyn Y. Young, Deputy Attorneys General, for Defendants and Respondents.

Opinion

Robie, Acting P. J.

****864** ***984** This case raises constitutional challenges to Senate Bill No. 277, which repealed the personal belief exemption to California's immunization requirements for children attending public and private educational and childcare facilities.[1] Plaintiffs are four parents and their children residing throughout California and a California nonprofit corporation, A Voice for Choice, Inc.[2] Defendants are the State Department of Education, the State Department of Public Health and various state officials.

***985** As our colleagues explained in *Brown*: "In 1890, the California Supreme Court rejected a constitutional challenge to a 'vaccination act' that required schools to exclude any child who had not been vaccinated against smallpox. [Citation.] In dismissing the suggestion that the act was 'not within the scope of a police regulation,' the court observed that, '[w]hile vaccination may not be the best and safest preventive possible, experience and observation ... dating from the year 1796 ... have proved it to be the best method known to medical science to lessen the liability to infection with the disease.' [Citation.] That being so, 'it was for the legislature to determine whether the scholars of the public schools should be subjected to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class.' [Citation.] [¶] More than 125 years have passed since [our Supreme Court's decision in *Abeel v. Clark* (1890) 84 Cal. 226, 24 P. 383], during which many federal and state cases, beginning with the high court's decision in *Jacobson v. Massachusetts* (1905) 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (*Jacobson*), have upheld, against various constitutional challenges, laws requiring immunization against various diseases. This is another such case, with a variation on the theme but with the same result." (****865** *Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1138, 235 Cal.Rptr.3d 218.)

Here, plaintiffs sued defendants claiming Senate Bill No. 277 violates their rights under California's Constitution to substantive due process (art. I, § 7), privacy (art. I, § 1), and a public education (art. IX, § 5). The trial court sustained the defendants' demurrer to plaintiffs' complaint without leave to amend and plaintiffs appeal. On appeal, plaintiffs also raise an additional argument that Senate Bill No. 277 violates their constitutional right to free exercise of religion, although they did not allege a separate cause of action on that basis in their complaint.

Plaintiffs' arguments are strong on hyperbole and scant on authority. We agree with our colleagues in *Brown* that Senate Bill No. 277 does not violate the constitutional right to attend school. We further conclude Senate Bill No. 277 does not violate plaintiffs' rights to substantive due process or privacy.[3] While plaintiffs' free exercise of religion claim was not raised in their complaint, we consider it for purposes of determining whether plaintiffs should be granted leave to amend their complaint. We find any such ***986** amendment would be futile because, as the *Brown* court found, Senate Bill No. 277 does not violate the right to free exercise of religion. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND OF SENATE BILL NO. 277

Senate Bill No. 277 amended various provisions in the Health and Safety Code,[4] effective January 1, 2016. (See Stats. 2015, ch. 35.) Pertinent to this appeal, the bill eliminated a parent's ability to opt out of the vaccination requirements imposed on children based on the parent's personal beliefs.[5] As of July 1, 2016, school authorities

"shall not unconditionally admit" any child for the first time to "any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center," or advance any child to seventh grade, unless he or she has been fully immunized against 10 specific diseases and "[a]ny other disease deemed appropriate by the [State Department of Public Health],"[6] or qualifies for an exemption recognized by statute. (§§ 120335, subds. (b) & (g)(3), 120370.)

A student is exempt from the requirement if a licensed physician states in writing that "the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe." (§ 120370, subd. (a).) Additionally, vaccinations are not required ****866** for students in a home-based private school or independent study program who do not receive classroom-based instruction, or those in individualized education programs. (§ 120335, subds. (f) & (h).)

The vaccination requirements are intended to provide "[a] means for the eventual achievement of total immunization of appropriate age groups against [certain] diseases." (§ 120325, subd. (a).) According to the Senate Committee on Education's analysis, the authors of the bill believed it was necessary because: " 'In early 2015, California became the epicenter of a measles outbreak which was the result of unvaccinated individuals infecting vulnerable individuals including children who are unable to receive vaccinations ***987** due to health conditions or age requirements. ... Measles has spread through California and the United States, in large part, because of communities with large numbers of unvaccinated people. Between 2000 and 2012, the number of Personal Belief Exemptions (PBE) from vaccinations required for school entry that were filed rose by 337%.... From 2012 to 2014, the number of children entering Kindergarten without receiving some or all of their required vaccinations due to their parent's personal beliefs increased to 3.15%. In certain pockets of California, exemption rates are as high as 21% which places our communities at risk for preventable diseases. Given the highly contagious nature of diseases such as measles, vaccination rates of up to 95% are necessary to preserve herd immunity and prevent future outbreaks.' " (Sen. Com. on Education, Analysis of Sen. Bill No. 277 (2015-2016 Reg. Sess.) as amended April 9, 2015, p. 5.)

The Assembly Committee on Health's report states: "Each of the 10 diseases was added to California code through legislative action, after careful consideration of the public health risks of these diseases, cost to the state and health system, communicability, and rates of transmission. ... [¶] ... [¶] All of the diseases for which California requires school vaccinations are very serious conditions that pose very real health risks to children." (Assem. Com. on Health, Analysis of Sen. Bill No. 277 (2015-2016 Reg. Sess.) as amended May 7, 2015, p. 4.)

In that report, the committee "discusses the protective effect of community immunity, which 'wanes as large numbers of children do not receive some or all of the required vaccinations, resulting in the reemergence of vaccine preventable diseases in the U.S.' [Citation.] The report explains that the vaccination rate in various communities 'varies widely across the state,' and some areas 'become more susceptible to an outbreak than the state's overall vaccination levels may suggest,' making it 'difficult to control the spread of disease and mak[ing] us vulnerable to having the virus re-establish itself.' [Citation.] Further, studies have found that 'when belief exemptions to vaccination guidelines are permitted, vaccination rates decrease,' and one analysis 'found that more than a quarter of schools in California have measles-immunization rates below the 92-94% recommended by the CDC [(Center for Disease Control)].' [Citation.] The report describes the December 2014 outbreak of measles linked to Disneyland (131 confirmed cases); states that according to the CDC, 'measles is one of the first diseases to reappear when vaccination coverage rates fall'; and states that in 2014, 600 cases were reported to the CDC, the highest in many years." (*Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1140, 235 Cal.Rptr.3d 218.)

***988** DISCUSSION

I

Standard Of Review

[1] [2] [3]"A demurrer tests the legal sufficiency of the complaint. We review the ****867** complaint de novo to determine whether it alleges facts sufficient to state a cause of action. For purposes of review, we accept as true all material facts alleged in the complaint, but not contentions, deductions or conclusions of fact or law. We also consider matters that may be judicially noticed." (*Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1141, 235 Cal.Rptr.3d 218.) We may affirm a trial court judgment on any basis presented by the record whether or not relied

upon by the trial court. (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 999, 24 Cal.Rptr.3d 474.)

[4] [5]"When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.' [Citation.] Plaintiff[s] ha[ve] the burden to show a reasonable possibility the complaint can be amended to state a cause of action." (*Brown v. Smith, supra*, 24 Cal.App.5th at pp. 1141-1142, 235 Cal.Rptr.3d 218.)

II

Substantive Due Process

[6]In their complaint, plaintiffs assert Senate Bill No. 277 violates their substantive due process rights because it: (1) infringes on their rights to bodily autonomy and to refuse medical treatments; (2) conditions the right to attend school on giving up the right to bodily autonomy and to refuse medical treatments; and (3) negates their parental right to make decisions in the upbringing of their children.[7] While plaintiffs argue the trial court erred in sustaining the demurrer to this cause of action, their opening brief is virtually ***989** devoid of any legal authority on this issue.[8] (*People v. Stanley* (1995) 10 Cal.4th 764, 793, 42 Cal.Rptr.2d 543, 897 P.2d 481 [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as [forfeited], and pass it without consideration' "].) Plaintiffs further do not apply the appropriate elements for determining whether the law satisfies the constitutional substantive due process construct.

[7] [8] [9]To determine whether a person's liberty interest for purposes of substantive due process has been violated, the court must balance his or her liberty interest against the relevant state interests. (*Cruzan v. Director, MO Health Dept.*(1990) 497 U.S. 261, 279, 110 S.Ct. 2841, 2852, 111 L.Ed.2d 224, 242.) Where the state infringes on a fundamental constitutional right, strict scrutiny applies; otherwise, the rational basis test applies. (*Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 748, 278 Cal.Rptr. 907.) A law subject to strict scrutiny ****868** is upheld only if it is narrowly tailored to promote a compelling governmental interest.[9] (*Johnson v. California* (2005) 543 U.S. 499, 505, 125 S.Ct. 1141, 1146, 160 L.Ed.2d 949, 958.) Under rational-basis review, by contrast, a law need only bear a rational relationship to a legitimate governmental interest. (*Vacco v. Quill* (1997) 521 U.S. 793, 799, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834, 841.)

[10]Plaintiffs' substantive due process claim fails under either level of scrutiny.[10] We agree with the *Whitlow* court: "Unquestionably, imposing a mandatory vaccine requirement on school children as a condition of enrollment does not violate substantive due process. This case is even one more step removed, as it involves the removal of an exemption that is not required under the law. The removal of the [exemption] subjects the children ***990** to mandatory vaccination, but the State is well within its powers to condition school enrollment on vaccination." (*Whitlow v. California Dept. of Education, supra*, 203 F.Supp.3d at p. 1089.)

It is well established that laws mandating vaccination of school-aged children promote a compelling governmental interest of ensuring health and safety by preventing the spread of contagious diseases. (*Brown v. Smith, supra*, 24 Cal.App.5th at p. 1146, 235 Cal.Rptr.3d 218, citing *Whitlow v. California Dept. of Education, supra*, 203 F.Supp.3d at pp. 1089-1090; *Abeel v. Clark, supra*, 84 Cal. at pp. 230-231, 24 P. 383 ["Vaccination, then, being the most effective method known of preventing the spread of the disease referred to, it was for the legislature to determine whether the scholars of the public schoolsshould be subjected to it, and we think it was justified in deeming it a necessary and salutary burden to impose upon that general class. ... 'What is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is invested with a large discretion, which cannot be controlled by the courts, except, perhaps, when its action is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful.' "]; *Jacobson v. Massachusetts, supra*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 [upheld state mandatory vaccination law under the Fourteenth Amendment]; *Zucht v. King* (1922) 260 U.S. 174, 176, 43 S.Ct. 24, 25, 67 L.Ed. 194, 198 [ordinances mandating certificate of vaccination prior to allowing school attendance did not violate substantive due process rights because it was "settled that it is within the police power of a state to provide for compulsory vaccination"].) That interest exists " 'regardless of the circumstances of the

day, and is equally compelling whether it is being used to prevent outbreaks or eradicate diseases.' " (*Brown*, at p. 1146, 235 Cal.Rptr.3d 218.)

****869** [11]Plaintiffs' failure to cite or even acknowledge the seminal cases (*Abeel* or *Zucht*) directly on point and counter to their argument in their opening brief violates counsel's duty to the court. "Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed. [Citation.] Rule 5-200 of the Rules of Professional Conduct addresses the issue and provides that, '[i]n presenting a matter to a tribunal, a member: [¶] (A) Shall employ ... such means only as are consistent with truth; [and] [¶] (B) Shall not seek to mislead the judge ... by an artifice or false statement of fact or law ....' " (*In re Reno* (2012) 55 Cal.4th 428, 510, 146 Cal.Rptr.3d 297, 283 P.3d 1181.)

[12]In reply to defendants' identification of these authorities, plaintiffs argue the cases are archaic and no longer applicable by modern standards. They further attack defendants, stating they "fail[ed] to synthesize dated ***991** precedent" because *Abeel*, *Zucht*, and *Jacobson* were issued "before the landmark due-process-based bodily autonomy cases." Notably, however, plaintiffs do not provide any synthesis they believe is lacking, nor do they provide legal citations to the "landmark due-process-based bodily autonomy cases" that purportedly inform the analysis. " 'Contentions supported neither by argument nor by citation of authority are deemed to be without foundation, and to have been abandoned.' " (*Estate of Randall* (1924) 194 Cal. 725, 728-729, 230 P. 445.) We are aware of no case holding mandatory vaccination statutes violate a person's right to bodily autonomy. Thus, we see no reason to view *Abeel*, *Zucht*, or *Jacobson* as obsolete.

Plaintiffs also argue our Supreme Court's holding in *Abeel* is "circular and conclusory," "doesn't even come close to modern standards of due process," is not instructive because it was decided before "California's modern compulsory-education laws were enacted in 1976" and cases confirmed that public education is a fundamental right in California, and an Illinois case has "dialed back the over-broad *Abeel* holding." None of these arguments has merit.

[13]Of course, it is axiomatic that an Illinois court has no jurisdiction to narrow, overturn, or "dial back" a California Supreme Court decision. Nor does the Illinois case have any application to the issue here. Plaintiffs cite to the following sentence in *Potts v. Breen* (1897) 167 Ill. 67, 47 N.E. 81: "The record wholly fails to show that there were any grounds upon which the board could have any reasonable belief that the public health was in any danger whatever." (*Id.* at p. 78, 47 N.E. 81.) In *Potts*, however, a school district (not the legislature) imposed a mandatory vaccination requirement, and the court found the district had no power conferred upon it to do so, except in cases of emergency. (*Id.* at pp. 71-75, 47 N.E. 81.) There is simply no comparison between the ultra vires action of the school district in *Potts* and our Legislature's enactment here.

Further, plaintiffs fail to explain or identify the "modern due process standards" that purportedly are incompatible with *Abeel* -- and we find none. As to plaintiffs' argument that *Abeel* is inconsistent with the right to attend school, as explained below, we find, as did our colleagues in *Brown*, Senate Bill No. 277 does not violate a student's right to attend school.

Plaintiffs next argue *Zucht* "merely stated that states can pass vaccine laws" and *Jacobson* and *Zucht* are limited to their facts "before the era of international travel -- indeed before much travel at all." Plaintiffs are again quite incorrect. In *Zucht*, the United States Supreme Court held that a state's mandatory vaccination law did not violate substantive due process requirements; ****870** it did not merely state that states may pass vaccine laws. (***992** *Zucht v. King*, *supra*, 260 U.S. at pp. 175-176, 43 S.Ct. at pp. 24-25, 67 L.Ed. at pp. 197-198.) Further, plaintiffs fail to explain and we can find no reason why these cases would be inapplicable merely because international and domestic travel is more prevalent now. To the extent plaintiffs argue we should decline to follow these decisions by the United States Supreme Court, we disagree. (See *Agostini v. Felton* (1997) 521 U.S. 203, 207, 117 S.Ct. 1997, 2002, 138 L.Ed.2d 391, 404 ["The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."].)

[14]Although not addressed in the substantive due process portion of their brief, plaintiffs argue Senate Bill No. 277 is not narrowly circumscribed because there are several " 'available alternative means' to accomplishing the state's goal of higher vaccination r[ate]s" including "a massive education effort," distributing free medication to

eliminate copayments for families, or providing incentives for vaccination in other ways. In their reply brief, plaintiffs further add that, because the law "does not cover homeschooled children and categorically exempts foster children" and does not account for the millions of tourists entering California each year ("many from countries with no vaccination requirements"), it "is so under-broad that it cannot achieve its objectives." They posit, "[a]bsent quarantines at the border, [Senate Bill No. 277] is not tailored to meet its ends." We disagree.

First, we note the pertinent analysis is whether the elimination of the exemption is narrowly circumscribed to address the goal of the law -- here, "[a] means for the eventual achievement of total immunization" of appropriate school-aged children. (§ 120325, subd. (a).) As the *Whitlow* court noted: "The objective of total immunization is not served by a law that allows for [exemptions], whether the [exemption] rate is 2% or 25%." (*Whitlow v. California Dept. of Education*, *supra*, 203 F.Supp.3d at p. 1091.) "While removing the [exemption] is an aggressive step, so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here." (*Ibid.*)

Second, we agree with our colleagues in *Brown*, rejecting a similar argument: "Plaintiffs allege in their complaint that Senate Bill No. 277 ... is not narrowly tailored to meet the state's interest, because there are less restrictive alternatives (such as alternative means (unspecified) of immunization, and quarantine in the event of an outbreak of disease). This argument fails, of course, as compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases. As is noted in the legislative history, studies have found that 'when belief exemptions to ***993** vaccination guidelines are permitted, vaccination rates decrease,' and community immunity wanes if large numbers of children do not receive required vaccinations." (*Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1146, 235 Cal.Rptr.3d 218.)

Accordingly, plaintiffs' substantive due process claim has no merit.

III

Right To Privacy

[15]In their complaint, plaintiffs assert Senate Bill No. 277 infringes on their constitutional right to privacy on two grounds: (1) requiring children to reveal ****871** personal medical information to attend a free public school; and (2) requiring parents and children to forego control over the integrity of the children's bodies.

[16] [17] [18]The California Constitution provides that all individuals have a right to privacy, which "protects a larger zone in the area of financial and personal affairs than the federal right." (*Wilson v. California Health Facilities Com.* (1980) 110 Cal.App.3d 317, 324, 167 Cal.Rptr. 801; Cal. Const., art. I, § 1.) A person's medical history and information and the right to retain personal control over the integrity of one's body is protected under the right to privacy. (*People v. Martinez* (2001) 88 Cal.App.4th 465, 474-475, 105 Cal.Rptr.2d 841; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 332-333, 66 Cal.Rptr.2d 210, 940 P.2d 797.) Although the right is important, it is not absolute; it "must be balanced against other important interests" and "may be outweighed by supervening public concerns." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 37, 26 Cal.Rptr.2d 834, 865 P.2d 633; *Wilson*, at p. 325, 167 Cal.Rptr. 801.)

[19] [20]Section 120325, subdivision (a), states the state's objective is "the eventual achievement of total immunization of appropriate age groups against [specified] childhood diseases." "[W]hen the state asserts important interests in safeguarding health, review is under the rational basis standard. [Citation.] In the area of health and health care legislation, there is a presumption both of constitutional validity and that no violation of privacy has occurred." (*Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 712, 34 Cal.Rptr.3d 19.)

As our colleagues pointed out in *Brown*, "compulsory immunization has long been recognized as the gold standard for preventing the spread of contagious diseases" and "federal and state courts, beginning with *Abeel*, have held 'either explicitly or implicitly' that 'society has a compelling ***994** interest in fighting the spread of contagious diseases through mandatory vaccination of school-aged children.' " (*Brown v. Smith*, *supra*, 24 Cal.App.5th at p. 1146, 235 Cal.Rptr.3d 218.)

The right to privacy, " 'fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children,' and 'removal of the [personal beliefs

exemption] is necessary or narrowly drawn to serve the compelling objective of [Senate Bill No.] 277." (*Brown v. Smith, supra*, 24 Cal.App.5th at pp. 1146-1147, 235 Cal.Rptr.3d 218.) Accordingly, Senate Bill No. 277 does not violate plaintiffs' right to privacy. Nothing in plaintiffs' argument convinces us otherwise.

IV

Right To Attend School

[21]California has recognized a fundamental interest in education, as provided in its Constitution. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 96 Cal.Rptr. 601, 487 P.2d 1241, superseded by statute on other grounds as stated in *Crawford v. Huntington Beach Union High School Dist.* (2002) 98 Cal.App.4th 1275, 1286, 121 Cal.Rptr.2d 96; Cal. Const., art. IX, § 5 ["Legislature shall provide for a system of common schools by which a free school shall be kept up and supported"].) Plaintiffs claim four cases "all stand for the principle that the right to a public education cannot be burdened the way it is here" by requiring families to incur "substantial costs for the multitude of doctors' visits," requiring students to relinquish rights to "determine what goes into their bodies and their rights to bodily autonomy," and conditioning a fundamental right on giving up another. Three of the four ****872** cases involve actions by school districts, not legislative actions by the state, and are inapplicable.[11]

The fourth case, *Serrano*, also does not support plaintiffs' position. As the *Brown* court explained: "*Serrano* struck down a public school financing scheme as violating equal protection guaranties 'because it discriminated ***995** against a fundamental interest -- education -- on the basis of a suspect classification -- district wealth -- and could not be justified by a compelling state interest under the strict scrutiny test thus applicable.' " (*Brown v. Smith, supra*, 24 Cal.App.5th at p. 1145, 235 Cal.Rptr.3d 218.) Like the plaintiffs in *Brown*, the plaintiffs here "cite *Serrano* to support their claim that Senate Bill No. 277 ... violates their constitutional right to attend school, but fail to explain its application here. There is no 'suspect classification' underlying Senate Bill No. 277." (*Brown*, at p. 1146, 235 Cal.Rptr.3d 218.) "But even if we assume the strict scrutiny test should be applied to any law affecting the fundamental interest in education, Senate Bill No. 277 ... would pass that test." (*Ibid.*)

[22]Plaintiffs also rely on *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 211 Cal.Rptr. 398, 695 P.2d 695, arguing that, when the government conditions a public benefit on the relinquishment of a right, the government must establish there was no alternative means to meeting its objective. Plaintiffs argue Senate Bill No. 277 does not meet "the *Robbins* test" because there "are several 'available alternative means' to accomplishing the state's goal of higher vaccination r[ate]s without using the public benefit of free K-12 education as the chokepoint." The test discussed in *Robbins* applies to government agency actions, not to state legislative acts. (See *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 501, 55 Cal.Rptr. 401, 421 P.2d 409.) Indeed, the first factor of the test requires the "government entity seeking to impose the condition [to] demonstrate that ... the condition reasonably relates to the purposes of the legislation which confers the benefit." (*Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 959, 227 Cal.Rptr. 90, 719 P.2d 660.) State legislative acts, in contrast, are subject to strict scrutiny, intermediate scrutiny, or rational-basis review, depending on the nature of the right involved. (See *Adoption of Kay C., supra*, 228 Cal.App.3d at p. 748, 278 Cal.Rptr. 907.)

