

PROFESSIONAL LIABILITY UPDATE

ETHICS

By Jennifer A. Becker

People ex rel. Herrera v. Stender 2012 WL 6808475

The First District upholds an injunction against an out-of-state attorney and his law corporation for aiding and abetting another attorney's unlicensed practice of law, in violation of California Law.

Christopher Stender became a shareholder in Martin Guajardo's law practice. After a name change to "Immigration Practice Group, PC," ("IPG"), it became a registered law corporation. Stender replaced Guajardo as president, treasurer, and secretary on the same day Guajardo resigned from the State Bar with disciplinary charges pending. Stender became IPG's sole shareholder.

The State of California filed an Unfair Business Practices complaint against Guajardo, Stender, and IPG. The complaint alleged Guajardo continued to practice law, aided and abetted by Stender and IPG. Clients, who were not informed of Guajardo's resignation, were led to believe Guajardo was in charge of their cases. Guajardo disappeared and could not be served; Stender and IPG appeared in the action.

In the context of a petition for a preliminary injunction, the parties submitted conflicting evidence about whether Guajardo continued to practice after his resignation from the bar. The trial court decided the contested factual issues in favor of the State, and granted a preliminary injunction against Stender and IPG. The court found Stender, who was not licensed in California, was bound by the rules and

regulations applicable to members of the California Bar. IPG and Stender had violated a host of California Rules of Professional Conduct ("Rule or Rules"), as well as provisions of the Business & Professions Code and Penal Code.

The injunction prohibited Stender and IPG from continuing to assist Guajardo in the unauthorized practice of law. It required them to provide notice to clients of Guajardo's resignation; actions Guajardo could not take; and the client's right to discharge Guajardo and secure return of unearned fees and the case file.

On appeal, Stender and IPG unsuccessfully asserted the California State Bar Act could only be enforced through the disciplinary system. The Court agreed Rule 1-100 specifically precludes new civil causes of action and the Rules cannot form the basis of a damages award. However, Unlawful Business Practices claims can be based on statutes a plaintiff cannot directly enforce.

Rule 1-311 prohibits a bar member from employing a resigned, disbarred, suspended, or involuntarily inactive bar member to provide legal services. A banned attorney can perform only limited, non-legal and preparatory

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activities, with proper notice to clients and the State Bar. Business & Professions Code § 6133 prohibits any attorney or law firm employing a banned attorney from permitting that attorney to practice law or hold himself out as practicing law, and requires the employer to supervise the resigned attorney in any other assigned duties. Business & Professions Code §6125 prohibits the practice of law by anyone who is not an active member of the State Bar; § 6126 sets forth criminal penalties for violations; and Rule 1–300(A) prohibits bar members from aiding any person or entity in the unauthorized practice of law. Title 8 C.F.R. § 1003.102(m) provides disciplinary sanctions against attorneys who assist the unauthorized practice of law.

Substantial evidence supported the finding Stender and IPG violated the Rules and statutes and aided and abetted Guajardo. Although Guajardo did not make appearances or sign documents, Stender and other IPG attorneys provided a backdrop for Guajardo to continue his law practice. The clients believed Guajardo was the handling attorney because of Stender's and IPG's actions.

Stender unsuccessfully argued that since both he and Guajardo were IPG employees, the agent's immunity rule precluded aiding and abetting liability. The Court reasoned the agent's immunity rule did not apply because Guajardo did not act in an authorized capacity for the benefit of IPG, but solely for his individual advantage.

The Court rejected the argument the State sought to improperly regulate Stender and IPG's federal law practice. Rather, the State sought to prevent the commission of unlawful business practices under California law. Federal preemption did not apply because the lawsuit concerned state law violations. The Ninth Circuit has rejected the proposition that discipline of immigration attorneys is preempted by federal law.

The Court disagreed the notice would cause irreparable harm to clients. The notice did not imply the allegations in the complaint against Stender and IPG had been established, undermining client relationships or suggesting an ongoing with relationship with Guajardo. The provisions concerned the clients' right to fire Guajardo, hire a licensed attorney, and seek return of unearned fees, and did not encourage claims against Stender.

In any event, the potential harm did not outweigh the need for an injunction. The trial court found the State would probably prevail on its claim that Stender and IPG facilitated Guajardo's unauthorized practice of law. Despite Guajardo's absence and the dissolution of IPG, the trial court was within its discretion to determine an injunction was necessary to prevent further violations. Moreover, under Business & Professions Code §§ 6180 and 6180.1 and Rule 1–311, Stender and IPG were required to give notice to the bar and to clients of Guajardo's bar status and that he was prohibited from advising clients or making appearances.

Stender and IPG were not precluded from presenting evidence by the duty of confidentiality or the attorney-client privilege. Cases against attorneys that cannot be prosecuted because privilege precludes a defense are rare. The court must consider four factors: the evidence must be confidential information the client insists remain confidential; the evidence must be highly material to the defense; the trial court must determine whether equitable measures could permit the action to proceed; and the trial court must evaluate whether it would be fundamentally unfair to allow the action to proceed. The court would not accept Stender's unsupported assertion his defense required disclosure of client confidences. The claims pertained to Guajardo's loss of the right to practice law and the required notice to clients; it was not apparent how confidential client

information would aid the defense.

Stender argued that his clients' identities were confidential, given the risk they could be pursued by immigration authorities. Generally, client identity is not privileged unless disclosure would betray personal, confidential information. For example, the client lists of attorneys who specialize in medical device litigation reveal a client's medical condition. Although many clients of immigration attorneys face deportation or other serious immigration problems, there was no evidence that all Stender's clients are illegally present, leaving him unable to rely upon any client's testimony. Stender did not explain how his defense required disclosure of clients other than those who had already voluntarily provided declarations to the State. Should other client evidence become necessary, the trial court could take measures to protect their identities. Ultimately, the injunction served to protect clients, by ensuring that they received advice from a licensed attorney.

Comment: The Court had no reluctance to hold Stender was bound by the rules and regulations pertaining to California attorneys. It was skeptical of Stender's claim the harm was past and client's rights should preclude claims against him. Stender's conduct, which could be repeated, harmed the clients by exposing them to an unlicensed attorney.