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Legal Profession

William J. Riegger

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by *William J. Riegger**

Professional Corporations Act

The Professional Corporations Act,[1] which became effective November 13, 1968, seemingly caught most members of the California Bar unaware of its passage. Nevertheless, it will have an important effect upon attorneys and clients. The act enables the members of a number of professions, of which the legal profession is one, to form corporations and thereby obtain benefits that non-professional corporations now enjoy. Although it might seem appropriate for a review of the year's developments in the legal profession to give a painstaking analysis, a definitive work on this act has already been written. The article appears in the November-December Journal of the State Bar of California and is co-authored by three of the

* B.S.L. 1949, J.D. 1950, University of Minnesota. Professor of Law and Assistant Dean, University of San Francisco School of Law. Member, Arizona and Minnesota State Bars.

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1. Cal. Stats. 1968 Ch. 1375.

lawyers active in promulgating the act—Paul A. Peterson and Byron F. White of San Diego, and H. Bradley Jones of Los Angeles.

Malpractice

In *Heyer v. Flaig,*[2] the supreme court clarified the application of the statute of limitations, Code of Civil Procedure section 339 (1), to a complaint filed against an attorney for alleged malpractice. Plaintiffs brought the action for damages based on the attorney's negligence in preparing their deceased mother's will. The complaint was filed more than two years after preparation of the will but less than two years after the mother's death.

Rather than interpret section 339 (1) under a contract theory, that the plaintiffs were third-party beneficiaries, and thus conclude that the period started to run when the will was made, the court invoked a tort theory under which the period would have have started at the time the mother died. The court applied the tort theory for two basic reasons. First, the attorney's duty to the testator extended to her death because of her reliance on the attorney preparing and maintaining a testamentary scheme that would coincide with her wishes until her death. Second, plaintiffs were unable to bring an action against the defendant until the testator died, yet the period could not have commenced to run until a cause of action accrued; a cause of action cannot accrue until there is an available remedy.

If the attorney's negligence is the failure to perfect an appeal, may the injured client obtain damages from the attorney to the extent of the complaint even though unsuccessful in the trial court? According to *Croce v. Sanchez,*[3] the client may not, if the appeal could not have led to a reversal as a matter of law. In *Croce* it was found that plaintiff, in the original suit, had not sustained her burden of proof. The appellate court reviewed the superior court file in both cases and the

2. 70 Cal.2d —, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

3. 256 Cal. App.2d 680, 64 Cal. Rptr. 448 (1967), cert. den. 391 U.S. 927, 20 L.Ed.2d 666, 88 S.Ct. 1827.

reporter's transcript in the first cause and found nothing requiring a reversal. In effect, does this not give a client who has lost the right to appeal an appellate review of the original action?

In Propria Persona

In *City of Downey v. Johnson*,[4] the determinative issue on appeal became not the extent of an award for the city's condemnation of a deceased's property, but Johnson's capacity as executor and conservator to appear in propria persona. The court held that, although Johnson in his representative capacity could file a notice of appeal, he could not appear in propria persona at trial or on appeal. Because Johnson did so appear, the appellate court concluded that the judgment below, condemning the property and rendering an award, was void: "(A) person who is not a licensed attorney and who is acting as an administrator, executor or guardian cannot practice law in matters relating to his trusteeship on the theory that he is practicing for himself."[5]

Fee Splitting

During the past year the Court of Appeal, Second District was called upon to decide an interesting case, *Provisor v. Haas Realty*,[6] dealing with an attorney's right to an agreed share of a real estate broker's commission. In rendering its decision the court set forth some guidelines, quite helpful to the practitioner in determining when he may judiciously enter into such an agreement and collect his fee under its terms.

Plaintiff, an attorney, was asked by persons interested in certain real property to help them negotiate for its purchase. The sale was offered through the defendant, a real estate broker. With plaintiff's help in the negotiations, a sale was

4. 263 Cal. App.2d 775, 69 Cal. Rptr. 830 (1968).

5. 263 Cal. App.2d at 779, 69 Cal. Rptr. at 833, quoted from Arkansas Bar Assn. v. Union Nat. Bank, 224 Ark. 48, 273 S.W.2d 408 (1954); In re Otterness, 181 Minn. 254, 232 N.W. 318, 73 A.L.R. 1319 (1930).

6. 256 Cal. App.2d 850, 64 Cal. Rptr. 509 (1967).

consummated. Defendant refused to pay plaintiff his agreed share of the commission.