We agree with the *Brown* court that Senate Bill No. 277 does not violate the right to attend school. (*Brown v. Smith, supra*, 24 Cal.App.5th at pp. 1145-1147, 235 Cal.Rptr.3d 218.) Indeed, our Supreme Court in 1904 found legislative vaccination requirements do not interfere with this right. (*French v. Davidson* (1904) 143 Cal. 658, 662, 77 P. 663 ["The legislature no doubt was of the opinion that the proper place to commence in the attempt to prevent the spread of contagion was among the young, where they were kept together in considerable numbers in the same room for long hours each day. ... [The legislation] in no way interferes with the right of the child to attend school, provided the ****873** child complies with its provisions. ... When we have determined that the act is within the police power of the state, nothing further need be said. The rest is to be left to the discretion of the law-making power. It is for that power to say whether vaccination shall be had as to all school children who have not been vaccinated all the time"].) We decline plaintiffs' invitation to read "*French* as dicta."

***996** V

Free Exercise of Religion

[23]Plaintiffs argue Senate Bill No. 277 violates their right to free exercise of religion. No such cause of action was asserted in their complaint nor were any allegations included in that regard.[12] While we consider the issue to determine whether plaintiffs should be given leave to amend their complaint, we note plaintiffs cite to only one case in support of their position that Senate Bill No. 277 violates their right to free exercise of religion -- an inapplicable Wyoming Supreme Court case.

We agree with our colleagues' detailed discussion of this issue in *Brown* and their conclusion that Senate Bill No. 277 does not violate the right to free exercise of religion. (*Brown v. Smith, supra*, 24 Cal.App.5th at pp. 1144-1145, 235 Cal.Rptr.3d 218.)

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

Mauro, J., and Murray, J., concurred.

All Citations

29 Cal.App.5th 980, 240 Cal.Rptr.3d 861, 360 Ed. Law Rep. 980, 18 Cal. Daily Op. Serv. 11,576, 2018 Daily Journal D.A.R. 11,622

Footnotes

1 The California Court of Appeal, Second Appellate District recently rejected various constitutional challenges to Senate Bill No. 277. (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 235 Cal.Rptr.3d 218 [rejecting claims Sen. Bill No. 277 violated four provisions of the California Constitution: the free exercise of religion, the right to a public education, equal protection, and substantive due process].) Senate Bill No. 277 was also previously challenged in two federal cases, both of which upheld its validity under federal law: *Middleton v. Pan* (C.D.Cal. 2017) 2017 WL 7053936, 2017 U.S. Dist. LEXIS 216203 (granting motion to dismiss complaint alleging Sen. Bill No. 277 violated federal civil rights and criminal statutes, and caused intentional infliction of emotional distress) and *Whitlow v. Cal. Dept. of Education* (S.D.Cal. 2016) 203 F.Supp.3d 1079 (denying motion for preliminary injunction brought on grounds that elimination of exemption violated free exercise, equal protection, due process, right to education, and a federal statute, and finding no likelihood of success on the merits).

2 Some of the plaintiffs previously brought an action against the defendants in the United States District Court Central District of California alleging Senate Bill No. 277 violated: (1) their substantive due process rights under the Fourteenth Amendment; (2) the equal protection clause of the Fourteenth Amendment; and (3) 42 U.S.C. section 1983. The district court granted defendants' motion to dismiss the case, but gave the plaintiffs limited leave to amend the complaint. (*Torrey-Love v. California Dept. of Education* (C.D.Cal. Nov. 21, 2016, No. 5:16-cv-02410-DMG-DTB) Dkt. No. 51.) Defendants state the plaintiffs voluntarily dismissed the federal action on February 1, 2017.

3 Although the *Brown* court also found Senate Bill No. 277 did not violate the plaintiffs' rights to due process, its decision was in response to the argument that Senate Bill No. 277 "is void for vagueness under California's due process clause," which is not asserted here. (*Brown v. Smith, supra*, 24 Cal.App.5th at pp. 1147-1148, 235 Cal.Rptr.3d 218.)

4 All further section references are to the Health and Safety Code unless otherwise specified.

5 The statute previously provided: "Immunization of a person shall not be required for admission to a school ... if the parent or guardian ... files with the governing authority a letter or affidavit that documents which immunizations required by [law] have been given, and which immunizations have not been given on the basis that they are contrary to his or her beliefs." (§ 120365 [repealed by Sen. Bill No. 277].)

6 A vaccination for "[a]ny other disease deemed appropriate by the [California Department of Public Health]" may only be mandated "if exemptions are allowed for both medical reasons and personal beliefs." (§§ 120325, subd. (a)(11), 120335, subd. (b)(11), 120338.)

7 Plaintiffs argue the trial court failed to address the "precedent or argument" regarding "the right for parents to direct the upbringing of their children." To the contrary, the trial court expressly addressed and rejected their claim that Senate Bill No. 277 "infringes upon the rights of parents to direct the upbringing of their children." We note plaintiffs did not assert this as a separate cause of action, but rather included those allegations in their cause of action for violation of due process in the complaint. Accordingly, we address that issue in this section of the opinion.

8 Their only legal citations are: *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, 195, 209 Cal.Rptr. 220 for the general proposition that "[t]he state's 'constitutional right of privacy [also] guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity' "; *Jacobson v. Massachusetts, supra*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 and *United States v. Carolene Products* (1938) 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 for the premise that those federal cases are not binding and do not apply under "the modern due-process construct."

9 Plaintiffs claim, without citing to any legal authority, the standard of review is strict scrutiny and that, "[t]o overcome strict scrutiny, the concern must be real, imminent, and widespread -- and the law must be narrowly tailored to meet its end." The standard is not whether the "concern must be real, imminent, and widespread," but rather whether the law promotes a compelling governmental interest.

10 The federal district court also rejected the plaintiffs' substantive due process claim regarding Senate Bill No. 277. (*Torrey-Love v. California Dept. of Education, supra*, Dkt. No. 51 at p. 6.) The court explained: "The Supreme Court long ago declared that a state can require children to be vaccinated as a precondition for school attendance without running afoul of the Due Process Clause in the interests of maintaining the public health and safety. ... Though Plaintiffs assail these cases for their age, they have not been overturned and are still good law and binding upon this Court." (*Ibid.*)

11 *Slayton v. Pomona Unified School Dist.* (1984) 161 Cal.App.3d 538, 541, 207 Cal.Rptr. 705 (sole issue was whether petitioners were entitled to attorney fees under Code of Civil Procedure section 1021.5); *Phipps v. Saddleback*

Valley Unified School Dist. (1988) 204 Cal.App.3d 1110, 251 Cal.Rptr. 720 (appellate court upheld trial court's issuance of a permanent injunction and attorney fee award in matter involving a child's exclusion from school after testing positive for the Acquired Immune Deficiency Syndrome (AIDS) virus); *Hartzell v. Connell* (1984) 35 Cal.3d 899, 201 Cal.Rptr. 601, 679 P.2d 35 (sole issue was whether a public high school district could charge fees for educational programs simply because they had been denominated "extracurricular").

12 In their reply brief, plaintiffs point to one paragraph in their complaint, which they assert "raised the issue of their creeds in their Complaint." That paragraph states: "California previously allowed children to receive a public-school education without the need for medical treatments if their parents declared a religious or personal belief exemption for such children. These exemptions allowed those children to attend a K-12 school education within the State of California without undergoing every single medical treatment on California's required list." Nothing in this paragraph raises a free exercise of religion constitutional challenge to Senate Bill No. 277.

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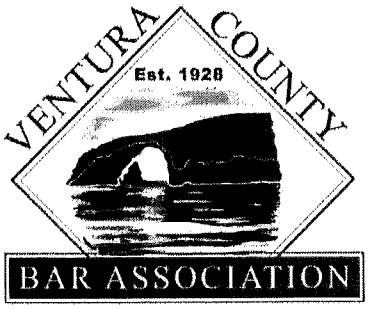

Barristers BTG – January 20, 2024

Session 2

Rule 3.5

Contact with Judges Officials Employees and Jurors

West's Annotated California Codes
Rules of the State Bar of California (Refs & Annos)
California **Rules** of **Professional Conduct** (Refs & Annos)
Chapter 3. Advocate

Prof.Conduct, **Rule 3.5**
Formerly cited as CA ST RPC **Rule** 5-300; CA ST RPC **Rule** 5-320

Rule 3.5. Contact With Judges, Officials, Employees, and Jurors

Currentness

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial **conduct**, or standards governing employees of a tribunal,[1] a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.* This **rule** does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

(b) Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial **conduct**, a **rule** or **ruling** of a tribunal,* or a court order, a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

(c) As used in this **rule**, "judge" and "judicial officer" shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall not communicate directly or indirectly with a juror if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known* to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly **conduct** an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this **rule** also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper **conduct** by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This **rule** does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(*l*) For purposes of this **rule**, "juror" means any empaneled, discharged, or excused juror.

Credits

(Adopted, eff. Nov. 1, 2018.)

Editors' Notes

COMMENT

[1] An applicable code of judicial ethics or code of judicial **conduct** under this **rule** includes the California Code of Judicial Ethics and the Code of **Conduct** for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or **conduct** codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and **rules** governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

Relevant Additional Resources
Additional Resources listed below contain your search terms.

HISTORICAL NOTES

Derivation

Former **Rule** 5-300, adopted, eff. May 27, 1989, as amended, eff. Sept. 14, 1992.

Former **Rule** 5-320, adopted, eff. May 27, 1989, as amended, eff. Sept. 14, 1992.

Former **Rule** 7-106, approved, eff. Jan. 1, 1975.

Former **Rule** 7-108, approved, eff. Jan. 1, 1975.

Former **Rule** 16, adopted 1928, as amended to July 1973.

ABA Code DR 7-108.

RESEARCH REFERENCES

Encyclopedias

59 Cal. Jur. 3d Trial § 45, **Conduct** of Trial Counsel, Generally.

Treatises and Practice Aids

California Practice Guide: **Professional** Responsibility Ch. 8-D, Restrictions on Speech and Behavior Outside Courtroom.

Relevant Notes of Decisions (6)
View all 9
Notes of Decisions listed below contain your search terms.

Pending matters

Where judgment in criminal case was final, there was nothing before judge to be decided and proceeding to recall defendant for resentencing had not yet been commenced, contested matter was not pending and defense attorney's request that department of corrections consider recommendation to recall defendant's sentence did not violate **Rule**. People v. Laue (App. 1 Dist. 1982) 182 Cal.Rptr. 99, 130 Cal.App.3d 1055. Attorneys And Legal Services 746

Communication through court

Receipt through court of juror questions regarding evidence during trial is not communication with juror which is proscribed by **Rules** of **Professional Conduct**. People v. Cummings (1993) 18 Cal.Rptr.2d 796, 4 Cal.4th 1233, 850 P.2d 1, modified on denial of rehearing, certiorari denied 114 S.Ct. 1576, 511 U.S. 1046, 128 L.Ed.2d 219, habeas corpus granted 80 Cal.Rptr.2d 765, 19 Cal.4th 771, 968 P.2d 476. Criminal Law 864

Written communications

Prosecutor's act of providing the court with a copy of opposing counsel's disciplinary record without first providing a copy to opposing counsel was not a violation of a court order, and thus did not support monetary sanction under statute allowing sanctions payable to the county for any violation of a lawful court order, even if the act was a technical violation of the State Bar's ethical **rules**, where the judge had not previously warned the prosecutor against ex parte communication. People v. Hundal (App. 3 Dist. 2008) 86 Cal.Rptr.3d 166, 168 Cal.App.4th 965, review denied. Attorneys And Legal Services 1243

Contact after discharge of jury

This **rule** concerning counsel's contact with jurors remains fully applicable in period from jury discharge to expiration of

time for filing new trial motions in case in which those jurors served. Lind v. Medevac, Inc. (App. 1 Dist. 1990) 268 Cal.Rptr. 359, 219 Cal.App.3d 516. Attorneys And Legal Services 781

Sending letters to jurors after trial of personal injury action asserting that fellow member of bar might employ "sharp investigative tactics" to "impeach" jury's verdict and have it set aside as "improper" violates this **rule** prohibiting attorney from taking actions which may adversely affect juror in his "present" or "future" jury service. Lind v. Medevac, Inc. (App. 1 Dist. 1990) 268 Cal.Rptr. 359, 219 Cal.App.3d 516. Attorneys And Legal Services 781

Attorney who wins trial by jury should not be barred by this **rule** from writing jurors postverdict, thereby requesting that attorney be notified of any posttrial **conduct** with jurors by adverse side, and that he be further allowed either to be present for any interviews granted adverse side or to discuss with juror any telephonic or written communications received from adverse side. Lind v. Medevac, Inc. (App. 1 Dist. 1990) 268 Cal.Rptr. 359, 219 Cal.App.3d 516. Attorneys And Legal Services 781

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology **rule**, **rule** 1.0.1.

Prof. **Conduct**, **Rule 3.5**, CA ST RPC **Rule 3.5**
Current with amendments received through December 1, 2023. Some rules may be more current, see credits for details.

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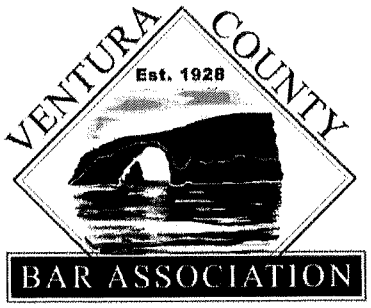


Barristers BTG – January 20, 2024

Session 2

Case Study 10

Nguyen v. Superior Court

150 Cal.App.4th 1006
Court of Appeal, Fourth District, Division 3, California.

Trung NGUYEN et al., Petitioners,
v.
The SUPERIOR COURT of Orange County, Respondent;
Janet Nguyen, Real Party In Interest.

No. G038475.
|
May 14, 2007.

Synopsis
Background: Candidate for office of county supervisor filed election contest after his opponent was certified the winner by Registrar of Voters following a recount. After trial, the Superior Court, Orange County, No. 07CC00407, Michael Brenner, J., entered judgment rejecting candidate's challenge. Candidate filed petition for a writ of mandate.

[Holding:] The Court of Appeal, Sills, P.J., held that appeal process, rather than petition for writ of mandate, was the appropriate procedural method for candidate to challenge the adverse judgment.

Petition denied.

West Headnotes (3)

[1] **Election Law**⇨Nature and form of remedy, and appellate jurisdiction

Appeal process, rather than petition for writ of mandate, was the appropriate procedural method for candidate for office of county supervisor to challenge trial court's adverse judgment in election contest, though legal issue involving recounts raised by the candidate had statewide ramifications for next election; any statewide election was relatively far away, issue presented was a highly technical one, statute afforded losing party in a election contest an adequate remedy at law by way of appeal, candidate's challenge did not implicate constitutional issues, and there were no conflicting trial court interpretations. West's Ann.Cal.C.C.P. § 44; West's Ann.Cal.Elec.Code § 16900.

See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 657; Cal. Jur. 3d, Elections, § 282 et seq.

1 Case that cites this headnote

[2] **Mandamus**⇨Return or Answer

Letter filed with the Court of Appeal by the real party in interest, in response to candidate's filing of petition for writ of mandate challenging trial court's judgment in election contest, was not an improper ex parte communication with the Court of Appeal, where the letter was personally served on candidate's counsel the same day it was filed, and letter constituted the sort of unsolicited informal response that every real party in interest had right to make in response to petition for writ of mandate.

5 Cases that cite this headnote

[3] **Trial**⇨Ex Parte Communications

An "ex parte communication" is one where a party communicates to the court outside of the presence of the other party.

8 Cases that cite this headnote

Attorneys and Law Firms

****803** Michael J. Schroeder and Steven D. Baric for Petitioners.

Phillip Barry Greer for Real Party in Interest.

No appearance for Respondent.

***1008** OPINION

SILLS, P.J.

I.

This is a petition for writ of mandate seeking to vacate a decision after an election contest over a seat on the Orange County Board of Supervisors. In this opinion we explain why, on balance, this matter should proceed by way of the more deliberative and thorough process of appeal, rather than the hastier route of a petition for writ of mandate.

Here is the background: In a February 2007, supervisorial election that included many candidates, Truong Nguyen was declared the winner; Janet Nguyen was the runner-up by seven votes. Janet Nguyen then asked for a recount. To be specific, she asked that all absentee ballots, that is, *paper ballots,* be counted manually. As for the ballots cast by direct recording electronic voting system—often called "DRE"—Janet Nguyen merely asked for a re-run of the electronic tabulation, essentially a downloading of the electronic memory of the voting machines. She did *not* ask for a hand-count of the paper ballots that are automatically printed within the machine (but not given the voter) when a voter votes by a direct recording electronic system. In essence, her recount centered on the paper ballots.

The recount as conducted by the Registrar of Voters actually changed the result. After the recount, the Registrar of Voters certified Janet Nguyen the winner—ironically enough, by the same margin of seven votes that Truong Nguyen had earlier prevailed over her.

Trung Nguyen then filed this election contest in the superior court. His challenge to the certification was essentially two-fold. The first involved the tedious task of ballot-by-ballot review of the absentee, that is, "true" paper ballots. The trial court's review lowered Janet Nguyen's seven-vote margin to three votes.

The second aspect of his challenge was legal, and is the focus of this writ proceeding. Trung Nguyen argued that by not electing a recount of the "voter verified paper audit trail"—that is, the paper the machine prints when a voter completes voting (or the acronym, "VVPAT"), the recount requested by Janet ***1009** Nguyen was, essentially, "illegal" (the word used in ****804** his petition filed in this court). That meant that the original count, giving him a seven-vote victory, would be operative and he should be declared the winner. The trial court rejected that legal challenge.

The trial court announced its decision on March 26, 2007. Janet Nguyen was sworn-in as a member of the Orange County Board of Supervisors the next day. Trung Nguyen filed this writ petition on April 10. This court then asked for informal briefing from the parties, to be completed by May 2, and in particular asked the parties to focus on the significance of section 16900 of the Elections Code, which affords the losing party in an election contest a clear remedy by way of appeal.[1]

II.

[1] There is a list of criteria identified by the court in *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273–1274, 258 Cal.Rptr. 66 which have been used by California courts to justify proceeding by extraordinary writ. Most of those criteria are not applicable in cases such as this one, because they involve the correction of some error made by the trial court *before* trial. This case involves an attack on a judgment after trial.

Among the factors is whether a litigant has an adequate remedy at law, this is, by way of appeal. In the case before us, the adequate remedy factor is particularly important because challenges to election contests have been the *specific* focus of the Legislature, in section 16900. That law provides in its entirety: "Any party aggrieved by the judgment of the court may appeal therefrom to the court of appeal, as in other cases of appeal thereto from the superior court. During the pendency of proceedings on appeal, and until final determination thereof, the person declared elected by the superior court shall be entitled to the office in like manner as if no appeal had been taken."

The statute also reduces the pressure on an appellate court to immediately (or close to immediately) decide the merits of an election contest. The winner at the trial court level holds office during the pendency of the appeal. On the other hand, the statute must be read in tandem with another statute, section 44 of the Code of Civil Procedure, which gives priority (after criminal cases) in the appellate court to election contests. (That law provides in part: ***1010** "Appeals in ... contested election cases ... shall be given preference in hearing in the courts of appeal.... All these cases shall be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties.")

In sum, while the Legislature has specifically provided for the relatively slower process of appellate review of election contests, it also sought to *expedite* that appellate review.

Because election contests have been the specific focus of legislative action, with the legislature clearly providing an adequate remedy at law, we conclude that any *Omaha* criteria that might otherwise justify proceeding by writ are outweighed under the circumstances of this case.

To be sure, for example, the legal issue involving recounts which Trung Nguyen presses to this court has statewide ramifications for the next election. However, as we consider his writ petition, any statewide election is relatively far away. And the issue he presents is a highly technical one as well, which is a factor that favors proceeding by appeal, with its measured processes and opportunities to study all facets of a complex issue.

****805** Another *Omaha* criteria is the presence of a significant and novel *constitutional* issue. The nature of Trung Nguyen's challenge, however, does not really implicate any constitutional issues except in the sense that anything involving election laws implicates constitutional issues. His challenge is essentially statutory, involving the interaction of various recount statutes.

Another criteria is conflicting trial court interpretations of law requiring a resolution of the conflict. But there are no conflicting trial court interpretations here, and there are not likely to be any prior to any decision by way of appeal.

To be sure, because all parties, Trung Nguyen, Janet Nguyen, and indeed the public itself, have an interest that elective offices be held by the true winners of elections, there is the possibility of irreparable harm just by virtue of the passage of time. We must acknowledge that.

