

PROFESSIONAL LIABILITY UPDATE

CAUSATION

By Jennifer A. Becker

***Yanez v. Plummer* (2013) 221 Cal.App.4th 180**

The Third District holds it is a question of fact whether an attorney's violation of the Rules of Professional Conduct is a cause of a client's injury.

Michael Yanez was present at a worksite where his co-worker, Robert Garcia, slipped and fell due to unsafe conditions. At his employer's request, he gave two statements about the accident. The statements contradicted each other because in the first Yanez stated he did not see the fall, and in the second he stated he had.

When Garcia sued the employer it assigned Brian Plummer to defend the claim. Plummer met with Yanez the day of his deposition and explained he would be Yanez's attorney for the deposition. Yanez expressed concern about his job, because he was likely to testify to unsafe conditions at the worksite, and asked Plummer who would protect him at the deposition. Plummer responded as long as Yanez told the truth in the deposition, his job would not be affected. There was no discussion of conflicts of interest and Plummer did not obtain Yanez's informed written consent.

After Garcia elicited testimony Yanez did not see the accident, Plummer examined him and undermined Yanez's credibility. He highlighted Yanez's deposition testimony that he did not "see" Garcia slip; presented the second, inconsistent statement at the deposition; led Yanez, under oath, to admit his deposition testimony conflicted with the second statement;

did not offer Yanez a chance to explain the discrepancy; and failed to present the first, consistent, statement.

An employer representative attended the deposition and initiated disciplinary proceedings for dishonesty based on the contradiction between Yanez's second statement and the deposition. At the disciplinary hearing, Yanez was allowed to explain the discrepancy was due to the omission of a single word in the second statement, which was written in haste. Nonetheless, Yanez was terminated.

Yanez sued his employer for wrongful termination and Plummer for legal malpractice, breach of fiduciary duty, and fraud. Plummer prevailed on summary judgment by asserting he was not the cause of Yanez's termination.

The Court of Appeal observed in a legal malpractice action, where there are a combination of causes, none of which is sufficient without the others to have caused the harm, the "but for" causation standard applies – the harm would not have occurred "but for" the attorney's conduct. If attorney negligence combines with another factor to cause harm, and is a substantial factor in causing the plaintiff's harm, the defendant cannot avoid responsibility

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because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm. Attorney conduct is not a substantial factor in causing harm, if the same harm would have occurred without the conduct.

Plummer was in a conflicted position. Yanez and his employer were adverse because Yanez was aware of unsafe work conditions. Yet, Plummer did not obtain Yanez's informed, written consent in violation of the Rules of Professional Responsibility.

A violation of the Rules of Professional Conduct cannot, standing alone, prove malpractice or fiduciary breach. However, Yanez presented a triable issue that "but for" Plummer's violation of the Rules, he would not have been terminated. Yanez's employer conceded that without the deposition, Yanez would not have been charged with dishonesty. Plummer's conduct uncovered the alleged deception the employer charged against Yanez. Plummer's conduct, combined with the employer's conduct, caused Yanez harm.

Comment: The Court did not need to invoke the Rules of Professional Responsibility in its causation analysis to reach its result. If Plummer had secured an informed, written conflict waiver, the standard of care still would require he protect Yanez at his deposition. The failure to meet the standard of care caused the damage; the failure to obtain a conflict waiver was not the direct cause of the damage.