Plaintiff's claim rested upon two separate oral agreements, each confirmed by a memorandum signed by defendant's agent: the first in time entitled him to half the commission as a fee; the second entitled him to all the commission over $5,600. Payment was conditioned upon the making of the sale. Neither of the memorandums mentioned for whom plaintiff was working.

At the trial there was contradictory testimony concerning a conference in which plaintiff, the defendant's agent, and plaintiff's clients had together conferred over who was obligated to pay plaintiff's fees. Plaintiff testified that he told defendant's agent that he expected to be paid for services to be rendered and that he told his clients that he expected to be paid whether the sale was made or not. One of his clients testified that it was agreed at the conference that the clients would be liable only if the sale did not materialize; otherwise the defendant was to be liable. The agent testified that nothing was said about paying plaintiff for legal services rendered or about to be rendered to his clients and nothing was said about their paying a fee if the sale was not consummated.[7]

In arriving at a decision against the plaintiff attorney, the court construed two statutes. The first was California Business and Professions Code section 10137—"Splitting of a Broker's Commission." It says in part:

> It is unlawful for any licensed real estate broker to employ or compensate, directly or indirectly, any person for performing any of the acts within the scope of this chapter who is not a licensed real estate broker, or a real estate salesman licensed under the broker employing or compensating him.

The other was a special exemption for attorneys provided in section 10133 of the same code:

> The definitions of a real estate broker and a real estate

7. 256 Cal. App.2d at 854, 64 Cal. Rptr. at 511.

> salesman as set forth in sections 10131 and 10132, do not include the following . . .(c) Services rendered by an attorney at law *in performing his duties as such attorney at law.* (Emphasis added.)

Since the plaintiff had no real estate broker's or salesman's license, was he rendering services in his capacity as an attorney under section 10133 and therefore legally eligible to collect a part of the commission? If the facts compel a negative answer, the attorney's work is characterized as that of a broker, is subject to the requirement of a license, and goes uncompensated.

To answer this question in *Provisor* the court relied in part on decisions of other states having statutes substantially similar to sections 10137 and 10133.[8] The court observed that these decisions have narrowed the avenue by which an attorney who is not licensed as a broker can enter the realm of a real estate broker or salesman and have further held that this avenue is available only when a true attorney-client relationship exists.

If the client does not seek to bind himself but seeks rather to shift the obligation of payment to the broker or seller, he is not in the true sense a client of the attorney. In this situation the attorney loses the statutory license exemption of 10133 because his work is tantamount to that of a broker, who is subject to the fee splitting limitations of section 10137. As a consequence, if an attorney has no license he may not share in the broker's commission.

The relationship between the plaintiff and defendant was not the same as in the situation above. The court in *Provisor* disposed of the possibility that the plaintiff was actually the defendant's attorney, by upholding the trial court's findings that no agreement existed between plaintiff and defendant and that plaintiff did not render any direct legal services to defendant.

Provisor indicates that short of possessing a broker's or

8. Tobin v. Courshon, 155 So.2d 785, 99 A.L.R.2d 1147 (1963); Krause v. Boraks, 341 Mich. 149, 67 N.W.2d 202 (1954).

salesman's license, the only means by which plaintiff could have recovered a fee based on the commission would have been to enter into an attorney-client relationship with the defendant.

Court-Appointed Counsel

Justice Mosk, writing for the supreme court in *Smith v. Superior Court*,[9] declared that a California lawyer is a general practitioner, not subject to any subjective limitation by a trial court and that a criminal defendant has as much right to keep a court-appointed counsel as he has to keep a retained counsel.

This case arrived in the supreme court only after traveling twice through the trial court and the court of appeal. On the first appeal, an attorney was appointed to defend Smith. The conviction was reversed and a new trial granted.[10]

During the second trial, friction developed between the appointed counsel and the trial judge. At first, the judge admonished counsel and later in the proceedings asked the lawyer if he had ever handled a case involving the death penalty. To this, counsel replied, "No." The judge then remarked that a question had come to his mind concerning counsel's competence to handle such a serious charge. Eventually the judge decided that counsel was incapable of representing the defendant and dismissed him from the case.

New counsel was appointed without consulting defendant—in fact, over his objections. Throughout the trial defendant vented his objections to the court, repeatedly asked to be represented by the original appointee and refused to cooperate with the newly appointed counsel. Defendant was again convicted. He appealed on the ground he was denied his constitutional right to counsel of his choice.