On the other hand, however, it is also true that the *Legislature has addressed that very problem.* In providing for a (quicker to be sure) appeal from election contests, the Legislature knew what it was doing. The alternative, ***1011** proceeding by petition for writ of mandate, requires the parties to prepare their own records, and requires them to work under considerable time pressure themselves. There may not be time to obtain a full transcript of all trial court proceedings, or arrange transmission of all exhibits to the appellate court. By contrast, the rules governing appeals insure the opportunity of both parties to have complete records prepared, provide an opportunity to check those records for accuracy, and usually give the parties minimum time frames to complete a proper brief.

And this brings us to a point that is easy to overlook: If an appellate court were to decide the merits of an election contest by writ proceeding, the court could ultimately wind up making an order that would have the effect of removing a sitting official from office. *That* is not a step to be taken on the rush. It should only be taken upon a complete record of proceedings in the trial court, with appropriate time afforded all sides to prepare their briefs, and with at least some time for reflection by the appellate court. Given the gravity of the removal of an office holder by an unelected appellate court, such a step should not be made in the comparative hurriedness of a writ proceeding—and the Legislature has so implied in enacting section 16900.

Brown v. Superior Court (1971) 5 Cal.3d 509, 96 Cal.Rptr. 584, 487 P.2d 1224, the authority primarily relied upon by Trung Nguyen to support proceeding by writ rather than appeal, is readily distinguishable. *Brown* began as a citizen's civil action seeking a determination of statutory penalties based on the violation of election disclosure laws against contributors (basically, oil companies) that funded the campaign against 1970's Proposition 18. Some of the defendant contributors filed a demurrer to the complaint, alleging that the statute providing for those penalties was unconstitutional on its face because the disclosure laws invidiously discriminated against those campaigning for and against ballot propositions, as distinct from candidates. The trial court agreed, sustained the demurrer, and held the disclosure statutes unconstitutional. (*Id.* at pp. 512–514, 96 Cal.Rptr. 584, 487 P.2d 1224.)

The citizen who brought the penalty suit, however, also happened to be the Secretary of State at the time, and there was no question that he, as Secretary of State, was a beneficially interested party in the outcome of the proceeding. As Secretary of State, he bore, after all,

"overall responsibility for administering the disclosure laws the constitutionality of which" had been challenged. **806 (*Brown, supra,* 5 Cal.3d at p. 514, 96 Cal.Rptr. 584, 487 P.2d 1224.) And, significantly, the trial court's decision had stymied the Secretary of State's ability to provide "instructions to proponents of statewide initiative, referendum and recall ***1012** petitions relating to their responsibilities under the disclosure laws." (*Id.* at p. 515, 96 Cal.Rptr. 584, 487 P.2d 1224.) Thus, noted our high court, "In the absence of a speedy final determination of the viability of disclosure laws, both proponents and opponents" of statewide and local ballot measures would "be forced to respond or not respond to legislative direction at their own risk." (*Ibid.*) In that regard, there were, at the time the Supreme Court decided the case (in August 1971), no less than "two statewide initiative measures and scores of local ballot measures, many of which [were] of a controversial nature and [would] involve substantial campaign expenditures" that were affected by the uncertainty created by the trial court decision. (*Ibid.*) No wonder the "public welfare" required an "early resolution" of the issue. (*Ibid.*)

The present case contrasts with *Brown* markedly. This is an election contest brought by a losing candidate, clearly within section 16900. *Brown* was not a section 16900 case, but a regular civil case involving election disclosure laws.

This is a contested election for a county board of supervisors. *Brown* involved an issue of disclosure law that was of a continuing nature and affected large-scale, statewide behavior.

This is a case which focuses on recount procedures. By definition, the need for such procedures arises after elections, not before them. Any decision concerning those procedures will not have any importance (beyond the parties before us, of course) until after the next election is held and someone requests a recount. *Brown* involved an issue of state campaign law that affected actors gearing up for the next campaign immediately after the trial court's decision.

This case involves a question of statutory construction involving recount procedures. *Brown* was a case where state campaign laws had been declared unconstitutional. Given the immediate and ongoing statewide effect of the trial court's ruling, the case needed to be decided at the *earliest possible* moment.

III.

We caution that this opinion should not be read as articulating an *inflexible* rule that section 16900 precludes all writ relief in election contest cases because of the presence of an adequate remedy at law, no matter what the circumstances. We do not go that far.

***1013** We need only note for purposes of our decision here that if and when an election contest presents "an issue of great public importance" that requires prompt resolution, our Supreme Court has the power to transfer the cause to itself. (Cal. Rules of Court, rule 8.552(c); see also *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241, 186 Cal.Rptr. 30, 651 P.2d 274 [transferring writs originally filed in Court of Appeal challenging recently enacted ballot proposition to Supreme Court because it was "uniformly agreed that the issues are of great public importance and should be resolved promptly"].)

But section 16900 certainly favors proceeding by appellate review as the norm. This case does not warrant departing from that norm.

IV.

[2] [3] We therefore conclude that the petition for writ of mandate should be DENIED. The reasons for denying the petition are sufficient by themselves, so we do not rely on the additional point made by **807 real party in interest that the petitioner omitted an indispensable party to this writ proceeding, namely the Orange County Registrar of Voters.[2] However, we do note that it is hard to see how this court could void the certification of the winner of an election by the Registrar of Voters without at least hearing the Registrar's side of the story, and of course the Registrar *was* a party in the trial court. Nor is it clear what sort of actual relief an appellate court could provide under these circumstances that did not either directly or indirectly affect procedures in the ***1014** Registrar of Voters office, to say nothing of any formal need to order the office to certify one candidate as the winner as distinct from the other.

WE CONCUR: ARONSON and FYBEL, JJ. Op. Serv. 5345, 2007 Daily Journal D.A.R. 6800

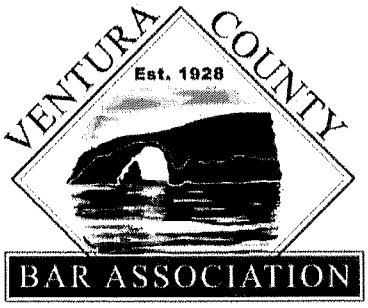
All Citations

150 Cal.App.4th 1006, 58 Cal.Rptr.3d 802, 07 Cal. Daily

Footnotes

1 All undesignated statutory references in this opinion are to the Elections Code.

2 Trung Nguyen's petition was filed April 10, 2007. On April 13, 2007, Janet Nguyen filed a letter with this court first raising the issue. On April 16, 2007, Trung Nguyen filed a letter with this court responding to Janet Nguyen's April 13, 2007 letter, in which he characterized it as an "ex parte communication with the Court" and "improper." That was a mischaracterization of Janet Nguyen's April 13, 2007 letter. It was neither "ex parte" nor "improper." An ex parte communication is one where a party communicates to the court *outside* of the presence of the other party. Janet Nguyen's April 13, 2007 letter, however, was personally served on Trung Nguyen's counsel the very day it was filed—all very above board. And, rather than being an "improper" ex parte communication with the court, Janet Nguyen's April 13, 2007 letter constituted the sort of unsolicited informal response that every real party in interest has a right to make when an opponent files a petition for writ of mandate. (See Eisenberg, et al., Cal. Practice Guide: Civil Writs and Appeals (The Rutter Group 2006) ¶ 15:215, p. 15–89 ["The real party has the option of filing an unsolicited preliminary response to a writ petition, and generally should do so if the petition seems persuasive or contains factual inaccuracies.... Any such response is due within 10 days after the petition is filed .... The preliminary opposition ordinarily is used to point out an adequate alternative remedy or the lack of irreparable harm, or to correct or add to the facts presented by petition."].)



Barristers BTG – January 20, 2024

Session 2

Case Study 11

In re Marriage of Spector

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Marriage of Ostrowski, Cal.App. 3 Dist., June 2, 2021

24 Cal.App.5th 201
Court of Appeal, Third District, California.

IN RE the MARRIAGE OF Phillip and Rachelle SPECTOR.
Phillip Spector, Respondent,
v.
Rachelle Spector, Appellant.

C084628
|
Filed 5/16/2018

Synopsis
Background: After husband filed for dissolution, the Superior Court, San Joaquin County, No. STAFLDWOC20160001460, Reva G. Goetz, Retired Judge, sitting by assignment, granted temporary order for spousal support in favor of wife and subsequently sua sponte corrected the order. Wife appealed.

Holdings: The Court of Appeal, Robie, J., held that:

[1] dissolution court had authority sua sponte to correct order, and

[2] dissolution court did not violate wife's due process rights.

Affirmed.

Procedural Posture(s): On Appeal; Other.

West Headnotes (14)

[1] **Appeal and Error**⇨Constitutional law
Appeal and Error⇨Statutory or legislative law

The Court of Appeal exercises independent de novo review of claims that the trial court incorrectly interpreted and applied statutory and constitutional law.

2 Cases that cite this headnote

[2] **Divorce**⇨Spousal Support Pending Proceedings

The purpose of a temporary spousal support order is to maintain the living conditions and standards of the parties as closely as possible to the status quo, pending trial and the division of the assets and obligations of the parties.

1 Case that cites this headnote

[3] **Divorce**⇨Commencement
Divorce⇨Nature, scope and effect of decision

A temporary spousal support order is operative from the time of pronouncement and is directly appealable as a final judgment.

8 Cases that cite this headnote

[4] **Divorce**⇨Operation and effect in general

If a party does not appeal a temporary spousal support order, the issues determined by the order are res judicata.

14 Cases that cite this headnote

[5] **Constitutional Law**⇨Encroachment on Judiciary

The Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that

power.

[6] **Motions**⚲Reargument or rehearing
Motions⚲Amendment of orders

Although a trial court has inherent authority to correct an erroneous ruling or order on its own motion, it has no inherent authority to order a new trial.

3 Cases that cite this headnote

[7] **Divorce**⚲Amendment

Dissolution court had authority sua sponte to correct temporary spousal support order, where time to appeal order had not yet run, the court considered no new evidence and made no additional findings, and the court limited itself to changing its mind based on evidence submitted in original motion. Cal. Civ. Proc. Code § 1008; Cal. Fam. Code § 3603.

6 Cases that cite this headnote

[8] **Trial**⚲Ex Parte Communications

An "ex parte communication" is one where a party communicates to the court outside the presence of the other party.

[9] **Trial**⚲Ex Parte Communications

Prohibition against ex parte communication is, in essence, rule of fairness meant to insure that all interested sides will be heard on an issue.

[10] **Motions**⚲Amendment of orders

If a court believes one of its prior orders was erroneous, it may correct that error no matter how it came to acquire that belief.

2 Cases that cite this headnote

[11] **Constitutional Law**⚲Spousal support; alimony
Divorce⚲Amendment

Dissolution court did not violate wife's due process rights when it sua sponte corrected temporary spousal support order, although court did not file formal motion prior to issuing revised ruling and did not hold a hearing, where parties received notice of court's intent to reconsider day after order was served, and parties responded to court's solicitation for briefing regarding the reconsideration. U.S. Const. Amend. 14; Cal. Civ. Proc. Code § 1008; Cal. Fam. Code § 3603.

[12] **Motions**⚲Nature of proceeding

There is no requirement for a court to file a motion to be considered by itself; parties file motions and courts issue orders on those motions.

[13] **Motions**⚲Amendment of orders

A judge's inherent authority to reconsider and correct erroneous orders is independent of the statutory limitations imposed on reconsideration motions initiated by the parties. Cal. Civ.

Proc. Code § 1008.

[14] **Motions**⇨Hearing

The opportunity to be heard on a motion does not necessarily compel an oral hearing.

See 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 50

2 Cases that cite this headnote

**856 APPEAL from a judgment of the Superior Court of San Joaquin County, Reva G. Goetz, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed. (Super. Ct. No. STAFLDWOC20160001460)

Attorneys and Law Firms

Brian J. Kramer, P.C. and Brian J. Kramer, Los Angeles, for Appellant.

Law Offices of James R. Eliaser, James R. Eliaser and Joanne D. Ratinoff, Los Angeles, for Respondent.

Opinion

Robie, J.

*204 Petitioner Phillip Spector (husband) filed for dissolution of his marriage to respondent Rachelle Spector (wife). The primary issue on appeal is whether the trial court's inherent authority to reconsider its own orders as explained in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 29 Cal.Rptr.3d 249, 112 P.3d 636 permitted the court to sua sponte modify the terms of the temporary spousal support order retroactively under the circumstances presented. Wife argues the trial court was precluded from doing so pursuant to Family Code [1] sections 3603, 3651, subdivision (c), and 3653, subdivision (a), and the various cases interpreting those statutes. We conclude the **857 court had inherent authority to reconsider its prior order and to apply its modified decision retroactively. Finding no merit in wife's argument that the court violated her due process rights when it exercised this authority, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are generally undisputed.[2] On September 9, 2016, wife filed a request for a temporary order for spousal support and professional fees. The parties filed their respective briefs with supporting declarations and evidence in advance of the February 17, 2017, hearing. The court issued its ruling on February 21, 2017 (February 21 Order) and served the order on the parties via e-mail the next day. The court ordered, among other things, husband to pay wife temporary spousal support and certain professional fees. The first temporary spousal support payment was due on March 1, 2017. The February 21 Order states that "[t]hese Orders shall remain in full force and effect until they are modified pursuant to a written agreement between the parties or further court Order."

Shortly after receiving the February 21 Order on February 22, 2017, husband sent an e-mail to the judge with a copy to wife, stating that "there appears to be an error in your arithmetic" regarding the monthly temporary spousal support figure. (Boldface omitted.) Husband, wife, and the judge engaged in several *205 e-mail exchanges regarding the calculations and the effect of the monetary awards and requirements in the February 21 Order. Husband suggested "that the court relabel it's [*sic*] ruling to instead be a Tentative Ruling and let us each argue before making it final." On February 23, 2017, the judge responded, "[q]uite frankly I have the authority to modify the orders and am considering doing so." She further stated "[w]e can call the notice and orders tentative," and invited the parties to argue the issues but indicated she "prefer[red] a 5 page written argument from each of [them]."

Husband responded that a five-page written argument was fine with him. Wife responded: (1) objecting to the use of e-mails for argument on substantive matters; (2) requesting the "ruling be treated like any other order after hearing issued in any family law or civil matter"; (3) requesting that any reconsideration of the ruling proceed under Code of Civil Procedure section 1008 and "by the briefing Code"; (4) stating, as a procedural matter, the parties and judge needed to review the hearing transcript, which would be available around March 3, 2017; and (5) explaining the "request for the standard briefing protocol and schedule" was to "assure that the parties' stipulation

and order appointing a private judge is complied with and due process followed here" and to provide her counsel with sufficient time and ability to represent her.

The judge responded to wife, "Pursuant to the holding in Le Francois v. Goel (2005) 35 Cal.4th 1094 [29 Cal.Rptr.3d 249, 112 P.3d 636], I have the authority and ability to reconsider a ruling I made sua sponte which is exactly what I'm going to do." The judge further explained she needed to review the hearing transcript based on wife's comments because her memory differed from wife's. She continued: "As part of my reconsideration I am providing, although I am not required to do so, an opportunity for counsel to provide a written argument of no more than 5 pages. [¶] ****858** I am happy to provide you more time to provide your argument ... no due date has as yet been set. Obviously I need to read the transcript before I am able to reconsider the ruling. [¶] The written argument, from both counsel, will be due by March 15. That way I'll have the transcript and both written arguments to read together. [¶] In the mean time [*sic*], the current orders while under reconsideration remain in full force and effect." Wife indicated "[n]o objection" to the "email re: scheduling and current order remaining in place while this matter is under reconsideration." Husband stated his objection that the February 21 Order should be a tentative order without full force and effect, which the judge noted.

On March 3, 2017, wife provided the judge with copies of the reporter's transcript from the February 17, 2017, hearing. In the same e-mail, wife requested an "expedited hearing date and briefing schedule" to seek relief from the court "to address [husband's] failure to comply with the Order After ***206** Hearing by failing to make the first spousal support payment that was due on March 1, 2017." Such proposed relief included an order barring husband from attacking the February 21 Order based on his noncompliance with the order pursuant to the disentitlement doctrine. The judge responded that wife would need to file a request for such relief in the trial court. Wife then asked for clarification regarding the five-page limitation and for guidance on the issues to be addressed in the parties' submissions. The judge responded the five-page limitation applied to argument only and added the parties were not allowed to submit additional declarations or exhibits. She further advised briefing should address "[t]he issue of what amount of pendente lite spousal shall be paid."

Both parties submitted briefs. Husband argued that "[t]he only problem is that [the amount ordered in the February 21 Order] greatly exceeds [husband's] monthly cash flow." Husband requested that the court either change the amount of the spousal support to below the guideline amount or order each party to pay his or her own attorney and professional fees, and for wife to pay all of the house-related expenses.

Wife argued there was no arithmetic error in the February 21 Order and "there has been no *additional findings or new evidence presented whatsoever*" to support reconsideration under Code of Civil Procedure section 1008, "which governs and limits the grounds upon which a motion for reconsideration can be heard to new facts or law—neither of which exist[s] here." Wife disagreed that the court had authority under *Le Francois* to reconsider its ruling in the absence of a motion. She further argued husband should be barred from affirmative relief regarding the February 21 Order under the disentitlement doctrine because he violated the February 21 Order by failing to make the first required spousal support payment due on March 1, 2017.

On March 23, 2017, the court issued a "reconsidered" ruling and order (March 23 Order). In the March 23 Order, the court explained it "was reconsidering its Ruling and Orders sua sponte pursuant to the holding in Le Francois v. Goel (2005) 35 Cal.4th 1094 [29 Cal.Rptr.3d 249, 112 P.3d 636]" and issued "on its own motion the reconsidered Rulings and Orders." The court noted that it "offered both counsel the opportunity to set another date to come in and provide additional argument related to the ruling issued on February 21, 2017" or, "in the alternative, for each counsel to submit further written argument regarding" the February 21 Order. "Both counsel agreed that written argument would be submitted no later than March 15, 2017."

****859** The March 23 Order sets forth wife's objections stating the court does not have the authority to reconsider the prior ruling, and the court's response that the *Le Francois* court "found that while legislation may limit what matters are ***207** brought by parties before the court, it may NOT limit a court's power to reconsider its rulings on its own." The court explained that "[w]hile there was no math error" in the February 21 Order, there were three other factors the court wanted to address. The March 23 Order, among other things, modifies downward from the February 21 Order the temporary spousal support amount awarded to wife, and imposes an effective date retroactive to March 1, 2017. Wife appeals.

DISCUSSION

[1]We exercise independent de novo review of wife's claims that the trial court incorrectly interpreted and applied statutory and constitutional law.[3] (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 973, 67 Cal.Rptr.2d 477; *Conservatorship of Christopher A.* (2006) 139 Cal.App.4th 604, 609-610, 43 Cal.Rptr.3d 427.)

I

The Court Had Authority Sua Sponte To Correct the Temporary Support Order

It appears wife's argument is threefold: first, a trial court's inherent authority to reconsider its orders, as discussed in *Le Francois*, does not apply to a temporary support order because it is a final rather than interim order; second, the trial court lost jurisdiction to modify the February 21 Order as a matter of law because it did not expressly reserve jurisdiction in that order, as required under *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 120 Cal.Rptr.3d 184 and *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 147 Cal.Rptr.3d 453; and third, if the trial court had authority to reconsider the February 21 Order on its own motion, it could not modify the order retroactively because it is precluded from doing so under sections 3603, 3651, subdivision (c), and 3653, subdivision (a), and the various cases interpreting those statutes.

To frame the analysis, we begin with the legal background regarding the interpretation of the Family Code statutes and the court's inherent authority to reconsider its own motions. We then apply those legal principles to conclude the court had authority sua sponte to correct the February 21 Order.

***208** A

Legal Background

1

Code Prohibition on Retroactive Modifications of Temporary Spousal Support Orders

[2] [3] [4]Pending final resolution of a marital dissolution case, the court may order one spouse to support the other. (§ 3600.) The purpose of a temporary spousal support order "is to maintain the living conditions and standards of the parties as closely as possible to the status quo, pending trial and the division of the assets and obligations of the parties." (*In re Marriage of McNaughton* (1983) 145 Cal.App.3d 845, 849, 194 Cal.Rptr. 176.) Such an order is operative from the time of pronouncement and "is directly appealable as a final judgment." (****860** *Greene v. Superior Court* (1961) 55 Cal.2d 403, 405, 10 Cal.Rptr. 817, 359 P.2d 249.) If a party does not appeal the order, the issues determined by the order are res judicata. (*In re Marriage of Gruen, supra*, 191 Cal.App.4th at p. 638, 120 Cal.Rptr.3d 184.)

