

ETHICAL ISSUES IN CIVIL LITIGATION

Dangers of Discovery Short-Cuts and Ex Parte Contacts with Court

Discovery short-cuts

Over the last two months, California courts have issued three decisions with a common theme: taking discovery "short-cuts" can get you and your client in serious trouble.

In the first case, Susan S. v. Israels, 55 Cal. App. 4th 1290 (1997), an attorney had short-circuited the process for obtaining medical records, obtaining them directly from the medical facility before the patient could object on privacy grounds. The court held that the litigation privilege (Civil Code § 47(b)) did not protect this conduct.

The court held that the attorney acted improperly not only by forwarding the documents to his expert for analysis and by using the documents to cross-examine the patient when she appeared as a witness at trial, but also by merely reading the documents before a court could determine whether he had good cause to see them.

The second case, Pillsbury, Madison & Sutro v. Schectman, 55 Cal. App. 4th 1279 (1997), involved a case of "self-help" discovery. In

that case, some employees took some human resources documents with them when they left the firm and ultimately turned those documents over to their attorney, Steven Schectman, who used them to prepare and file a discrimination lawsuit against Pillsbury. Although the case is mostly of interest to lawyers specializing in employment, it is also important to other civil litigators as well: the court makes very clear that the Discovery Act was intended to "occupy the field" in terms of setting the rules for how we conduct discovery. The court stated that:

The fact counsel still conduct much pretrial preparation and discovery without judicial assistance . . . does not mean parties to litigation can operate outside the applicable parameters of the Discovery Act or may violate other laws or common law strictures in their zeal to pursue litigation.

55 Cal. App. 4th at 1288 (citation omitted).

The court went on to condemn "self-help" discovery "which is otherwise violative of ownership or privacy interests and unjustified by any exception to the jurisdiction of

the courts to administer the orderly resolution of disputes." Id. at 1289.

Any litigant or potential litigant who converts, interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery [including the litigation privilege] and risks being found to have violated protected rights. The least sanction cognizable in these circumstances would appear to be the one chosen by the trial court here: the return to the status quo existing at the time the documents were taken.

Ibid.

There are a few instances in which "self-help" is permitted, but one has to be very careful in concluding that such an exception applies. The case discusses those exceptions.

In California Shellfish, Inc. v. United Shellfish Co., 56 Cal. App. 4th 16 (1997), a plaintiff sought to enforce a subpoena for business records under section 2020(d) of the Code of Civil Procedure, which plaintiff had served on a third party

before plaintiff served any of the defendants with the summons and complaint. Under section 2025(b)(2) of the Code of Civil Procedure, a plaintiff may not serve discovery on a defendant until 20 days after serving the complaint or after a defendant appears. Plaintiff tried to argue that this "discovery hold" did not apply to third-party subpoenas for business records. The court rejected plaintiff's argument, finding the notion of such one-sided discovery "intolerable" and subject to abuse.

Read together, these three cases show that civil litigators should be very careful in how they conduct informal discovery. Succumbing to tempting short-cuts could be very dangerous. Also, if litigators obtain documents that are subject to someone else's right to privacy, whether through formal or informal discovery, they should be on high alert to handle them properly. In the situation where they receive such documents informally, they should be aware that they have no right to read them and should take immediate steps to protect the privacy of the person whose rights are implicated in the documents.

Ex parte contacts with judicial officers

When are ex parte contacts with judges proper? Only in very limited circumstances, according to Mathew Zaheri Corp. v. New Motor Vehicle Board (Mitsubishi Motor Sales of America, real party in interest), 55 Cal. App. 4th 1305 (1997). Zaheri spells out when attorneys can and cannot have ex parte contacts with judges, including administrative law judges ("ALJs"). The applicable rule is Rule 5-300 of the California Rules of Professional Conduct.

In Zaheri, the defendant's attorney communicated to the

supervising ALJ his concern for his own safety and that of his colleague, based on the plaintiff's emotional behavior during settlement discussions. The supervising ALJ had presided over a prior settlement conference in the case and was in charge of supervising the other ALJs who presided over subsequent sessions. Noting that the applicable rules "generally bar[] any ex parte communication by counsel to the decisionmaker of information relevant to issues in the adjudication," the court found that the undisclosed communication in this case also constituted misconduct by the attorney or by the ALJs. Id. at 1317.

The court noted that there are exceptions to the general prohibition against ex parte communications "where other interests supervene." Ibid. The only possible exception available in Zaheri was one for communications properly made in the context of settlement proceedings, but the court ruled that exception did not apply to expressions of concern about personal safety.

The court observed that there could be circumstances in which concern for personal safety could warrant an ex parte communication with the decisionmaker:

If immediate open disclosure would compromise the safety of the participants, e.g., if counsel believed that an opposing party was unlawfully carrying a concealed weapon, counsel could communicate that information to the tribunal.

Ibid.

However, there was no such emergency in the case at hand. The tone of the court's discussion suggests that exceptions to the general prohibition against ex parte

communications are to be construed narrowly.

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