California Code of Civil Procedure section 284,[11] the statu-

9. 68 Cal.2d 547, 68 Cal. Rptr. 1, 440 P.2d 65 (1968).

10. People v. Powell, 67 Cal.2d 32, 59 Cal. Rptr. 817, 429 P.2d 137 (1967).

11. Cal. Code of Civ. Proc. § 284: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: 1. Upon the

tory authority for removing counsel, requires an application to the court by either defendant or counsel. Since neither had applied in Smith, did the court have the inherent power to remove counsel? Justice Mosk said that this power admittedly exists if counsel is physically incapacitated. More difficult, as Justice Mosk pointed out, is the situation here. To an extent the answer was supplied by the question "whether the foregoing power extends to the removal of counsel on the ground of the trial judge's subjective opinion that counsel is 'incompetent' because of ignorance of the law to try the particular case before him."[12] Exercising this nonstatutory authority, the trial judge cannot impose his subjective opinion to the point of compromising the independence of the bar or infringing the constitutional rights of a defendant to be represented by counsel.

In addressing itself to the first aspect of the case—the California attorney as a general practitioner—the court lucidly points out that admission to the bar establishes the fact that the state deems the attorney competent to undertake the practice of law before all our courts in all types of actions. While trial judges may use the contempt power to guide counsel where necessary, only the supreme court has jurisdiction to take direct action if that original appraisal of the attorney be wrong.

The opinion states further that the removal of counsel on the ground of incompetency is more of a threat to the independence of the bar than is an arbitrary misuse of the contempt power. As original counsel said in writing for defendant, "if the advocate must labor under the threat that, at any moment, if his argument or advocacy should incur the displeasure or lack of immediate comprehension by the trial judge, he may be summarily relieved as counsel on a subjective charge of incompetency by the very trial judge

consent of both client and attorney, filed with the clerk, or entered upon the minutes; 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other . . . ."

12. 68 Cal.2d at 559, 68 Cal. Rptr. at 9, 440 P.2d at 73.

he is attempting to convince, his advocacy must of necessity be most guarded and lose much of its force and effect."[13]

The other aspect of this case, involving the attorney-client relationship where counsel has been appointed, seems to turn on the constitutionality of whether the court's invasion is subjective. Here the supreme court acknowledged that an indigent defendant must generally be satisfied with the counsel appointed for him but pointed out that here defendant was indeed satisfied with the original appointment of counsel and was merely attempting to enforce it.

It was argued that since defendant did not pay for the appointed counsel, he should not be able to object to a change. In finding this argument unpalatable the court noted that the attorney-client relationship entails a high degree of trust culminated by a series of consultations and planning—it is certainly not a passing relationship and its existence is independent of the source of compensation.

Ethical Standards

Of general interest to the profession, the ABA Special Committee on Evaluation of Ethical Standards has published a Preliminary Draft of the proposed new *Code of Professional Responsibility*.[14] The final draft is to be submitted for action to the House of Delegates of the American Bar Association at its meeting in August, 1969. The report shows that the present code, in the main, was adopted in 1903, that repeated studies were made by special committees in 1928, 1933, 1937, and 1954, and that although these committees made recommendations for overall revision, no action was taken on their recommendations. The present committee recommends revision in "important areas involving the conduct of lawyers that are either only partially covered in or totally omitted from the canons," and where "changed and changing conditions in our legal system and urbanized society require new statements of professional principles." The committee notes

13. See 68 Cal.2d at 561, 69 Cal. Rptr. at 10, 440 P.2d at 74.

14. Copies may be obtained by written request to the Committee at 1155 East 60th Street, Chicago, Ill. 60634.

the impact of the United States Supreme Court decisions on group legal services,[15] on admission to the Bar, and on discipline of attorneys.[16]

15. See NAACP v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963), Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed.2d 89, 84 S.Ct. 1113, 11 A.L.R.3d 1196 (1964), and United Mine Workers v. Ill. State Bar Association, 389 U.S. 217, 19 L.Ed. 2d 426, 88 S.Ct. 353 (1967).

16. Schware v. Bd. of Bar Examiners, 353 U.S. 232, 1 L.Ed.2d 796, 77 S.Ct. 752, 64 A.L.R.2d 288 (1957); Spevak v. Klein, 385 U.S. 511, 17 L.Ed.2d 574, 87 S.Ct. 625 (1967).

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