A temporary spousal support order "may be modified or terminated at any time except as to an amount that accrued before the date of the filing of the notice of motion or order to show cause to modify or terminate." (§ 3603; see also §§ 3651, subd. (c)(1) [same but noting an exception inapplicable here], 3653, subd. (a) ["[a]n order modifying or terminating a support order may be made retroactive to the date of the filing of the notice of motion or order to show cause to modify or terminate, or to any subsequent date" subject to exceptions inapplicable here].) While numerous cases have discussed the application of this statutory prohibition against retroactive modification of temporary spousal support orders, wife points us to two specific cases— *Gruen* and *Freitas*.[4]

In *Gruen*, a husband filed for dissolution of marriage and applied for an order to show cause concerning child and spousal support, among other matters. (*In re Marriage of Gruen, supra*, 191 Cal.App.4th at p. 632, 120 Cal.Rptr.3d 184.) The ***209** trial court entered an order directing the husband to pay temporary support in the amount of $40,000 per month, and appointed an expert to assist in determining the amount of husband's income available for support. (*Id.* at pp. 632-633, 120 Cal.Rptr.3d 184.) Later that month, the husband asked the court to take his pending order to show cause off calendar. (*Id.* at p. 633, 120 Cal.Rptr.3d 184.) Several months later, after the expert's report was issued, the husband moved for retroactive reimbursement, seeking a reduction in his support obligation back to when the court entered the original order to pay temporary support. (*Id.* at pp. 633-634, 120 Cal.Rptr.3d 184.) The trial

court granted husband's request. (*Id.* at pp. 635-636, 120 Cal.Rptr.3d 184.)

The appellate court reversed, noting the original order was "final" and "immediately operative and directly appealable." (*In re Marriage of Gruen, supra*, 191 Cal.App.4th at p. 639, 120 Cal.Rptr.3d 184.) Accordingly, the wife was "entitled to rely on the amount of temporary support ordered without the threat of having to repay or credit [the husband] with any portion of accrued support." (*Ibid.*) The court also held that, to the extent the modifications of the original order were prospective, they exceeded the trial court's jurisdiction because they were not based on any pending motion or order to show cause for modification. (*Ibid.*)

Gruen was later distinguished in *Freitas*. In *Freitas*, the trial court entered a temporary spousal support award in favor of the husband but reserved jurisdiction over whether to amend the support award, stating husband could submit additional evidence pertaining to the wife's income. (*In re Marriage of Freitas, supra*, 209 Cal.App.4th at pp. 1061-1062, 147 Cal.Rptr.3d 453.) The court later held that, under *Gruen*, it lacked jurisdiction to reassess ****861** the wife's income for September and October 2010. (*In re Marriage of Freitas*, at p. 1065, 147 Cal.Rptr.3d 453.) The appellate court reversed, distinguishing *Gruen* in a couple of ways. (*Id.* at p. 1062, 147 Cal.Rptr.3d 453.)

First, in *Gruen*, the original support order was "final" and "directly appealable," whereas the *Freitas* trial court had expressly reserved jurisdiction to amend its original support awards based on further consideration of evidence. (*In re Marriage of Freitas, supra*, 209 Cal.App.4th at pp. 1073-1074, 147 Cal.Rptr.3d 453.) "Thus, unlike in *Gruen*, ... the parties' clear expectation was that the original support awards *were not* final as to these months. [Citation.] ... The trial court's original child and spousal support awards were not fully dispositive of the rights of the parties with respect to the amount of support to be awarded for September and October 2010, and therefore did not constitute final support orders as to those months." (*Id.* at pp. 1074-1075, 147 Cal.Rptr.3d 453.) The court held "neither *Gruen*, nor the authority upon which *Gruen* is based, precludes a trial court from reserving jurisdiction to amend a *nonfinal* order based on the anticipated presentation of additional evidence." (*Id.* at p. 1075, 147 Cal.Rptr.3d 453.)

***210** Second, in *Gruen*, the husband had taken his original order to show cause off calendar and there was no pending motion to modify the support order. (*In re Marriage of Freitas, supra*, 209 Cal.App.4th at p. 1075, 147 Cal.Rptr.3d 453.) In contrast, the *Freitas* trial court specifically reserved jurisdiction, meaning the trial court "continued to have jurisdiction to render a final order on" the husband's order to show cause. (*Ibid.*)

Distilled simply, *Gruen* and *Freitas* together establish the rule that a trial court lacks jurisdiction to retroactively modify a temporary support order to any date earlier than the date on which a proper pleading seeking modification of such order is filed (*In re Marriage of Gruen, supra*, 191 Cal.App.4th at p. 631, 120 Cal.Rptr.3d 184), unless the trial court expressly reserves jurisdiction to amend the support order such that the parties' clear expectation is the original support award is not final (*In re Marriage of Freitas, supra*, 209 Cal.App.4th at pp. 1062, 1075, 147 Cal.Rptr.3d 453).

2

A Court's Inherent Authority To Reconsider Its Own Orders

The interplay between statutory directives and a court's inherent authority to reconsider its own orders was addressed by our Supreme Court in *Le Francois*. In *Le Francois*, a judge granted a motion for summary judgment on grounds previously denied by another judge in the same case more than a year prior. (*Le Francois v. Goel, supra*, 35 Cal.4th at p. 1096, 29 Cal.Rptr.3d 249, 112 P.3d 636.) Our Supreme Court had to "decide whether the court had authority to consider the new motion even though it was not based on either new facts or new law" because "Code of Civil Procedure sections 437c, subdivision (f)(2), and 1008 seemingly prohibit a party from making such a new motion." (*Ibid.*) It appeared the statutory language could be read to deprive courts of jurisdiction to reverse their own earlier rulings.

[5]After "uphold[ing] the statutes to the extent they apply to motions filed by the parties," the court explained "[w]hether these statutes can validly limit the court's authority to act on its own motion to correct its own errors presents quite a different question." (*Le Francois v. Goel*, *supra*, 35 Cal.4th at p. 1104, 29 Cal.Rptr.3d 249, 112 P.3d 636.) "Such a limitation ****862** might go too far" and infringe on the constitutional principle of separation of powers—that is "[t]he Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power." (*Id.* at pp. 1103, 1104, 29 Cal.Rptr.3d 249, 112 P.3d 636.) The court explained, however, that it did not need to decide the constitutional question because it could, to avoid difficult constitutional questions, interpret the statutes as "imposing a limitation on the ***211** parties' ability to file repetitive motions, but not on the court's authority to reconsider its prior interim rulings on its own motion." (*Id.* at p. 1105, 29 Cal.Rptr.3d 249, 112 P.3d 636.)

The court found Code of Civil Procedure section 437c, subdivision (f)(2), "can easily be so interpreted" because "that subdivision merely states that 'a *party* may not' make a motion that violates its provisions." (*Le Francois v. Goel*, *supra*, 35 Cal.4th at p. 1105, 29 Cal.Rptr.3d 249, 112 P.3d 636.) "It says nothing limiting the *court's* ability to act." (*Ibid.*) The "question [was] a bit more complex regarding [Code of Civil Procedure] section 1008," because the language of "the statute and its legislative history suggest that it has a broader meaning and does restrict the court's authority to act on its own." (*Ibid.*) After weeding through the complexities, including the legislative intent, the court concluded both statutes "limit the parties' ability to file repetitive motions but do not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors." (*Id.* at p. 1107, 29 Cal.Rptr.3d 249, 112 P.3d 636.)

Our Supreme Court noted that a judge may act on his or her own motion "whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion," "although any such communication should never be ex parte." (*Le Francois v. Goel*, *supra*, 35 Cal.4th at p.1108, 29 Cal.Rptr.3d 249, 112 P.3d 636.) "If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief." (*Ibid.*) "The court need not rule on any suggestion that it should reconsider a previous ruling and, without more, another party would not be expected to respond to such a suggestion." (*Ibid.*) "To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion—something we think will happen rather rarely—it should inform the parties of this concern, solicit briefing, and hold a hearing." (*Ibid.*) "Then, and only then, would a party be expected to respond to another party's suggestion that the court should reconsider a previous ruling." (*Id.* at pp. 1108-1109, 29 Cal.Rptr.3d 249, 112 P.3d 636.) This procedure provides a reasonable balance between the conflicting goals of limiting repetitive litigation and permitting a court to correct its own erroneous interim orders. (*Id.* at p. 1109, 29 Cal.Rptr.3d 249, 112 P.3d 636.)

Because the court addressed only interim orders in the *Le Francois* decision, and noted in a footnote that "[w]hat we say about the court's ability to reconsider *interim* orders does not necessarily apply to *final* orders, which present quite different concerns" (*La Francois v. Goel*, *supra*, 35 Cal.4th at p. 1105, fn. 4, 29 Cal.Rptr.3d 249, 112 P.3d 636), it was unclear whether or how the analysis for final orders would differ. This question was addressed in *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 70 Cal.Rptr.3d 691.

In *Barthold*, the judgment of dissolution provided the wife would get a bonus if the ****863** house was listed for sale and sold within a certain amount of ***212** time. (*In re Marriage of Barthold*, *supra*, 158 Cal.App.4th at p. 1304, 70 Cal.Rptr.3d 691.) After the house was sold, the husband argued the wife was not entitled to the listing bonus and the wife moved unsuccessfully to enforce her entitlement to it. (*Id.* at pp. 1304-1305.) The wife filed a motion for reconsideration, which the husband opposed. (*Id.* at pp. 1305-1306, 70 Cal.Rptr.3d 691.) Although the trial court determined the wife's motion did not meet the statutory requirements of Code of Civil Procedure section 1008, the judge said he realized he had made a mistake in denying her original motion, by " 'completely miss[ing] the most important point' " raised by the wife. (Barthold, at p. 1306.) The judge then granted the wife's reconsideration motion and found her entitled to the listing bonus. The husband appealed.

The Court of Appeal affirmed. The husband argued, among other things, that the court's inherent authority to reconsider orders only extended to interim rulings. (*In*

re Marriage of Barthold, supra, 158 Cal.App.4th at p. 1312, 70 Cal.Rptr.3d 691.) The court noted "[it] read the Supreme Court's footnote simply as a cautionary statement that its holding in *Le Francois* may not apply to *all* final orders, an issue not examined in that case inasmuch as the order under review was interim." (*Ibid.*) The court further explained Code of Civil Procedure section 1008, subdivision (e), specifically states it applies to all applications to reconsider any order, whether interim or final. (*Ibid.*) Accordingly, the court held that "a court may reconsider final as well as interim orders on its own motion." (*Ibid.*) In a footnote, the court did, however, add a caveat that "th[e] appeal d[id] not present, and [it] therefore d[id] not decide, the issue whether a trial court can reconsider an appealable order on its own motion after the time to appeal from that order has expired." (*Id.* at p. 1313, fn. 9, 70 Cal.Rptr.3d 691; compare with, *Safaie v. Jacuzzi Whirlpool Bath, Inc.* (2011) 192 Cal.App.4th 1160, 1173, 122 Cal.Rptr.3d 344 [*Le Francois* does "not state or suggest a trial court has the authority to reconsider *final orders* after they have been affirmed on appeal"].)

The court upheld the trial court's use of its inherent authority, explaining that while the wife submitted new evidence in support of her motion, "the judge stated that the basis for his ruling was his rereading of the papers submitted with the original motion, and the order did not rely on or even mention [the wife's] additional evidence." (*In re Marriage of Barthold, supra*, 158 Cal.App.4th at p. 1309, 70 Cal.Rptr.3d 691.) The *Barthold* court "stress[ed] that in order to grant reconsideration on its own motion, the trial court must conclude that its earlier ruling was wrong, and change that ruling *based on the evidence originally submitted*." (*Id.* at p. 1314, 70 Cal.Rptr.3d 691.)

[6]We later agreed with the *Barthold* court's decision in *In re Marriage of Herr* (2009) 174 Cal.App.4th 1463, 95 Cal.Rptr.3d 464. Specifically, we explained that the "trial court's reconsideration on its own motion in *Barthold* was proper ***213** because it limited itself to changing its mind based on the evidence submitted in connection with the wife's original motion." (*In re Marriage of Herr*, at pp. 1469-1470, 95 Cal.Rptr.3d 464.) In contrast, because the trial court in *Herr* reexamined the factual issues after directing the parties to submit new declarations and present additional evidence, its action constituted an order granting a new trial and did "not fall under the rubric of 'reconsideration.' " (*Id.* at p. 1465, 95 Cal.Rptr.3d 464.) "Although a trial court has inherent authority to correct an ****864** erroneous ruling or order on its own motion, it has no inherent authority to order a new trial." (*Ibid.*)

B

Application to the Court's Reconsideration of the February 21 Order

[7]Wife attempts to distinguish *Le Francois* and *Barthold* on the grounds that "[n]either of th[o]se two cases involved the modification of a *final* order awarding temporary spousal support" governed under the sections applicable here, and argues *Gruen* and *Freitas* are controlling. She further argues the court improperly reconsidered the February 21 Order based on husband's "ex parte" communications. We disagree.

The principles espoused in *Le Francois* and *Barthold* are not circumscribed to the subject matter of the underlying cases or limited to the statutes at issue therein. In *Le Francois*, our Supreme Court analyzed statutes that traverse all types of subject matter areas, i.e., Code of Civil Procedure sections 1008 and 437c, subdivision (f)(2). (*Le Francois v. Goel, supra*, 35 Cal.4th at p. 1096, 29 Cal.Rptr.3d 249, 112 P.3d 636.) The question before the court was whether a statute "can validly limit the court's authority to act on its own motion to correct its own errors." (*Id.* at p. 1104, 29 Cal.Rptr.3d 249, 112 P.3d 636.) The court explained that a statute "violates the separation of powers doctrine embodied in the California Constitution" if it seeks to "defeat or materially impair the court's exercise of its inherent constitutional authority to reconsider its own interim orders." (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 111, 50 Cal.Rptr.3d 208.) In *Barthold*, the court considered, in pertinent part, whether a trial court's inherent authority, as explained in *Le Francois*, may extend to final orders and answered the question in the affirmative. (*In re Marriage of Barthold, supra*, 158 Cal.App.4th at pp. 1312-1313, 70 Cal.Rptr.3d 691.) The *Le Francois* and *Barthold* principles apply with equal force to all cases in which a court uses its inherent authority to reconsider a prior order.

If the Family Code statutes were read to preclude a court from reconsidering a temporary support order sua sponte to correct its own error, the interpretation would clearly raise separation of powers concerns, as discussed ***214** in *Le Francois*. Further, if the statutes were read to allow a court to sua sponte reconsider a prior erroneous temporary support order, but to preclude the court from retroactively modifying the order, the statutes would strip the court of its ability to *effect* the use of its inherent authority. In other words, it would *practically* render such authority meaningless by placing temporal restrictions on the court's ability to correct its error—tying it to a *party's* filing of a motion or order to show cause. Such a proposition cannot be squared with *Le Francois* either because it would require a court to subject the parties to an erroneous order even when the court realizes it misunderstood or misapplied the law. This would result in the miscarriage of justice our Supreme Court warned against.

We heed our Supreme Court's directive in *Le Francois*, reading the statutes in a manner to avoid the constitutional issue of separation of powers. (*Le Francois v. Goel*, *supra*, 35 Cal.4th at p. 1105, 29 Cal.Rptr.3d 249, 112 P.3d 636.) Thus, we read the statutes as *not* applying to the court's authority to reconsider its prior rulings on its own motion *to correct an error*. (*Ibid.*) This interpretation does not implicate the decisions in *Gruen*, *Freitas*, and other cases interpreting the statutes, because none of those cases applied the statutes in the context of a trial court seeking to amend its own erroneous order sua sponte ****865** without consideration of additional or new evidence.[5] Accordingly, our interpretation does not nullify the statutes or conflict with the cases interpreting those statutes.

Here, the trial court explained that it was reconsidering the February 21 Order on its own motion because, while there was no math error, there were three other factors it wanted to address. As wife acknowledged, when the court reconsidered the February 21 Order, "there ha[d] been no *additional findings or new evidence presented whatsoever*." The trial court's reconsideration on its own motion was proper "because it limited itself to changing its mind based on the evidence submitted in connection with the [parties'] original motion[s]." (*In re Marriage of Herr*, *supra*, 174 Cal.App.4th at pp. 1469-1470, 95 Cal.Rptr.3d 464; see *In re Marriage of Barthold*, *supra*, 158 Cal.App.4th at p. 1314, 70 Cal.Rptr.3d 691.)

Wife further argues the court did not have inherent authority to reconsider the order because it acted in contravention of *Le Francois* when it revisited and modified the February 21 Order based on "ex parte" communications from husband, i.e., the e-mails on February 22 and 23. Wife mischaracterizes the nature of the communications. (*Le Francois v. Goel*, *supra*, 35 Cal.4th at p.1108, 29 Cal.Rptr.3d 249, 112 P.3d 636.)

***215** [8] [9]"An ex parte communication is one where a party communicates to the court *outside* the presence of the other party." (*Nguyen v. Superior Court* (2007) 150 Cal.App.4th 1006, 1013, fn. 2, 58 Cal.Rptr.3d 802; Black's Law Dict. (8th ed. 2004) p. 296 [an ex parte communication includes "[a] communication between counsel and the court when opposing counsel is not present"].) The prohibition against ex parte communication is " 'in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue.' " (*Mathew Zaheri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1317, 64 Cal.Rptr.2d 705.)

It is undisputed that wife's counsel was included on all e-mails between husband's counsel and the court on the issue of reconsideration of the February 21 Order. In fact, the pertinent e-mails were attached to *her* counsel's declaration in support of her opposition to reconsideration of the February 21 Order, showing her counsel was copied on all those communications. Further, wife's counsel responded to a number of those e-mails detailing wife's opposition. While these communications occurred in an informal setting, there is simply no support for wife's assertion that those e-mails were ex parte communications.

[10]The court's reconsideration of the February 21 Order in response to husband's e-mails was furthermore permissible. "[I]f a court believes one of its prior orders was erroneous, it may correct that error no matter how it came to acquire that belief." (*In re Marriage of Herr*, *supra*, 174 Cal.App.4th at p. 1469, 95 Cal.Rptr.3d 464; see *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1248, 104 Cal.Rptr.3d 145, 223 P.3d 15 [it is immaterial what may have triggered a trial court's insight that an order might be erroneous].)

Turning to wife's argument that the court's inherent authority to reconsider its orders is limited to interim orders, we agree with *Barthold* that such authority may extend to final orders, such as the ****866** order at issue here. (*In re Marriage of Barthold*, *supra*, 158

Cal.App.4th at p. 1312, 70 Cal.Rptr.3d 691.) The order in *Barthold* was like the 2-21 Order in that it was a final order subject to appeal, but the time for appeal had not yet run at the time the judge reconsidered it. (*Id.* at p. 1313, fn. 9, 70 Cal.Rptr.3d 691.) We see no reason to distinguish this case from *Barthold.*

We also note the court's reconsideration did not run counter to the policy rationale underlying the Family Code statutes that the parties should be entitled to rely on the amount of a temporary support order without the threat of having to repay or credit the other spouse or to pay additional sums in the future. (*In re Marriage of Gruen, supra,* 191 Cal.App.4th at p. 639, 120 Cal.Rptr.3d 184.) The court notified the parties that it would reconsider the 2-21 Order a few days after it was issued and prior to the March effective dates. Additionally, the 2-21 Order was still subject to appeal when the court reconsidered it. Thus, ***216** wife had no settled expectations regarding the effect of the February 21 Order when the March 23 Order was issued. Accordingly, we conclude the court had inherent authority to reconsider the February 21 Order to correct its error and apply its modification retroactively.[6]

II

The Court Did Not Violate Wife's Due Process Rights

[11]Wife argues *Le Francois* required the court to inform the parties of the concern with the order, solicit briefing, and hold a hearing, and "the trial court did none of these things," violating her due process rights. Not true.

First, wife received notice of the court's intent to reconsider the February 21 Order on February 23, 2017—the day after the order was served. The judge sent two e-mails on February 23, 2017, first stating, "I have the authority to modify the orders and am considering doing so," and later affirming, "[p]ursuant to the holding in Le Francois v. Goel (2005) 35 Cal.4th 1094, 29 Cal.Rptr.3d 249, 112 P.3d 636, I have the authority and ability to reconsider a ruling I made sua sponte which is exactly what I'm going to do." She also advised the reconsideration would address "[t]he issue [of] what amount of pendente lite spousal shall be paid."

[12]Wife repeatedly argues the March 23 Order is procedurally deficient because the trial court did not formally file a motion or an order to show cause prior to issuing its revised ruling. But there is plainly no requirement for a *court* to file a *motion* to be considered by itself. *Parties* file *motions* and *courts* issue *orders* on those motions. (*Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 187, 121 Cal.Rptr.2d 405 ["Clearly, trial courts do not make applications, motions, or renewals of motions to themselves"].)

[13]There are also no specific procedural requirements associated with a ****867** court's inherent authority to reconsider its own prior order—and wife does ***217** not cite to any authority to the contrary. As we noted in *Herr,* a judge's inherent authority to reconsider and correct erroneous orders is "independent of the statutory limitations imposed on reconsideration motions initiated by the parties." (*In re Marriage of Herr, supra,* 174 Cal.App.4th at p. 1469, 95 Cal.Rptr.3d 464.) While wife alternatively argues husband was required to file a motion or serve notice that the 2-21 Order was going to be modified, the court's reconsideration of the 2-21 Order was made sua sponte and, therefore, husband was not required to file a formal motion for reconsideration under Code of Civil Procedure section 1008.

Second, the court solicited briefing regarding its reconsideration of the order and the parties each filed a brief. While wife requested that any reconsideration proceed under Code of Civil Procedure section 1008 and "by the briefing Code," there are no specific page requirements when a court acts pursuant to its inherent authority. California Rules of Court rule 5.2(g), provides that "[i]n the exercise of the court's jurisdiction under the Family Code, if the course of proceeding is not specifically indicated by statute or these rules, any suitable process or mode of proceeding may be adopted by the court that is consistent with the spirit of the Family Code and these rules." Wife does not argue that she would have benefited from more allowable briefing pages, that she would have made additional arguments, or that she was prejudiced by the five-page limit. Thus, we have no cause to find error. (See Cal. Const., art. VI, § 13 [fundamental precept of appellate jurisprudence is error that is not harmful or prejudicial is not reversible].)

Third, while the court did not hold a hearing, it did invite the parties to argue the issues but indicated it "prefer[red] a 5 page written argument from each of [them]." Wife argues she requested that the court "adopt a briefing and hearing schedule that complied with the Code" but the record shows she only asked for "the standard briefing protocol and schedule." Wife did not ask for a hearing on

the court's reconsideration of the 2-21 Order. Wife's request for a *hearing* schedule pertained to her request for an "expedited hearing date and briefing schedule" to seek relief from the court "to address [husband's] failure to comply with the Order After Hearing by failing to make the first spousal support payment that was due on March 1, 2017." The court responded that wife would have to file an appropriate motion because the matter was not before the court.

[14]Accordingly, the court gave the parties the opportunity to request a hearing and wife cannot now complain of her failure to do so. Moreover, wife makes no argument or showing that she was prejudiced by the lack of an oral argument. Wife argued her position in the e-mail exchanges with husband and the court on February 23, 2017, and also in the briefing she filed with the ***218** court. We note the opportunity to be heard does not necessarily compel an oral hearing. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1247, 82 Cal.Rptr.2d 85, 970 P.2d 872.)

Wife cites two cases for the proposition that "[s]imilar failures by trial courts to satisfy due process in taking *sua sponte* acts have resulted in reversal." Neither case is similar, as she contends. In *Bricker v. Superior Court* (2005) 133 Cal.App.4th 634, 35 Cal.Rptr.3d 7, "petitioner was not notified prior to the readiness conference that [the court] was considering dismissing her appeals." (*Id.* at p. 639, 35 Cal.Rptr.3d 7.) "At the beginning of the readiness conference, and without even mentioning to ****868** the parties at that time that it was considering the question, [the court] announced its decision that petitioner had no right to appeal. [The court's] sua sponte ruling, which effectively dismissed petitioner's appeals from the 11 small claims judgments, plainly violated petitioner's due process rights." (*Ibid.*) The trial court was directed to "properly notice and hear the dismissal matter anew, permitting the parties to present evidence and argument concerning whether petitioner's appeals should be permitted to proceed." (*Ibid.*)

In *Moore v. California Minerals etc. Corp.* (1953) 115 Cal.App.2d 834, 252 P.2d 1005, the trial court essentially granted an unnoticed motion for judgment on the pleadings following the parties' opening statements. (*Id.* at pp. 835-836, 252 P.2d 1005.) The trial court found the answer failed to deny the allegations of the complaint and raised no issue as a matter of law. (*Id.* at p. 836, 252 P.2d 1005.) The appellate court reversed, concluding defendant's due process rights had been violated. (*Id.* at pp. 836-837, 252 P.2d 1005.) "The ruling came as a surprise to defense counsel, who had no opportunity to point out the sufficiency of the answer to raise an issue as to [the merits]." (*Id.* at p. 836, 252 P.2d 1005.) "The parties were prepared to go to trial, and but for the precipitate and unexpected action of the court would have done so." (*Ibid.*) The appellate court explained that "[e]lementary principles of due process support [the] conclusion that if, during a trial, the court, *sua sponte*, unearths a point of law which it deems to be decisive of the cause, the party against whom the decision impends has the same right to be heard before the decision is announced that he has to produce evidence upon the issues of fact." (*Id.* at p. 837, 252 P.2d 1005.)

In contrast to the circumstances in *Bricker* and *Moore*, wife had ample notice of the court's reconsideration of the February 21 Order, was allowed to file a brief in response (and did file such a brief), and was given the opportunity to make her arguments. There was no due process violation.

***219** DISPOSITION

The trial court's order is affirmed. Husband shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Hull, Acting P.J.

Hoch, J., concurred.

All Citations

24 Cal.App.5th 201, 233 Cal.Rptr.3d 855, 18 Cal. Daily Op. Serv. 5526, 2018 Daily Journal D.A.R. 5432

Footnotes

[1] All further section references are to the Family Code unless otherwise stated.

[2] The disputed facts are not discussed because they are immaterial to resolution of the case.

[3] Wife does not argue that the evidence was insufficient to support the court's reconsidered 3-23 Order.

[4] Wife cites several other cases finding a trial court lacked jurisdiction to retroactively modify a temporary spousal support order, e.g., *In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1318, 172 Cal.Rptr.3d 699 [trial court lacked jurisdiction to retroactively modify temporary order because it did not reserve jurisdiction to do so] and *In re Marriage of Sabine & Toshio M.* (2007) 153 Cal.App.4th 1203, 1213, 63 Cal.Rptr.3d 757 [trial court has no discretion to waive or forgive part of final support arrearages debt]. Those cases do not further the analysis for purposes of her argument and are, therefore, not addressed in greater detail.

[5] Relying on *In re Marriage of Freitas, supra*, 209 Cal.App.4th at pages 1068-1069, 147 Cal.Rptr.3d 453, wife argues the court was required to find a change of circumstance warranting the downward modification of the temporary support award. Because the court merely corrected its own erroneous order and did not modify it based upon additional evidence (the circumstances at issue in *Freitas* and the cases cited therein), there is no basis for applying such a requirement here.

[6] Wife argues the court erred in finding the disentitlement doctrine was inapplicable. The disentitlement doctrine was codified in the context of dissolution of marriage proceedings in Code of Civil Procedure section 1218, subdivision (b), which provides: "Any party, who is in contempt of a court order or judgment in a dissolution of marriage, dissolution of domestic partnership, or legal separation action, shall not be permitted to enforce such an order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party." We agree with the trial court that the disentitlement doctrine was inapplicable here because the court notified the parties that it was reconsidering the 2-21 Order prior to the March 1, 2017, payment date, and the court retroactively modified the order. Further, husband was not attempting to enforce the 2-21 Order against wife—wife was the one seeking to enforce the order against husband.

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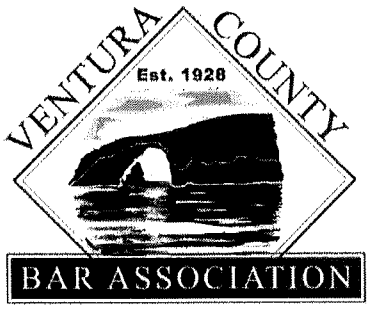

Barristers BTG – January 20, 2024

Session 2

Case Study 12

Matthew Zaheri Corp. v. New Motor Vehicle Bd.

55 Cal.App.4th 1305, 64 Cal.Rptr.2d 705, 97 Cal. Daily Op. Serv. 4739, 97 Daily Journal D.A.R. 7817

MATHEW ZAHERI CORPORATION et al.,
Plaintiffs and Appellants,
v.
NEW MOTOR VEHICLE BOARD, Defendant and Respondent; MITSUBISHI MOTOR SALES OF AMERICA, INC., Real Party in Interest and Respondent.

No. C022981.
Court of Appeal, Third District, California.
June 20, 1997.

[Opinion certified for partial publication. *]

SUMMARY

Following administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, the dealer petitioned for a writ of administrative mandate, seeking to overturn the board's decision in favor of the franchisor on the ground that the dealer was deprived of a fair hearing because of ex parte communication between the franchisor's counsel and the administrative law judges (ALJ's). The trial court denied the petition. (Superior Court of Sacramento County, No. CV379993, Ronald W. Tochterman, Judge.)

The Court of Appeal affirmed. The court initially held that counsel for the franchisor did not secretly provide the board, through the ex parte communication, with evidence that the dealer made threats to counsel. The trial court found that counsel told the ALJ that he feared for his and his cocounsel's safety. In context, counsel said no more than that the dealer presented a potential threat because he was unable to maintain his composure under the stress of trial adversity, which had a lesser propensity to impugn the dealer's veracity than the assertion that the dealer "made a threat." The court also held that the ex parte communication did not violate Gov. Code, § 11513, which limits evidence to the admissible evidence introduced in the hearing. The ex parte communication could be characterized as "evidence" only if the information was considered by the ALJ for its bearing on the issues resolved by the findings in his proposed decision. Although the court found that the ex parte communication was a violation of legal ethics on the part of counsel or the ALJ's, the court held that this fact did not necessitate reversal of the board's decision, since the misconduct was not shown to be prejudicial as a miscarriage of justice, or as intentional and sufficiently heinous to warrant reversal as a punishment ***1306** or because it shows bias on the part of the tribunal. (Opinion by Blease, Acting P. J., with Sparks and Callahan, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1a], [1b])
Administrative Law § 48--Administrative Actions--Adjudication-- Evidence--Ex Parte Communication--Trial Court's Findings as to Potential Threatening Behavior of Litigant.
In administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, counsel for the franchisor did not secretly provide the board, through an ex parte communication, with evidence that the dealer made threats to counsel. Counsel told the administrative law judge that he feared for his and his cocounsel's safety. However, this was not the same as asserting that the dealer "made a threat." In ordinary usage, "to make a threat" is to make a threatening statement. In context, counsel said no more than that he felt threatened by the dealer's alleged behavior, his uncontrolled crying or sobbing in a public hearing, i.e., that the dealer presented a potential threat because he was unable to maintain his composure under the stress of trial adversity. This had a lesser propensity to impugn the dealer's veracity than the assertion that he "made a threat."

([2])
Appellate Review § 152--Scope of Review--Sufficiency of Evidence-- Consideration of Evidence--Substantial Evidence Rule--Presumption in Favor of Judgment.
In reviewing a finding of facts, the appellate court first applies the substantial evidence rule and defers to the trier of fact where the inferences are conflicting. The appellate court accepts as true the actual and unambiguous determinations of fact in the trial court's opinion, notwithstanding the absence of a statement of decision.

Second, the appellate court presumes that the judgment is correct. As to factual matters not actually and unequivocally determined in the opinion of the trial court, the appellate court implies any necessary findings in support of the judgment that are supported by the evidence.

([3])
Administrative Law § 53--Administrative Actions--Adjudication-- Evidence--Material Not Offered in Evidence--Ex Parte Communication--Regarding Potential Threatening Behavior of Litigant.
In administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, an ex ***1307** parte communication from the franchisor's counsel to the administrative law judge (ALJ), that counsel felt threatened by the dealer's behavior, did not violate Gov. Code, § 11513, which limits evidence to the admissible evidence introduced in the hearing. The ex parte communication could be characterized as "evidence" within the ambit of Gov. Code, § 11513, only if the information was considered by the ALJ for its bearing on the issues resolved by the findings in his proposed decision. However, since the information was not so considered, it did not constitute evidence taken or evidence admitted, nor could counsel be characterized as an opposing witness (Evid. Code, § 140; Code Civ. Proc., § 1878). The fact that the ALJ was made aware of counsel's concern for his safety and decided not to proceed without security did not mean the information inevitably colored his view of the dealer and his integrity. An ALJ, having observed that a litigant is acting irrationally, may decide that the presence of a police officer is a prudent safeguard without drawing adverse conclusions as to the veracity of the litigant. The same is true if the impetus is increased by an expression of concern by an opposing counsel.

([4a], [4b], [4c])
Administrative Law § 48--Administrative Actions--Adjudication--Evidence--Ex Parte Communication--As Violation of Legal Ethics.
In administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, an ex parte communication from the franchisor's counsel to the administrative law judge (ALJ), that counsel felt threatened by the dealer's behavior, was a violation of legal ethics on the part of counsel or the ALJ. Although an ALJ is not a "judicial officer" under Rules Prof. Conduct, rule 5-300(B) (communications to judge or judicial officer), the law of legal ethics is not limited to written law; it also partakes of a common law or "unwritten law" (Code Civ. Proc., § 1899) aspect. There is no basis to distinguish between an ALJ and a judge in the judicial branch for purposes of the ethical strictures against ex parte contacts. Hence, the same standard applied. While there are exceptions to the general standard for improper ex parte communication, the only overt claim of exception in this case was for communications made in the context of settlement proceedings, and there was no showing of how the communication was germane to settlement. Although concern for personal safety could warrant ex parte communication, there was no such emergency in this case. Nor was there any apparent reason the communication was not fully disclosed after the immediacy of the perceived danger abated.

([5])
Administrative Law § 42--Administrative Actions--Adjudication--Due Process of Law--Denial of Fair Hearing Based on Misconduct of Court or Counsel.
Misconduct of court or counsel is a ***1308** potential ground of reversal in a civil action, and the misconduct can be a ground for overturning an administrative adjudication for denial of a fair hearing.

([6])
Attorneys at Law § 39--Discipline of Attorneys--Violation of Rules of Professional Conduct--Ex Parte Communication.
The basic standard for improper ex parte communication is stated several different ways, e.g., communications "regarding any issue in the proceeding," "upon the merits of a contested matter," and "concerning a pending or impending proceeding." It is, in essence, a rule of fairness meant to ensure that all interested sides will be heard on an issue. It extends to communication of information in which counsel knows or should know the opponents would be interested. Construed in aid of its purpose, the standard generally bars any ex parte communication by counsel to the decisionmaker of information relevant to issues in the adjudication. There are exceptions to the general standard, where other interests supervene.

([7])
Administrative Law § 48--Administrative Actions--Adjudication-- Evidence--Ex Parte Communication--As Violation of Legal Ethics--Failure to Show Prejudice or Other Ground for Reversal.
In administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, the fact that an ex parte communication from the franchisor's counsel to the administrative law judge (ALJ), that counsel felt threatened by the dealer's

behavior, was a violation of legal ethics on the part of counsel or the ALJ did not necessitate reversal of the board's decision in favor of the franchisor. To warrant reversal, such misconduct must be shown to be prejudicial as a miscarriage of justice, or as intentional and sufficiently heinous to warrant reversal as a punishment or because it shows bias on the part of the tribunal. Prejudice connotes that the board's decision stemmed, at least in part, from the asserted misconduct, and such a conclusion was not compelled from the record in this case.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 424, 433, 444.]

([8])
Administrative Law § 42--Administrative Actions--Adjudication--Due Process of Law--Denial of Fair Hearing Based on Misconduct of Court of Counsel--Ex Parte Communication.
In administrative proceedings before the New Motor Vehicle Board to resolve a dispute between a dealer and a franchisor, an ex parte communication from the franchisor's counsel to the administrative law judge (ALJ), ***1309** that counsel felt threatened by the dealer's behavior, did not violate the dealer's right to due process of law, where the board did not actually use the illicit information in reaching its decision. When an administrative adjudicator uses evidence outside the record, there is a denial of a fair hearing because, as to that evidence, there has been no hearing. If a trial-type hearing is required by due process, its deprivation a fortiori violates the due process precept. The prohibitions against improper ex parte communications are measures imposed to avert such due process violations, and they also aid in preserving the due process requirement of an unbiased tribunal and the public interest in avoiding the appearance of bias on the part of decisionmakers. However, the communication in this case could not be characterized as the type presenting such a due process violation. If a reviewing court appropriately concludes that the agency did not rely upon the information in the ex parte communication, and that the decisionmaker was not guilty of actual misconduct giving rise to a presumption of bias, there is no deprivation of a fair hearing and no denial of due process.

COUNSEL
Eisen & Johnston, Jay-Allen Eisen, Marian M. Johnston, Tuel & Flanagan, Michael J. Flanagan and Christopher J. Gill for Plaintiffs and Appellants.
Daniel E. Lungren, Attorney General, S. Michele Inan, Christine B. Mersten and Damon M. Connolly, Deputy Attorneys General, for Defendant and Respondent.
Latham & Watkins, J. Thomas Rosch, Richard B. Ulmer, Jr., Gibson, Dunn & Crutcher, Elizabeth A. Grimes, Cori L. MacDonneil and Stephanie Yost Cameron for Real Party in Interest and Respondent.

BLEASE, Acting P. J.

This is an appeal from a judgment denying a petition for a writ of administrative mandamus under Code of Civil Procedure section 1094.5 and Vehicle Code section 3068.

Mathew Zaheri Corporation and Mathew Zaheri (Zaheri) contend the trial court erred in ruling that undisclosed ex parte communication between opposing counsel and administrative law judges did not deprive Zaheri of a fair trial. ***1310**

We will affirm the judgment, concluding that the trial court properly examined the circumstances for prejudice and did not abuse its discretion in determining that the trial was fair.[1]

Facts and Procedural Background

Zaheri is a new motor vehicle dealer franchised to sell Mitsubishi vehicles in Hayward. On February 3, 1992, Zaheri tendered a protest to the New Motor Vehicle Board (Board), under Vehicle Code sections 3050 and 3065, claiming that, after an audit, franchisor Mitsubishi Motor Sales of America, Inc. (Mitsubishi) had unfairly charged back $137,444.79 in warranty service claims it had paid Zaheri.

A hearing was conducted by Douglas Drake, an administrative law judge (ALJ) for the Board. He prepared a written opinion which was adopted by the Board. The opinion concludes that part of the charge back, $57,054.68, was unfair because it was predicated upon Zaheri's failure to obtain prior written authorization for services in cases in which Mitsubishi's warranty policy and procedures manual had been modified to permit postrepair written authorization. Notwithstanding, the opinion concludes that Mitsubishi was entitled to a full offset of the charge back because it proved that the Zaheri dealership had submitted fraudulent warranty claims totaling more than that amount.

Zaheri then filed a petition seeking to overturn the Board's decision on grounds the evidence does not support the offset granted Mitsubishi and that he was deprived of a fair hearing because of ex parte contacts between counsel for Mitsubishi and key representatives of the Board.

The claim of ex parte communications was tried to the court on depositions, declarations, and documentary evidence. The court issued a written opinion which explained its reasons for denying the petition. The written opinion and uncontroverted evidence pertaining to the ex parte communications claim disclose the following.

Sam Jennings is the chief ALJ and the executive secretary for the Board. As the chief ALJ he assigns matters to be heard by the Board's ALJ's. At Zaheri's request we take judicial notice that the job description for chief ALJ includes as one duty the direction and supervision of other ALJ's. ALJ Jennings presided over a settlement conference in the Zaheri protest proceeding. ***1311**

At some point during discovery prior to the protest hearing, Elizabeth Grimes, one of two attorneys representing Mitsubishi, telephoned ALJ Jennings to complain that Zaheri attempted to intimidate or threaten prospective witnesses by telling them that he would fire them or sue them if they cooperated with Mitsubishi. Jennings responded that the complaint would have to be tendered by way of a noticed motion.

While the Zaheri protest was being heard by ALJ Drake, Robert Mackey, Mitsubishi's other attorney, asked to speak to ALJ Jennings. Mackey told Jennings that Mathew Zaheri had been crying and sobbing during the testimony of a witness, that Mackey believed this boded well for possible settlement, and that Mackey was very concerned for the safety of himself and Grimes.

ALJ Jennings spoke to ALJ Drake. He asked Drake if he had noticed any change in the environment of the hearing and whether he had seen Mathew Zaheri crying or sobbing uncontrollably. Drake said he had not seen Mathew Zaheri crying or sobbing but that Mathew Zaheri was acting irrationally or illogically. Jennings told Drake that Mackey was concerned for the safety of Grimes and himself.[2] Drake then told Jennings that he would not proceed with the protest hearing without security. Jennings told Drake he would arrange for a state police officer to be present in the hearing room. Jennings then arranged for the attendance of a state police officer at the hearing.[3]

Jennings told counsel for Zaheri, during the pendency of the hearing on the Zaheri protest, that Mackey had spoken to him and informed him that Mathew Zaheri had been sobbing uncontrollably in the hearing room and that Mackey believed there might now be an opportunity to settle the matter. However, Zaheri's counsel was not informed that Mackey told Jennings he feared for the safety of Mitsubishi's counsel or that Jennings related that to ALJ Drake, which was the cause of the attendance of the state police officer.

The trial court reasoned that Zaheri's claim was analogous to a claim that the tribunal was biased. Relying on California Administrative Mandamus (Cont.Ed.Bar 1989) sections 2.13-2.14, pages 41-42 the court concluded that ***1312** the standard for review of the Board's decision was whether the improper ex parte communications resulted in actual bias or a strong likelihood of such bias. It found that the standard was not satisfied by the evidence.

Zaheri appeals from the ensuing judgment.

Discussion

I

Zaheri contends the trial court erred in failing to overturn the Board's decision based upon improper ex parte communication. ([1a]) Zaheri claims that, under the trial court's findings: (1) Mitsubishi secretly provided the Board with evidence that Mathew Zaheri made threats and the Board acted upon it, (2) in violation of Government Code section 11513 and (3) Zaheri's constitutional right to due process of law. Mitsubishi replies that: (1) the trial court did not find that the ex parte communications included the assertion that Mathew Zaheri made threats, (2) there was nothing improper about the ex parte communications, hence no violation of the statutory or constitutional law, and, if the communication was improper, (3) Zaheri did not show that the Board's decisionmaking process was "irrevocably tainted," the showing he must make to overturn the decision.[4]

We will reach the following conclusions. Under the trial court's findings Mitsubishi's counsel did not tell ALJ Jennings that Mathew Zaheri made threats. The ex parte communication of Mackey's fear for his safety was improper, as was the failure to disclose this communication. However, the impropriety does not warrant a rehearing of Zaheri's protest.

A.

Mitsubishi is essentially correct concerning the findings. The trial court did not find that Mackey told ALJ Jennings that Mathew Zaheri had threatened counsel.

([2]) We apply the following standards to review the facts. First, we apply the substantial evidence rule and defer to the trier of fact where the inferences are conflicting. (See, e.g., 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 288, p. 300.) Applying this rule we accept as true the actual and unambiguous determinations of fact in the trial court's opinion, notwithstanding the absence of a statement of decision. (See, e.g., *id.*, § 264, pp. 271-272; cf., e.g., *People v. Butcher* (1986) 185 Cal.App.3d 929, 936-937 [229 Cal.Rptr. 910].) ***1313**

Second, we presume that the judgment is correct. As to factual matters not actually and unequivocally determined in the opinion of the trial court, we imply any necessary findings in support of the judgment which are supported by the evidence. (See, e.g., 9 Witkin, Cal. Procedure, *supra*, § 268, pp. 276-277.)

([1b]) The trial court found that Mackey told ALJ Jennings that he feared for the safety of himself and his cocounsel. This is not the same as asserting that Mathew Zaheri "made a threat"; in ordinary usage "to make a threat" is to make a threatening "statement" (see Evid. Code, § 225). In context, Mackey said no more than that he felt threatened by Mathew Zaheri's alleged behavior, his uncontrolled crying or sobbing in a public hearing, i.e., that Zaheri "presented" a potential threat because he was unable to maintain his composure under the stress of trial adversity. Notably, this has a lesser propensity to impugn Mathew Zaheri's veracity than the assertion that is the emotive linchpin of Zaheri's arguments, i.e., that he "made a threat."

B.

That brings us to the argument that the ex parte communication with the ALJ's that did occur violates the statutory and constitutional law.

1.

([3]) Zaheri argues that the ex parte communication violates Government Code section 11513.

Government Code section 11513 applies to the protest hearing by virtue of Vehicle Code section 3066. Vehicle Code section 3066 provides: "The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 of the Government Code apply to these proceedings."

This limits the evidence to the admissible evidence introduced in the protest hearing. As best we can make out, Zaheri's argument is that the information ALJ Drake received—Mackey's opinion that Mathew Zaheri presented a potential threat to opposing counsel—e.g., was "received as evidence," in derogation of the requirements of Government Code section 11513. ***1314**

The necessary premise of this argument is that the Board (i.e., ALJ Drake) relied upon this information for the purpose of making its findings. (See generally, Annot., Administrative Decision or Finding Based on Evidence Secured Outside of Hearing, and Without Presence of Interested Party or Counsel (1951) 18 A.L.R.2d 552.) This is implicit in Zaheri's rhetoric: "The Board's reliance on evidence received in secret, which appellants were given no opportunity to rebut, constitutes a failure to proceed as required by law."

However, the ex parte communication can be characterized as "evidence" within the ambit of section 11513 only if the information was considered by ALJ Drake for its bearing on the issues resolved by the findings in his proposed decision. If the information was not so considered, it is not "evidence ... taken" or "evidence ... admitted," nor can Mackey be characterized as an "opposing witness." (See Evid. Code, § 140; Code Civ. Proc., § 1878.)

The trial court did not find that Drake considered the information for that illicit purpose,[5] nor was such a finding compelled by the evidence adduced at trial.

Zaheri submits that since Drake was made aware of Mackey's concern for his safety and told ALJ Jennings that he would not proceed without security, the information "inevitably colored his view of Mr. Zaheri and his integrity." We reject the assertion of inevitability. Litigation can engender great emotional stress regardless

whether a litigant is as pure as the driven snow. An ALJ, having personally observed that a litigant is acting irrationally, may decide that the presence of a police officer is a prudent safeguard without drawing any adverse conclusions concerning the veracity of the litigant. The same is true if the impetus is increased by an expression of concern by an opposing counsel. Accordingly, Zaheri's claim that the ex parte communication resulted in a violation of section 11513 is not meritorious.

2.

([4a]) The only other pertinent subconstitutional "law" (Code Civ. Proc., § 1895) is the law of legal ethics, potentially applicable under the rubric of misconduct of the tribunal or of counsel. ([5]) Misconduct of court or counsel is a potential ground of reversal in a civil action, and can be a ground for overturning an administrative adjudication for denial of a fair hearing. ***1315**

([4b]) As appears, the ex parte communication in this case did violate the law of legal ethics. However, to warrant reversal such misconduct must be shown to be prejudicial as a miscarriage of justice or as intentional and sufficiently heinous to warrant reversal as a punishment or because it shows bias on the part of the tribunal. (See 9 Witkin, Cal. Procedure, *supra*, §§ 340, 348, and 360, pp. 346, 351, 363-364.) No such finding is compelled on this record.

In aid of its due process argument Zaheri points to various legal standards proscribing ex parte communications in particular contexts. For the most part these standards are not directly applicable to this setting, e.g., Zaheri points to canon 3(B)(7) of the California Code of Judicial Ethics,[6] and, by way of analogy, federal law and inchoate amendments to the California Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), Government Code sections 11430.10 and 11430.70, which do not become operative until July 1997.[7] ***1316**

Zaheri suggests that rule 5-300(B) of the Rules of Professional Conduct[8] is directly applicable and was violated by the ex parte communication in this case.

Zaheri notes that Formal Opinion No. 1984-82 of the State Bar Committee on Professional Responsibility and Conduct (1 Cal. Compendium on Prof. Responsibility, pt. II A) (hereafter opinion 84-82), concludes that an ALJ is a "judicial officer" under the Rules of Professional Conduct, former rule 7-108, the predecessor of rule 5-300(B) which contains substantially identical text. However that conclusion is incorrect.

Opinion 84-82 goes awry in asserting that Rules of Professional Conduct, former rule 7-108 is derived from the American Bar Association (ABA) Model Code of Professional Responsibility, disciplinary rule 7-110(B). Rather, the ABA rule is derived from the California rule. (See ABA proposed Code Prof. Responsibility (final draft July 1, 1969) DR 7-110(B), fn. 92, p. 105.) Former rule 7-108 carries forward the language of former rule 16 of our original rules of professional conduct adopted in 1928. (204 Cal. xciii-xciv.)

The rule was adopted long before the burgeoning of our present system of administrative adjudication and the associated developments in the law and legal usage. (See generally, Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions* 1939-49 (1950) 2 Stan.L.Rev. 285.) When Rules of Professional Conduct former rule 16 was adopted "judicial officer" had a settled meaning; it referred to persons who exercised judicial power under the tripartite division of state government. The usage was frequently employed to *distinguish* between the proper function of the (administrative) officials in the executive branch and those in the judicial branch. (See, e.g., *People v. Provines* (1868) 34 Cal. 520, 534; *People v. Bird* (1931) 212 Cal. 632, 641 [300 P. 23]; former Code Civ. Proc., § 282; Code Civ. Proc., § 1211.)

Thus an ALJ is not within the compass of the term "judicial official" as used in Rules of Professional Conduct, former rule 16. (See, e.g., 2A ***1317** Sutherland, Statutory Construction (5th ed. 1992) § 47.30, p. 262.) Nor did the term change its meaning when it was simply carried forward in subsequent regulations. (Cf., e.g., *Estate of Childs* (1941) 18 Cal.2d 237, 242-243 [115 P.2d 432, 136 A.L.R. 333].)

Nonetheless, the law of legal ethics is not limited to written law; it partakes of a common law or "unwritten law" (Code Civ. Proc., § 1899) aspect. (See, e.g., rule 1-100(A), Rules Prof. Conduct.)[9] There is no principled basis to distinguish between an ALJ and a judge in the judicial branch for purposes of the ethical strictures against ex parte contacts. Hence, we find the same standard applicable. (See generally, e.g., rule 5-300(B), Rules Prof. Conduct; canon 3(B)(7) of the Cal. Code Jud. Ethics; Gov. Code, § 11513.5, fn. 7, *ante*.)

Mitsubishi does not disagree. It notes that the general

standard for improper ex parte communication is limited to communications about "issue[s] in the proceeding" and argues that the communication here did not transgress that standard.

([6]) The basic standard is stated several different ways, e.g., "regarding any issue in the proceeding," "upon the merits of a contested matter," "concerning a pending or impending proceeding." We do not assign significance to the varying terminology. "It is, in essence, a rule of fairness meant to insure that all interested sides will be heard on an issue." (*Heavey v. State Bar* (1976) 17 Cal.3d 553, 559 [131 Cal.Rptr. 406, 551 P.2d 1238].) It extends to communication of information in which counsel knows or should know the opponents would be interested. (See *ibid.*) Construed in aid of its purpose, we conclude the standard generally bars any ex parte communication by counsel to the decisionmaker of information relevant to issues in the adjudication.

There are exceptions to the general standard, where other interests supervene. ([4c]) The only overt claim of exception advanced here is for communications properly made in the context of settlement proceedings. That exception could justify part of the communication between Mackey and ALJ Jennings. However, there is no showing how the information that Mackey feared for his safety and that of Grimes was germane to settlement.

There are circumstances in which a concern about personal safety could warrant ex parte communication with the tribunal. If immediate open disclosure would compromise the safety of the participants, e.g., if counsel ***1318** believed that an opposing party was unlawfully carrying a concealed weapon, counsel could communicate that information to the tribunal. However, there was no such an emergency in this case. Moreover, no reason appears why the communication should not be fully disclosed to the opponent after the immediacy of the perceived danger abates. (See Cal. Code Jud. Ethics, canon 3(B)(7)(d), fn. 6, *ante*.)

We conclude that the undisclosed communication of this information to ALJ Drake constituted misconduct on the part of Mackey[10] or of the ALJ's, e.g., in failing to promptly disclose the substance of the ex parte communication and to allow Zaheri an opportunity to respond. ([7]) Nonetheless, this does not compel reversal of the Board's decision. As related, to warrant reversal such misconduct must be shown prejudicial or intentional and heinous.

"Prejudice" connotes that the Board's decision stemmed, at least in part, from the asserted misconduct.[11] (See, e.g., *Sabella Southern Pac. Co., supra*, 70 Cal.2d at pp. 317-318.) As explained previously, that conclusion is not compelled on this record. Nor was the trial court compelled to find that the misconduct was "actual misconduct," i.e., known to be in violation of the law of legal ethics.[12] In keeping with the ordinary rule, we defer to the predominantly fact-based decisions of the trial court. (See, e.g., *People v. Louis* (1986) 42 Cal.3d 969, 984-988 [232 Cal.Rptr. 110, 728 P.2d 180]; cf. *Moran v. Board of Med. Examiners* (1948) 32 Cal.2d 301, 309 [196 P.2d 20].)

Accordingly, there is no warrant in the subconstitutional law for reversal of the trial court on appeal.

3.

([8]) Zaheri next contends the trial court erred in failing to overturn the Board's decision for violation of Zaheri's constitutional right to due process ***1319** of law. As appears, no such violation was made out and the contention of error is not meritorious.

Zaheri argues that any ex parte "receipt of evidence" violates due process. Like Zaheri's argument concerning violation of Government Code section 11513, the argument rests upon the implied premise that the Board *used* the illicit information in reaching its decision on the protest.[13] For the reasons that we have already given, this premise is untenable on this appeal.

When an administrative adjudicator uses "evidence" outside the record there is a denial of a fair hearing because, as to that "evidence," there has been no hearing at all, for the disadvantaged party has not been heard. (See, e.g., *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159 [217 P.2d 22, 18 A.L.R.2d 547].) If a trial-type hearing is required by due process of law (see 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 9.5, pp. 43-61), its deprivation a fortiori violates the due process precept.

The prohibitions against improper ex parte communications are measures imposed to avert this kind of due process violation. They also aid in preserving the due process requirement of an unbiased tribunal and the related public interest in avoiding the appearance of bias on the part of public decisionmakers. Zaheri does not identify any case law which holds that the violation of such a prohibition is itself a violation of the constitutional

due process precept.[14] We discern no persuasive reason to characterize an ex parte communication of the kind that occurred here as presenting such a due process violation.

If the trial court appropriately concludes that the agency did not rely upon the information provided in the ex parte communication, and that the ***1320** decisionmaker was not guilty of actual misconduct giving rise to a presumption of bias, there is no deprivation of a fair hearing and no denial of due process.[15] <2>II, III*

Disposition

The judgment is affirmed.

Sparks, J., and Callahan, J., concurred.

A petition for a rehearing was denied July 15, 1997, and appellants' petition for review by the Supreme Court was denied September 17, 1997.

. . . . . .

Footnotes

* See footnote 1, *post*, page 1310.

1 The Reporter of Decisions is directed to publish the opinion except for parts II. and III. of the Discussion.

2 The most disturbing aspect of this case is the trial court's rejection of the sworn assertions of ALJ Jennings, and to a lesser degree ALJ Drake and Mackey. They testified that they heard or said nothing about Mackey's fear for his and Grimes's personal safety. The trial court rejected this account based on evidence which we do not recount. We conclude that this matter is not material to the disposition of this appeal. The trial court could attribute these discrepancies to forgetfulness or even lies without contradicting its core conclusions in the matter. The trial court was not sitting as a disciplinary body. (See, e.g., *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321 [74 Cal.Rptr. 534, 449 P.2d 750].)

3 The form Jennings signed to request the state police coverage gives as the reason for service: "Hearing—Threats on administrative law judge."

4 The Board joins in Mitsubishi's brief.

5 Zaheri did not tender this statutory argument in the trial court. Therefore it is unremarkable that the trial court did not address it in its opinion.

6 Canon 3(B)(7), applicable to "members of the judiciary" (Cal. Code Jud. Ethics, preamble), in pertinent part, is as

follows:

"A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

"(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

"(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

"(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

"(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

"(e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so." (Cal. Code Jud. Ethics, canon 3(8)(7) [23 West's Cal. Codes Ann. Rules (Appen.) pt. 2 (1996 ed.) p. 714].)

7 Mitsubishi suggests that these APA standards are inapplicable both because of their future operative date and because of their absence from the list of applicable APA statutes in Vehicle Code section 3066, page 1313, *ante.ante.*

Neither party cites Government Code section 11513.5, the statute which presently addresses the subject of ex parte communications in proceedings governed by the APA. It too is absent from the list in Vehicle Code section 3066. In pertinent part, it is as follows: "Except as required for the disposition of ex parte matters specifically authorized by statute, a presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any party, including employees of the agency that filed the accusation, with any person who has a direct or indirect interest in the outcome of the proceeding, or with any person who presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication."

8 Rule 5-300(B) is as follows:

"(B) A member shall not directly or indirectly communicate with or argue to a judge or judicial officer upon the merits of a contested matter pending before such judge or judicial officer, except:

"(1) In open court; or

"(2) With the consent of all other counsel in such matter; or

"(3) In the presence of all other counsel in such matter; or

"(4) In writing with a copy thereof furnished to such other counsel; or

"(5) In ex parte matters."

9 Rule 1-100(A) in pertinent part provides: : "The prohibition of certain conduct in these rules is not exclusive.... Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."

10 Misconduct of counsel need not be intentional, i.e., an act performed with the knowledge that it is wrongful, prohibited by the law of legal ethics. (See, e.g., *People v. Bolton* (1979) 23 Cal.3d 208, 213-214 [152 Cal.Rptr. 141, 589 P.2d 396].) However, the term "misconduct" suggests that the conduct must at least be negligent in light of some legal duty of care.

11 Alternatively, one might use the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243] [after an examination of the entire cause, including the evidence, it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the misconduct].

12 If the trial court had found that ALJ Drake knew that the communication was improper and that he was obliged to disclose its substance to Zaheri, this would have afforded a strong presumption of prejudice on the ground of "actual bias." (See generally, *People v. Cooper* (1991) 53 Cal.3d 771, 835 [281 Cal.Rptr. 90, 809 P.2d 865].)

13 Zaheri also argues that there was a due process violation because the Board used the information in deciding to station a state police officer in the hearing room. He relies upon *Gibson v. Superior Court* (1982) 135 Cal.App.3d 774 [185 Cal.Rptr. 741]. *Gibson* is inapposite. In that case, arising on a writ petition, the question was whether the court could impose highly intrusive and dramatic security measures based upon ex parte information without affording the defendants a requested hearing. "Here, the deprivatory action is the creation of a courtroom environment which will distinguish petitioners' trial from those of other defendants and possibly deter some members of the public from attending." (*Id.* at p. 781.) The stationing of a single police officer on standby in an administrative hearing room presents no deterrence to public attendance and no analogous "deprivation."

14 The closest approach to such a holding is in *Sangamon Valley Television Corp. v. United States* (D.C. Cir. 1959) 269 F.2d 221 [106 App.D.C. 30]. There an interested party conveyed ex parte information to the tribunal, "[i]ts importance was great and perhaps critical," to the disposition of the merits. (*Id.* at p. 224.) The circuit court observed that "basic fairness requires such a proceeding to be carried on in the open." (*Ibid.*)

Sangamon Valley is not analogous to this case. The information was conveyed there for the purpose of influencing the disposition of the merits and in prejudicial violation of the agency's own rules forbidding any communication on the merits after the record was closed. (269 F.2d at pp. 224-225.)

15 Accordingly, we need not address the interesting question of the standard of harmless error for a constitutional due

process violation in a civil case. (See generally, e.g., *In re La Croix* (1974) 12 Cal.3d 146, 154 [115 Cal.Rptr. 344, 524 P.2d 816]; *United States v. Valle-Valdez* (9th Cir. 1977) 554 F.2d 911, 915-916, especially fn. 7; *Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 379 [54 Cal.Rptr.2d 781].)

* See footnote 1, *ante*, page 1310*ante*, page 1310.

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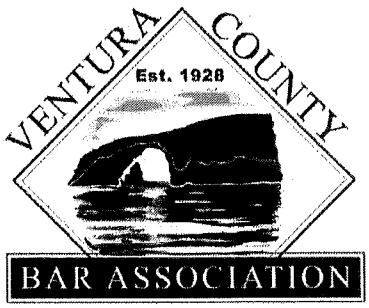

Barristers BTG – January 20, 2024

Session 2

Case Study 13

Haluck v. Ricoh Electronics, Inc.

151 Cal.App.4th 994
Court of Appeal, Fourth District, California.

James HALUCK et al., Plaintiffs and Appellants,
v.
RICOH ELECTRONICS, INC., et al., Defendants and Appellants.

No. G035681.
|
June 1, 2007.
|
As Modified June 21, 2007.
|
Review Denied Aug. 29, 2007.
|
Certiorari Denied April 14, 2008.
|
See 128 S.Ct. 1869.

Synopsis
Background: Employees sued their employer and certain of its employees for damages for statutory and common law discriminatory employment practices. The Superior Court, Orange County, No. 03CC10166, James M. Brooks, J., entered judgment on jury verdict in favor of defendants. Employees appealed, and defendants filed a protective cross-appeal and a motion for sanctions.

Holdings: The Court of Appeal, Rylaarsdam, J., held that:

[1] trial judge should not have permitted counsel for only one party to participate in viewing a videotape with him;

[2] trial judge's actions during trial constituted judicial misconduct;

[3] deposition testimony from non-party former employee should not have been admitted;

[4] trial judge's curative instructions were not enough to mitigate or cure his misconduct; and

[5] trial judge's misconduct warranted reversal of judgment and remand for a new trial with a different judge.

Reversed and remanded; motion for sanctions denied.

West Headnotes (18)

[1] **Trial**⚖Remarks of Judge
Trial⚖Conduct of judge

In conducting trials, judges should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side of the other.

8 Cases that cite this headnote

[2] **Trial**⚖Conduct of judge

A judge's conduct during trial must accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.

10 Cases that cite this headnote

[3] **Trial**⚖Requisites of fair trial

The trial of a case should not only be fair in fact, it should also appear to be fair.

8 Cases that cite this headnote

[4] **Trial**⚖Particular cases
Trial⚖Conduct of judge
Trial⚖Ruling or order

Trial judge in employment discrimination case should not have permitted counsel for only one party to participate in viewing a videotape with him during lunch break; contact between

defense counsel and the court dealt with a substantive matter—whether or not the videotape, to which plaintiffs objected, would be admitted.

1 Case that cites this headnote

[5] **Trial**⇨Ex Parte Communications

Generally, ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice.

1 Case that cites this headnote

[6] **Judges**⇨Standards, canons, or codes of conduct, in general
Trial⇨Conduct of judge

Trial judge's actions during employment discrimination case, in allowing and indeed helping to create a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer, constituted judicial misconduct. Code of Jud.Ethics, Canon 3(B)(3).

[7] **Pretrial Procedure**⇨Parties entitled to use and availability of deponent

Deposition testimony from non-party former employee should not have been admitted during employment discrimination case, where employee was not employed by employer at the time her deposition was taken, and the record did not reflect any showing of employee's unavailability. West's Ann.Cal.C.C.P. § 2025.620(b); West's Ann.Cal.Evid.Code § 1291(a)(2).

4 Cases that cite this headnote

[8] **Trial**⇨Conduct of judge
Trial⇨Objections and exceptions
Trial⇨In general; duty of court

Trial judge's use of a "soccer-style" "red card" procedure during employment discrimination case, to penalize and fine counsel for improper conduct, was inappropriate and violated the requirement of judicial decorum; after it was initiated, defendants' attorney was allowed to raise numerous objections, some of which were overruled, and to joke with the judge without being fined, while plaintiffs' lawyer was immediately given a "red card" when she attempted to address an objection. Code of Jud.Ethics, Canon 3(B)(3).

[9] **Trial**⇨Examination, credibility, and impeachment of witnesses

Trial judge's "aren't they clever" comment during employment discrimination case, which disparaged plaintiff's testimony and implied he was not telling the truth and that his lawyer was trying to sneak in otherwise inadmissible evidence, constituted misconduct.

[10] **Trial**⇨Examination, credibility, and impeachment of witnesses

A trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness.

3 Cases that cite this headnote

[11] **Trial**⇨Remarks of Judge

It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial.

[12] **Trial**⇨Role and Obligations of Judge
Trial⇨Admission of evidence in general
Trial⇨Control by court in general

It is the duty of the judge to control all proceedings during a trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

2 Cases that cite this headnote

[13] **Appeal and Error**⇨Remarks and conduct of judge

Although the general rule requires objection to preserve the right to appeal acts of judicial misconduct, failure to object does not preclude review when an objection and an admonition could not cure the prejudice caused by such misconduct, or where objecting would be futile.

[14] **Trial**⇨Irregularities in conduct of trial

Trial judge's curative instructions during employment discrimination case, that the jury should disregard any comments he made during trial, were not enough to mitigate or cure his misconduct and improper comments during trial; neither instruction was directed to any particular misconduct, so the jury would have no way of knowing to what it referred.

[15] **Appeal and Error**⇨Remarks and conduct of judge
Appeal and Error⇨Failure of court to restrain erroneous argument or conduct

Trial judge's misconduct during employment discrimination case, in allowing and indeed helping to create a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer, warranted reversal of judgment in defendants' favor and remand for a new trial with a different judge.

See 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 254 et seq.; Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2006) ¶ 12:41 et seq. (CACIVEV Ch. 12-A); Cal. Jur. 3d, Trial, § 55 et seq.

3 Cases that cite this headnote

[16] **Appeal and Error**⇨Presumptions and Burdens as to Harmless and Reversible Error

Where the appearance of judicial bias and unfairness colors the entire record, the Court of Appeal departs from the general rule requiring a plaintiff seeking reversal to make an affirmative showing of prejudice; the test is not whether plaintiff has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause the Court of Appeal to lack confidence in the fairness of the proceedings such as would necessitate reversal.

14 Cases that cite this headnote

[17] **Judges**⇨Bias and Prejudice

Court of Appeal scrupulously guards against judicial bias and prejudice, actual or reasonably perceived, not only to prevent improper factors

from influencing the fact finder's deliberations, but to vindicate the reputation of the court itself.

1 Case that cites this headnote

[18] **Appeal and Error**⇨Remarks and conduct of judge
Appeal and Error⇨Course and conduct of trial

Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided, but should reverse the judgment and remand the matter to a different judge for a new trial on all issues.

5 Cases that cite this headnote

Attorneys and Law Firms

**544 Law Offices of Michelle A. Reinglass, Michelle A. Reinglass, Laguna Hills; Law Offices of Marjorie G. Fuller and Marjorie G. Fuller, Fullerton, for Plaintiffs and Appellants.

Callahan & Blaine and Jim P. Mahacek, Santa Ana, for Defendants and Appellants.

*997 OPINION

RYLAARSDAM, J.

Plaintiffs James Haluck and Michael Litton appeal from a judgment in favor of defendants Ricoh Electronics, Inc., Larry Vaughn, Haruo Uesaka, Yoji Ide, Yoshihiro Nomura, and Houssam El Jurdi on their complaint for employment discrimination on the ground the trial judge's misconduct so infected the proceedings they were deprived of a fair trial. Defendants filed a protective cross-appeal, claiming the trial court erred by denying their motions for summary judgment and summary adjudication on the ground the action was barred by a United States treaty with Japan. Defendants also filed a motion for sanctions against plaintiffs and their counsel, claiming the appeal is frivolous.

We conclude the trial judge's conduct was sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial and reverse on that ground. On remand, the case shall be assigned to a different judge. Because we reverse, the motion for sanctions is denied. *998 As to defendants' cross-appeal, the court properly found the treaty did not bar the action and thus we affirm its ruling.

FACTS

Based on the nature of this appeal, few of the underlying facts are relevant. Plaintiffs were employed by defendant Ricoh. They sued Ricoh and certain of its employees for damages for statutory and common law discriminatory employment practices, claiming they were passed over for promotions, and Litton ultimately wrongfully terminated, because they were Caucasian and complained about racial discrimination. After a 30–day plus trial, the jury returned a defense verdict.

THE MISCONDUCT

We recite only the most egregious instances of the judicial misconduct cited by plaintiffs.

Ricoh sought to introduce a video it used for training or public relations purposes. **545 (Characterization by the trial court.) Plaintiffs' lawyer contended, among other reasons for excluding it, that the video was "prejudicial ... and it's a marketing piece and has no bearing on the lawsuit." The court announced it would watch the video during the lunch hour and did so together with defense counsel without notifying plaintiffs' lawyer that he would be present or inviting her to join them. It then overruled

plaintiffs' objections to admission of the video.

Somewhere midpoint in trial, in overruling one of plaintiffs' objections, the judge held up a hand-lettered sign, apparently prepared by him, stating "overruled." The next day, when the court overruled another of plaintiffs' objections, defendants' attorney presented the judge with a different sign, stating: "Your honor, I want to help you if I may. This is a much nicer version. [¶] The Court: Better than my homemade one. [¶] Ms. Reinglass: Plaintiffs object to Mr. Callahan presenting another 'overruled' sign to the court. The court's sign was adequate enough. [¶] The Court: The court will await receiving a 'sustained' sign from plaintiff[s] so we can split the benefits here. [¶] Ms. Reinglass: How many do I get?"

A week later, when plaintiffs' lawyer objected to a question, the court apparently used Mr. Callahan's "overruled" sign. "Ms. Reinglass: [I am objecting to a]ny reading of the document not in evidence. [¶] The Court: He's not reading, [he's] asking questions. [¶] Ms. Reinglass: Hopefully he ***999** won't read. [¶] The Court: And hopefully he won't keep talking. [¶] Mr. Callahan: Your honor, I didn't get a chance to make that. [¶] The Court: It took too much time to make that sign. [¶] Ms. Reinglass: And there's a sign, and I object to that. [¶] The Court: He is directing it to me. It's lightening things up. And the jury nods."

Midway into the trial, the court stated, "Jeffrey [the clerk], we're going to the soccer style method here. Red card, 50 bucks each. Okay. If I say, red card plaintiff, write it down, 50 bucks. Red card defense, 50 bucks. [¶] We'll keep a running tab. End of trial, we'll collect it from them and we may take you guys [presumably the jury] to lunch at a very nice place. Okay. Court has enough money for now, and that will either *stop the talking* or give you a very nice lunch." (Italics added.)

Over the next 20 pages of transcript, during which plaintiff Litton was being examined, defendants' lawyer raised at least nine objections, six of which were overruled, with no mention of a red card. Then, when plaintiffs' counsel stated she was reading the last portion of a deposition, defendants' counsel stated, "Very good. [¶] ... [¶] I probably shouldn't say very good. No objection." The court states, "That's an orange card, not a red card."

During the next 12 pages or so in the transcript, defendants' lawyer made three objections, two of which were overruled. As plaintiffs' lawyer continued her examination of Litton, she noted she was almost finished with a section. Defendants' counsel stated "352." The court responded, "351 and a half. [¶] Go ahead." After several questions, defendants' lawyer stated, "351 and three-quarters," to which the court replied, "Overruled. Numbers junky." No red cards were mentioned.

Over the next 10 pages of transcript, defendants' lawyer raised two more objections, one of which was overruled. Defendants then interposed a hearsay objection. The court asked, "We're going to have [the expert witness] testify, right? [¶] Ms. Reinglass: Pardon me? [¶] The Court: We're going to have him testifying, right? [¶] Ms. Reinglass: Yes. [¶] The Court: ****546** And [Litton] is testifying to his numbers pretrial and questioned on the complaint and not about experts and discovery, so we'll wait for the expert to tell us what those numbers were and how had he arrived on them. [¶] Sustained. [¶] Ms. Reinglass: May I? [¶] The Court: Red card plaintiff, Jeffrey. [¶] Ms. Reinglass: I was asking. [¶] The Court: 5–0. Next question."

***1000** In testifying as to his emotional distress, Litton stated that he felt like he was in a white room without doors or windows that had no boundaries. On cross-examination as to this testimony, the following exchange occurred:

"Mr. Callahan: Q Have you ever heard of The Twilight Zone?" [¶] A Yes sir. [¶] Q Goes kind of like this, do do, do do. [¶] Ms. Reinglass: Your Honor, I would just object. This is argument. [¶] The Court: Your objection's on the record, ma'am. [¶] Ms. Reinglass: Also improper argument. [¶] Mr. Callahan: You're traveling through another dimension, a dimension not only of sight and sound, but of mind, a journey into a wondrous land, whose boundaries are that of imagination[;] that's a sign post up ahead, your next stop, The Twilight Zone. Do do, do do. Do do, do do. [¶] The Court: That was terrible. Get to the question, please. [¶] Ms. Reinglass: Noting for the record, counsel was singing The Twilight Zone theme song. [¶] The Court: And how the jurors left it will be reflected on the same record. [¶] By Mr. Callahan: Q Endless white room with no doors or windows. [¶] Is that where you got your idea of this white room theory? [¶] ... [¶] A From where? [¶] ... [¶] The Court: Twilight Zone. That's his question. [¶] The Witness: No sir. [¶] Mr. Callahan: Do do, do, do. Do do, do do. [¶] Ms. Reinglass: I request that counsel stop singing. As entertaining as it is for the jury, it's mocking my client and mocking the trial. [¶] By Mr. Callahan: Q Ever heard of The Twilight Zone, the show? [¶] A Yes sir. [¶] The Court: For the record, he hit a few notes of The Twilight Zone theme song which I don't see as mocking. He was off color [*sic*]. [¶] Mr. Callahan: I go through life tone deaf and colorblind. This

is tough."

During defense counsel's cross-examination of Litton, he read approximately 30 pages of the deposition of Rhonda Stevenson, a one-time employee of Ricoh. Stevenson was not a defendant and at the time of her deposition no longer worked for Ricoh. She never testified at trial. Litton had complained to her about what he believed was unfair treatment. Litton was asked whether he had read her deposition and then counsel was allowed to read several portions of her testimony and ask Litton if he recalled reading that testimony. For example, "Did you read ... where [Stevenson] said you were insincere and tried to manipulate both her and [another employee]?" "Do you recall [Stevenson's] testimony that you were a proper candidate for layoff ... ?" When Litton said he did not recall, the court permitted defendants' lawyer to read Stevenson's testimony to that effect.

During that testimony, plaintiffs' lawyer raised numerous objections. At one point she asked to "have a running objection until I add anything new. [¶] The Court: That would help. Same objection that's been going on all day will ***1001** be deemed to be made to every question and every answer throughout time. [¶] Ms. Reinglass: There may be some I like. [¶] The Court: With the same ruling. Well, until I die. Same ruling. Okay. [¶] Ms. Reinglass: Just as to Ms. Stevenson's deposition. I'll settle for that for now."

As defendants' counsel continued to cross-examine Litton using that deposition, ****547** before one question he stated, "Okay. This one is not good for Mr. Haluck.... [¶] Ms. Reinglass: Objection to the characterization by counsel. Improper argument. [¶] The Court: It's a warning. Just giving the witness a heads up." [¶] What's the question, sir?"

The next day, as defendants' lawyer again began to cross-examine Litton using the deposition, plaintiffs' lawyer objected, to which the court responded: "Overruled. Objection, 187.[¶] Ms. Reinglass: Huh? [¶] The Court: I got a number for all these things. [¶] Mr. Callahan: 187 in the Penal Code, what is that, your honor? [¶] The Court: Murder."

In another instance, when Litton was testifying that he was discriminated against because of his race, his lawyer asked: "And did you feel that it was based upon your race because of comments by [defendant] Nomura?" The court sustained an objection as leading. Counsel then rephrased, asking, "Was there any other reason why you felt that it was based upon your race? [¶] A [D]ue to the comment by [defendant] Nomura." Defendants' attorney stated, "What a surprise," to which the judge remarked, "Aren't they clever. [¶] (Laughter)."

As defendants' counsel was concluding his cross-examination of Litton, the following exchange occurred: "With that, your honor—[¶] Oh, do you [Litton] play poker? [¶] A No, sir. [¶] Q Terrific poker face." Plaintiffs' lawyer objected "to the editorializing by counsel." There was no ruling.

After a question by plaintiffs' counsel, defendants' attorney stated, "Objection. Gosh, what is that? [¶] The Court: What is it? [¶] Mr. Callahan: Hearsay. [¶] The Court: Overruled. [¶] Mr. Callahan: How about—[¶] The Court: No. Go back to sleep. [¶] ... [¶] Mr. Callahan: Wake me when it's break time. [¶] The Court: It's very close. [¶] (Laughter)." Later that day, when Mr. Callahan made an objection, the court stated, "Don't wake him up," to which Mr. Callahan replied, "Hey, I don't get a lot of sleep."

***1002** DISCUSSION

Plaintiffs' Appeal

1. Introduction

Plaintiffs assert the judgment should be reversed because the judge committed misconduct so egregious they were denied a fair trial. We agree.

[1] [2] [3] In conducting trials, judges " 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side of the other.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237–1238, 39 Cal.Rptr.3d 799, 129 P.3d 10.) Their conduct must " ' "accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality[.]" ' " (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 462, 134 Cal.Rptr.2d 756.) " 'The trial of a case should not only be fair in fact, ... it should also appear to be fair.' " (*Id.* at p. 455, 134 Cal.Rptr.2d 756.) The judge's actions and comments during trial violated these principles such that " 'it shocks the judicial instinct to allow the judgment to stand.' [Citation.]" (*Ibid.*)

2. Ex Parte Contact

[4] Plaintiffs challenge the judge's viewing of the videotape with defendants' counsel present, claiming it was improper ex parte contact that "tainted" the court's ruling on its admissibility.

[5] Generally ex parte contacts between a judge and counsel are improper, ****548** and if not unjust in actuality, give the appearance of injustice. (See *In re Hancock* (1977) 67 Cal.App.3d 943, 947–949, 136 Cal.Rptr. 901.) "A judge shall not initiate, permit, or consider ex parte communications ... concerning a pending ... proceeding, except" "where circumstances require, for ... administrative purposes ... that do not deal with substantive matters provided: [¶] ... the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and [¶] ... the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond." (Cal.Code Jud. Ethics, canon 3B(7)(d); see also Rules Prof. Conduct, rule 5–300(B) [lawyer shall not communicate with judge about merits of pending contested case except in open court, in writing, or in presence or with consent of opposing counsel].)

The record shows defendants' lawyer was present when the court previewed the video. Although it also reflects that the judge stated he would ***1003** review the video at lunch, there was never any indication he would do so with defendants' counsel present or that plaintiffs' lawyer was invited to participate.

And the contact between defense counsel and the court dealt with a substantive matter—whether or not the videotape, to which plaintiffs objected, would be admitted. As plaintiffs note, we have no way of knowing whether there was discussion during which defendants' counsel explained the video, to which plaintiffs' lawyer would be entitled to respond.

We are not holding that either the judge or defendants' counsel intended to violate any professional standards in this instance. However, the trial judge should not have permitted counsel for only one party to participate in viewing the video with him.

3. Lack of Courtesy and Decorum

[6] The remainder of the court's conduct set out above was also improper. Judicial ethics require a judge to "be patient, dignified, and courteous to litigants ... [and] ... lawyers ... and ... require similar conduct of lawyers ... under the judge's direction and control." (Cal.Code Jud. Ethics, canon 3(B)(4).) The delineated exchanges between the court and counsel are the antithesis of judicial decorum and courtesy. They cannot in any sense be characterized as "tempered miscellaneous comments," as defendants suggest. (Bold, capitalization, and underscoring omitted.)

a. Twilight Zone

We are not persuaded by defendants' assertion that many of the exchanges between the judge and defendants' lawyer, such as the Twilight Zone colloquy, cannot be judicial misconduct because they were made by counsel, not the judge. That misses the point. Although some of these comments were counsel's, the judge instigated and encouraged many of them. He also allowed, indeed helped create, a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer. That was misconduct. (Cal.Code Jud. Ethics, canon 3(B)(3) ["A judge shall require order and decorum in proceedings"].)

b. "Overruled" Signs

The "overruled" signs also demonstrated the court's lack of courtesy and decorum. Defendants' arguments justifying this conduct are imaginative but fatuous. We reject their characterization of use of the sign as the court ***1004** "overruling certain objections in writing." (Bold, underscoring, and capitalization omitted.) The ****549** judge's suggestion to plaintiffs' lawyer that she supply a "sustained" sign was not "circumspect" nor is counsel to be faulted for not "choosing" to provide one. This conduct was a sideshow in the overall circus atmosphere mocking a serious proceeding important to the parties, and it "cast the judicial system itself in a bad light in the eyes of the litigants and the public at large." (*Hernandez v. Paicius, supra,* 109 Cal.App.4th at p. 455, 134 Cal.Rptr.2d 756.)

Defendants challenge plaintiffs' argument that the court used these signs only when ruling on their objections. Again, this misses the mark. It is like saying a baseball

team could not complain if the umpire decided to call balls and strikes with his eyes closed, as long as he kept them closed for both teams. The point is not that the acts were even-handed, it is that the game could not safely be said to have been played according to the rules. And if defendants' lawyer was enjoying the spectacle, he would not object to use of the signs to overrule his objections.

Plaintiffs argue the court's use of the sign was persistent. The record does not specifically reflect it. But the fact that the sign was still in use a week after first being displayed lends support to this assertion. We agree this conduct made a mockery of plaintiffs' objections.

Defendants' argument plaintiffs waived their challenge to this behavior by failing to object to the judge's initial use of the sign he made, by commenting it was adequate, or by failing to ask for a curative instruction does not persuade. Counsel did note the judge's sign for the record; that certainly was not to approve of it. She also objected to use of defendants' sign, twice, and the court denied the objections. A request for a curative instruction would have been futile. (*People v. Sturm, supra,* 37 Cal.4th at p. 1237, 39 Cal.Rptr.3d 799, 129 P.3d 10.)

4. Stevenson Deposition

a. Improper Use of Deposition

[7] There was also misconduct connected to the reading of the Stevenson deposition. Plaintiffs argue actual use of the deposition testimony was improper for several reasons, including that it contained improper opinion and hearsay, and lacked foundation, and based on the failure to comply with Evidence Code section 1291, subdivision (a)(2). In addition to the erroneous ruling on admissions, plaintiffs protest the demeaning manner in which the court overruled their objections. Plaintiffs are correct on both counts.

Under Evidence Code section 1291, subdivision (a)(2), subject to certain conditions not at issue here, previously recorded testimony may be ***1005** offered at trial only if the deponent is unavailable as a witness. Code of Civil Procedure section 2025.620, subdivision (b) is an exception to this rule in that it allows the deposition of a party or one who was an employee of a party at the time the deposition is taken to be used at trial against the other party, whether or not the deponent is available. Here, however, Stevenson was not employed by Ricoh at the time her deposition was taken. Thus the conditions of section 2025.620, subdivision (b) were not met, and the record does not reflect any showing of Stevenson's unavailability. (Evid.Code, § 1291, subd. (a)(2); see also Code Civ. Proc., § 2025.620, subd. (c).) Thus, it was error to admit the testimony, and plaintiffs sufficiently objected to its admission.

b. "Until I Die" and "187" ("Murder")

When plaintiffs' lawyer asked for a running objection to use of the Stevenson deposition, the court agreed the objection would apply to every question "until I die." Later, when counsel raised another objection, ****550** the judge overruled it, noting, Objection, 187." In response to defendants' lawyer's facetious question about Penal Code section 187, the court stated, "Murder."

It is unclear from the record exactly what the court meant when it used "187" in overruling plaintiffs' repeated objections. It could have been a sarcastic reference to the number of objections plaintiffs had made, as they contend. The "until I die" statement makes it clear the court had no use for the objections. If the colloquy had stopped at the court stating 187, it probably would not have been a factor in this case. But the judge again allowed defendants' counsel to make an inappropriate remark and joined in the continuing antics by responding to the Penal Code question with the answer, "murder."

The court and defendants' lawyer may just have been having a good time; defendants comment in their brief that the Penal Code reference was "[o]bviously ... a humorous question." But while humor may have a legitimate place in a trial, it should not be used to belittle litigants or their counsel. Here the judge and defendants' lawyer had fun by making plaintiffs' lawyer the butt of their jokes. They took turns providing straight lines and punch lines to each other in a way that could only convey to the jury that they were a team and plaintiffs' counsel was an outsider.

5. Soccer Game

[8] Use of the "soccer-style" "red card" procedure was glaringly inappropriate, also violating the requirement of judicial decorum. In addition, in employing it the court demonstrated favoritism toward defendants. After it was initiated, ***1006** defendants' attorney was allowed to raise

numerous objections, some of which were overruled, and to joke with the judge without being fined. When plaintiffs' lawyer attempted to address an objection, however, she was immediately given a "red card." In instituting this game, the judge stated he wanted to "stop the talking." However, apparently he only wanted to stop plaintiffs' lawyer from talking. This unequal treatment improperly "created the impression that the trial judge was allied with [defendants]." (*People v. Sturm, supra,* 37 Cal.4th at p. 1241, 39 Cal.Rptr.3d 799, 129 P.3d 10.)

We reject defendants' argument based on their self-described scorecard showing they received 12 red cards compared to plaintiffs' three, and concluding the "match favors [plaintiffs.]" (Bold, underscoring, and capitalization omitted.) The problem with this claim is the same as with the court's conduct. A trial is not a sporting event. Defendants' spin on this conduct is ludicrous; it was not a "circumspect" way to " 'tone down' " imposition of sanctions. There was nothing circumspect about it; it was designed to make the sanctions as obvious as possible to the jury.

6. "Aren't They Clever"

[9] [10] [11] The "aren't they clever" comment disparaged Litton's testimony and implied he was not telling the truth and that his lawyer was trying to sneak in otherwise inadmissible evidence. (*People v. Sturm, supra,* 37 Cal.4th at p. 1240, 39 Cal.Rptr.3d 799, 129 P.3d 10.) "[A] trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness. [Citations.]" (*Id.* at p. 1238, 39 Cal.Rptr.3d 799, 129 P.3d 10.) In addition, " '[i]t is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial.' ... The trial court's comment implying that ... counsel was behaving unethically or in an underhanded fashion constituted misconduct." ****551** (*Id.* at pp. 1240–1241, 39 Cal.Rptr.3d 799, 129 P.3d 10.)

[12] The fact that the judge used the word "clever" at many times throughout the trial and in different contexts not all unfavorable to plaintiffs, as defendants point out, does not undo the damage inflicted by the instance of misconduct. Here there was no question the word "clever" was a derogatory reference to plaintiff Litton's testimony. That the word was used neutrally in other contexts is wholly irrelevant. "[I]t is 'the duty of the judge to *control* all proceedings during the trial, and to *limit* the introduction of evidence and the *argument* of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' " (*People v. Sturm, supra,* 37 Cal.4th at p. 1237, 39 Cal.Rptr.3d 799, 129 P.3d 10, italics added.) Obviously, that was not done here.

***1007** The other comments by defendants' counsel that the court allowed over plaintiffs' objections, including reference to Litton's "poker face" and that a question was "not a good one" for Haluck, are more examples of the inappropriate conduct that mocked plaintiffs and their testimony and impugned their credibility.

7. Defendants' Assertions

[13] In addition to their other arguments discussed above, defendants maintain plaintiffs waived their claims of judicial misconduct because they did not object. We disagree. Although the general rule requires objection to preserve the right to appeal acts of judicial misconduct, "failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or where objecting would be futile. [Citations.]" (*People v. Sturm, supra,* 37 Cal.4th at p. 1237, 39 Cal.Rptr.3d 799, 129 P.3d 10.) In the atmosphere of this trial, such was the case.

[14] Defendants also point to curative instructions, which they claim mitigated any misconduct. After a lunch break one day the judge informed the jurors he would be instructing them later about how to apply law to the facts. He pointed out that he "talk[ed] a lot and you shouldn't take anything that I say seriously [because] I have no role in this trial. 'I have not intended by anything I have said or done or any question that I may have asked or by any rulings that I may have made to suggest how you should decide any question of fact or that I believe or disbelieve any witness. If anything I've done or said has seemed to so indicate, you must disregard it and form your own opinions.' " One of the standard jury instructions given at the end of trial repeated the language the jury should not decide based on the judge's statements or actions.

But neither instruction was directed to any particular misconduct, so the jury would have no way of knowing to what it referred. Further, in light of all the improper comments by the court and those it allowed from defendants' lawyer, the instructions constituted only a dribble of water incapable of quenching a blazing fire. "Jurors rely with great confidence on the fairness of

judges, and upon the correctness of their views expressed during trials. [Citation.]" (*People v. Sturm, supra,* 37 Cal.4th at p. 1233, 39 Cal.Rptr.3d 799, 129 P.3d 10; see also *People v. Santana* (2000) 80 Cal.App.4th 1194, 1207, 96 Cal.Rptr.2d 158 [admonitions throughout trial did not cure judge's statements giving impression he found defense case weak].) Having served in that capacity, we are well aware of the tremendous power the comments and attitude of a trial judge have on a jury. ****552** That power was repeatedly abused during this case and a passing admonition was not enough to cure it.

[15] ***1008** Defendants examine each act of misconduct individually and argue that a jury could not have perceived bias based on one comment during a 31–day trial. But it is the total effect of these acts and statements that is fatal. "Although no one instance of misconduct appears to, in itself, require reversal, the cumulative effect of the trial judge's conduct requires reversal." (*People v. Sturm, supra,* 37 Cal.4th at p. 1243, 39 Cal.Rptr.3d 799, 129 P.3d 10.) Further, we reject defendants' argument that the misconduct on which plaintiffs rely cannot be characterized as pervasive because it only spanned day 7 to day 22 of the trial.

In addition, defendants' 50–page plus list of instances where they lost objections does not ameliorate the misconduct. Likewise, the fact the judge chastised their lawyer many times or was rude to him does not justify his other improper acts and comments. Moreover, to the extent this is true, neither side received a fair trial. That both parties were subjected to this conduct should not be a basis for affirming the judgment. Furthermore, as plaintiffs note, they bore the burden of proof. So the question is whether the court so interfered with their case it was impossible to meet that burden.

8. Misconduct Requires Reversal

[16] "Where, as here, the appearance of judicial bias and unfairness colors the entire record, we depart from the general rule requiring plaintiff to make an affirmative showing of prejudice. The test is not whether plaintiff has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal. The record here inspires no confidence in either case." (*Hernandez v. Paicius, supra,* 109 Cal.App.4th at p. 461, 134 Cal.Rptr.2d 756.)

[17] "We scrupulously guard against bias and prejudice, actual or reasonably perceived, not only to prevent improper factors from influencing the fact finder's deliberations, but to vindicate the reputation of the court itself.... 'We must also keep in mind ... that the source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had.' " (*Hernandez v. Paicius, supra,* 109 Cal.App.4th at p. 462, 134 Cal.Rptr.2d 756; see Cal.Code Jud. Ethics, canon 2(A) ["A judge ... shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"].)

It is obvious that much of the judge's conduct was not malicious but rather a misguided attempt to be humorous, and defendants' lawyer played into it, often acting as the straight man. But a courtroom is not the Improv and the presider's role model is not Judge Judy. We can only imagine what was in the jurors' minds as they endured a 30–plus day trial in this atmosphere or the impression of the judicial system they took away with them posttrial.

[18] ***1009** "Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided [citation], but should reverse the judgment and remand the matter to a different judge for a new trial on all issues." ****553** (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 247, 42 Cal.Rptr.2d 440.) We do that here.

Defendants' Appeal

Defendants filed a protective cross-appeal from the court's denial of their motions for summary judgment and motions for summary adjudication of issues on the ground that the action was barred by the Japanese Friendship, Commerce and Navigation Treaty of 1953 (Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863) (treaty), particularly article VIII(1). Article VIII(1) provides that "companies of either Party [to the treaty] shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." (4 U.S.T. 2063, 2070.) Article VIII(1) is "intended to give both parties to the treaty a degree of discretion in staffing enterprises operating in the other's country with managerial or technical personnel from the home country.

[Citation.]" (*Kirmse v. Hotel Nikko* (1996) 51 Cal.App.4th 311, 317, 59 Cal.Rptr.2d 96.)

Defendant Ricoh, a United States company, is a wholly owned subsidiary of Ricoh Corporation, a New Jersey corporation, which is a wholly owned subsidiary of Ricoh Company, Ltd., a Japanese corporation (Ricoh Japan). Defendants assert that any claim of discrimination against plaintiffs on the basis of their race or national origin was only Ricoh Japan placing its employees at defendant Ricoh "on a temporary basis in key management and technical positions ... as permitted by the [t]reaty." Since the treaty allows such temporary employees, they continue, it bars plaintiffs' suit.

The one California case on this subject, *Kirmse v. Hotel Nikko, supra,* 51 Cal.App.4th 311, 59 Cal.Rptr.2d 96, rejects defendants' claim, holding that the treaty "does not apply to a domestically incorporated subsidiary of a Japanese corporation." (*Id.* at p. 317, 59 Cal.Rptr.2d 96.) In arriving at this decision, *Kirmse* relied on *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765. It contained a detailed analysis of the treaty and its underlying intent and went to great lengths to distinguish between U.S. branches of a Japanese corporation, which would be subject to the terms of the treaty, and locally incorporated subsidiaries, which would not. *Sumitomo* reasoned that because Sumitomo Shoji America was incorporated in New York, it was "a company of the United States, not a company of ***1010** Japan. As a company of the United States operating in the United States, under the literal language of ... the [t]reaty, Sumitomo cannot invoke the rights provided in Article VIII(1), which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan." (*Sumitomo Shoji America, Inc. v. Avagliano, supra,* 457 U.S. at pp. 182–183, 102 S.Ct. 2374, fn. omitted.)

Defendants primarily rely on a footnote in *Sumitomo* in which the court noted that it expressed no view on whether a United States subsidiary of a Japanese corporation could assert its parent's rights under the treaty. (*Sumitomo Shoji America, Inc. v. Avagliano, supra,* 457 U.S. at pp. 189–190, fn. 19, 102 S.Ct. 2374.) They claim defendant Ricoh may assert such rights. *Kirmse* considered that issue, noting that in some circumstances, namely piercing the corporate veil or where there was a closely-related third party, a subsidiary could have standing to assert rights under the treaty. (*Kirmse v. Hotel Nikko, supra,* 51 Cal.App.4th at p. 321, 59 Cal.Rptr.2d 96.)

Here, there is no claim of piercing the corporate veil. Defendants advance the theory that Ricoh Japan is a closely-related ****554** third party. They point to *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660, which stated that in " 'certain, limited exceptions,' ... a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." (*Id.* at p. 629, 111 S.Ct. 2077.)

Defendants fail to meet this burden. They argue Ricoh Japan has suffered injury but do not address whether defendant Ricoh, "the litigant," has been harmed. Moreover Ricoh is not even a direct subsidiary of Ricoh Japan; it is owned by Ricoh Corporation, a New Jersey corporation, which is the subsidiary of Ricoh Japan. Defendants have not shown *Edmonson* or any other authority would allow standing in such an attenuated circumstance.

Defendants also rely on *Fortino v. Quasar Co.* (7th Cir.1991) 950 F.2d 389, which distinguished *Sumitomo* on the ground that in that case, there was no claim the subsidiary's discriminatory conduct had been mandated by the Japanese parent. In a well-reasoned discussion, *Kirmse* found *Fortino* unpersuasive and rejected it. (*Kirmse v. Hotel Nikko, supra,* 51 Cal.App.4th at pp. 319–321, 59 Cal.Rptr.2d 96.) We agree with its conclusions and see no need to reiterate that discussion. Likewise, none of the other federal cases defendants cite dissuades us from our conclusion the treaty does not protect defendant Ricoh.

***1011** DISPOSITION

The judgment is reversed. The motion for sanctions is denied. On remand the case shall be assigned to a different judge. Appellants Michael Litton and James Haluck are entitled to costs on appeal.

SILLS, P.J., and BEDSWORTH, J., concur.

All Citations

151 Cal.App.4th 994, 60 Cal.Rptr.3d 542, 07 Cal. Daily Op. Serv. 6457, 2007 Daily Journal D.A.R. 8154

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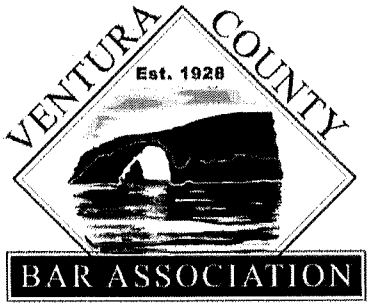

Barristers BTG – January 20, 2024

Session 2

Case Study 14

Blum v. Republic Bank

73 Cal.App.4th 245, 86 Cal.Rptr.2d 226, 1999 Daily Journal D.A.R. 6725

MARVIN A. BLUM et al., Plaintiffs,
v.
REPUBLIC BANK, Defendant.
SANDRA MONTGOMERY et al., Plaintiffs,
v.
REPUBLIC BANK, Defendant; ROBB EVANS, as Receiver, etc., Movant and Respondent;
B. DANIEL LYNCH, Objector and Appellant.
QUALIFIED PENSIONS, INC., Plaintiff,
v.
REPUBLIC BANK, Defendant.

No. B121384.
Court of Appeal, Second District, Division 3, California.
June 30, 1999.

SUMMARY

The trial court, in a multiparty civil action, entered an order imposing monetary sanctions on an attorney for a violation of a local court rule prohibiting ex parte communications on the substance of a pending case with a judge or his or her clerk. The sanctions were based on the attorney's having communicated with a court clerk to set a date for a status conference without informing other counsel. (Superior Court Los Angeles of County, Nos. BC138614, BC144539 and YS005334, Harvey A. Schneider, Judge.)

The Court of Appeal reversed. The court held that the attorney's conduct was not the type the rule contemplates prohibiting. The communication with the clerk was not unlike many telephone calls attorneys make to court personnel to schedule all types of conferences, or for other purely administrative matters. Because there was no authority enabling the trial court to impose sanctions on the attorney, the trial court erred in imposing sanctions. (Opinion by Aldrich, J., with Klein, P. J., and Croskey, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
Courts § 5.1--Powers--Sanctions--Ex Parte Communications With Judge or Clerk.
In a multiparty civil action, the trial court had no authority to impose monetary sanctions on an attorney for a violation of a local court rule prohibiting ex parte communications on the substance of a pending case with a judge or his or her clerk. The ***246** sanctions were based on the attorney's having communicated with a court clerk to set a date for a status conference without informing other counsel. The rule was not intended to preclude a simple communication between counsel and a clerk, or other court personnel, to set a date for a status conference. The attorney's conduct was not the type the rule contemplates prohibiting. The communication with the clerk was not unlike many telephone calls attorneys make to court personnel to schedule all types of conferences, or for other purely administrative matters. Because there was no authority enabling the trial court to impose sanctions on the attorney, the trial court erred in imposing sanctions.

[See 2 Witkin, Cal. Procedure (4th ed. 1996) Courts, § 447.]

COUNSEL
B. Daniel Lynch, in pro. per., for Objector and Appellant.
Brobeck, Phleger & Harrison and Frederick D. Holden, Jr., for Movant and Respondent.

ALDRICH, J.

Introduction

Appellant Attorney B. Daniel Lynch appeals from a $2,500 sanction order. We reverse.

Factual and Procedural Background

On February 16, 1996, Lynch filed a lawsuit entitled Montgomery v. Republic Bank (No. BC144539) in the Los Angeles Superior Court. This class action lawsuit sought recovery on behalf of thousands of investors who allegedly lost millions of dollars when illegal transfers

were made from their retirement accounts at Republic Bank by the fund administrator, Qualified Pensions, Inc. The lawsuit was brought by Sandra Montgomery and John Chavanne on behalf of themselves and all other persons who deposited retirement money with Republic Bank.

Respondent Robb Evans (Receiver) was appointed as the receiver for Qualified Pensions by the federal court. On August 13, 1996, Receiver filed ***247** a Los Angeles Superior Court case (Qualified Pensions, Inc. v. Republic Bank (No. YS005334)) to recover money deposited with the bank.

It appears that the two cases were consolidated, along with other actions, including Blum v. Republic Bank (No. BC138614).

On October 29, 1997, Lynch called the clerk in department 22 and requested that a status conference be scheduled. He made the request without conferring with other counsel. The clerk and Lynch agreed that the status conference would be set eight days later, on November 7, 1997. Lynch gave notice by mail.

By letter dated October 31, 1997, the law firm of Rossbacher & Associates informed the trial court that none of the other counsel knew Lynch was seeking a status conference.[1] This letter also suggested that a status conference the next Friday was neither warranted nor appropriate at that time, and should be taken off calendar, as the parties were scheduled to appear on December 2, 1997, on a motion for preliminary approval of the settlement of the consolidated cases. The proposed settlement resolved certain insurance coverage issues and included a plan for asset allocation.

On November 7, 1997, when the matter was called, Receiver appeared. The trial court announced that a status conference would not be held and that Lynch's method of obtaining court approval for setting the conference had not conformed to law or practice.

Receiver filed a motion for sanctions, contending Lynch's actions in setting the status conference were improper. Lynch, representing Montgomery and Chavanne, opposed the motion.

On December 2, 1997, a hearing was held on a proposed settlement. Lynch appeared on behalf of the class representatives, Montgomery and Chavanne. Other counsel appeared, including those representing the class, the bank, Receiver, and an insurance company. On December 3, 1997, over the objections of Montgomery and Chavanne, as class representatives, the trial court approved the order preliminarily approving settlement of the consolidated cases. Subsequently, the trial court entered an order settling the consolidated cases.

On March 12, 1998, the trial court ordered Lynch to pay Receiver sanctions in the sum of $2,500, pursuant to ***248** Code of Civil Procedure section 575.2, California Rules of Court, rule 227, and the Superior Court of Los Angeles County Rules, rule 7.12. The order stated, "That date and time for the status conference had been obtained by Mr. Lynch in telephone conferences with the clerk of the Court, which implied to the Court that all counsel in these cases were in agreement on the need and date for the conference. In fact, Mr. Lynch had not attempted any prior consultation with other counsel before contacting the Court or mailing the Notice."

Lynch appeals from the sanction order.[2] We reverse.

Discussion

The trial court had no authority to impose sanctions.

([1]) Code of Civil Procedure section 575.2 and California Rules of Court, rule 227, permit courts to impose sanctions for the failure to comply with local rules, as does Los Angeles Superior Court Rules, rule 7.13.[3] The only authority remotely applicable to this case is Superior Court of Los Angeles County Rules, rule 7.12, which establishes guidelines for litigation conduct.

Superior Court of Los Angeles County Rules, rule 7.12 states in pertinent part: "(j) Ex Parte Communications With the Court. [¶] (1) A lawyer should avoid ex parte communication on the substance of a pending case with a judge (or his or her law clerk) before whom such case is pending. [¶] (2) Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application."

As Lynch contends, Superior Court of Los Angeles County Rules, rule 7.12 does not apply. Subdivision (j)(1) is inapplicable because the ex parte communication was not "on the substance" of the pending case. Subdivision (j)(2) is inapplicable because Lynch was not

communicating on the substance of the matter and he was not trying to schedule an ex parte hearing. The rule was not intended to preclude a simple communication between ***249** counsel and a clerk, or other court personnel, to set a date for a status conference. Lynch's conduct was not the type the rule contemplates prohibiting. Lynch's communication with the clerk was not unlike many telephone calls attorneys make to court personnel to schedule all types of conferences, or for other purely administrative matters.

It appears the trial court was expanding the applicability of Superior Court of Los Angeles County Rules, rule 7.12 to include communications with court personnel for the purposes of scheduling all types of hearings. However, the rule is not that expansive.

Because there is no authority enabling the trial court to impose sanctions on Lynch, we must conclude the trial court erred in imposing sanctions. (Cf. *Trans-Action Commercial Investors, Ltd. v. Firmaterr, Inc.* (1997) 60 Cal.App.4th 352, 362 [70 Cal.Rptr.2d 449].)

Disposition

The sanction order is reversed. The parties are to bear their own costs on appeal.

Klein, P. J., and Croskey, J., concurred. ***250**

Footnotes

1 When Montgomery v. Republic Bank was filed, Rossbacher & Associates were cocounsel of record along with Lynch, for the named plaintiffs, as class representatives. By the time of the October 31, 1997, letter, Lynch, through his own law firm, represented Montgomery and Chavanne, the class representatives. Rossbacher & Associates continued to represent other parties.

2 On appeal, Lynch purports to represent himself and his clients, Sandra Montgomery and John Chavanne. However, the sanction was imposed only upon Lynch individually.

3 Rule 7.13, Sanctions, reads in part: "The Court may impose appropriate sanctions for the failure or refusal (1) to comply with the Rules, ... Counsel are directed to Code of Civil Procedure sections 128, 128.5, 177.5, 575.2, 583.150, 583.430, 2016 through 2036, Government Code section 68609(d), and Rule 227 of the California Rules of Court. Such sanctions may be imposed on a party and/or, if appropriate, on counsel for such party."