CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG
Alternative Dispute Resolution
❖ Resolution Arts Building ❖
2630 J Street, Sacramento, CA 95816
ph: (916) 442-6739 • fx: (916) 442-4107
elong@ernestalongadr.com • www.ernestalongadr.com

Gutierrez v G & M Oil Company, Inc (5/7/2010)

Motion to Set Aside Default; Code of Civil Procedure section 473; In-House Counsel

Plaintiff filed a class action suit against defendant, one of the largest Chevron dealers in the nation. The company runs more than 125 gas stations and has more than 500 employees, but is described as a "family enterprise." The suit alleges that defendant's employment policies violate wage and hour laws. Michael Gray is part of the ownership group, related to the owner by marriage. Gray was the chain's vice president and general counsel since 2001. He was also the registered agent for service of process for the company. He had been the company's only in-house attorney since 2001, and would continue to be until January 2009.

In a conversation with Gutierrez's attorney, he agreed to accept service of the complaint in January of 2007. Gray decided to handle the defense himself. He did not send a copy of the pleadings to any other officer, director, manager or employee of the company. He never talked to or otherwise let on to anyone else at the company that it had been sued for alleged wage and hour violations. The litigation was his secret.

Gray attended two case management conferences over the next year, but otherwise took no action to defend the case. Eventually, plaintiff's counsel requested entry of default, which was granted in January 2008. In August, after Gray failed to respond to discovery orders, counsel obtained an order holding defendant in contempt. Gray neither opposed nor appeared to argue that order. Finally, in September 2008, plaintiff's counsel requested entry of a default judgment, which was obtained in December 2008, for $4 million. This was finally too much for Gray who brought it to the attention of the founder and chief

executive officer in December, 2008. Gray was immediately removed from his position as general counsel and from his position as agent for service of process. A private law firm was retained and a motion was filed to vacate the default class action judgment, based primarily on Code of Civil Procedure section 473 and Gray's declaration. Gray confessed neglect for letting the default judgment be taken. He stated that his actions were taken without the knowledge or consent of management, which was entirely blameless in the matter. The papers filed on behalf of G & M also noted that Gray never had any management responsibilities. His sole job was to act as agent for service of process. The trial court vacated the default judgment, after a hearing, and ordered the defendant to file an answer. Gray was also ordered to pay about $17,000 in attorney fees. Plaintiff Gutierrez then appealed.

On appeal, plaintiff's theory was that, as a matter of law, Gray's conduct was his client's conduct, hence G & M is stuck with it, no matter how innocent the company might otherwise be. The Third Division of the Fourth DCA noted there was no California case dealing with the issue of whether in-house attorneys come within the mandatory relief provision of section 473. The Justices examined two California Supreme Court opinions to reach its decision. The first is a wrongful termination and discharge case where the high court noted the proliferation of in-house or corporate counsel, the unusual pressures they face to conform to their employer's goals not shared by outside counsel, their complete economic dependence on their one client, and the necessity of preserving the attorney-client privilege if any claim for wrongful termination were to be allowed. (*General Dynamics Corp. v Superior Court* (1994) 7 Cal.4th 1164) The Court was careful to craft a decision allowing former in-house attorneys to sue their former employers while continuing to observe the attorney-client privilege. The Fourth DCA carefully noted the case clearly stands for the proposition that in-house attorneys do have an attorney-client relationship with their employers. In the second analogous case, an attorney requested a defense of a legal malpractice action against him from his insurance company. After the matter settled, the carrier sought reimbursement of its fees from the insured attorney, eventually suing him to recover. When he cross-complained for bad faith, the carrier used its in-house attorney to defend itself. The carrier won at trial, and sought recovery of fees for having to litigate the reimbursement issue. (*PLCM Group, Inc. v Drexler* (2000) 22 Cal.4th 1084)

The Fourth DCA took the following principles from the Supreme Court's opinions: (1) In house attorneys do not represent themselves, they represent third parties. Attorney fees imply an attorney-client relationship. The in-house attorney has an agency relationship with the corporation he or she represents. (2) Treating in-house attorneys differently than outside counsel for purposes of attorney fee awards under Civil Code section 1717 would create an unfair differentiation in the law. Unlike pro per plaintiffs that represent themselves, in-house attorneys are like private counsel and do not represent their own personal interests, and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a non-lawyer (*Trope v Katz* (1995) 11 Cal.4th 274). Finally, (3) the payment of a salary to an in-house attorney is analogous to hiring a private firm on a retainer. In-house counsel have the same duties to their clients and are bound by the same fiduciary and ethical duties to their clients. (*PLCM*, supra, at p. 1094)

Each one of these reasons applies just as much to the mandatory provisions of Code of Civil Procedure section 473, under which G & M's motion to set aside the default judgment is brought. Here, Gray was in an attorney client relationship with G & M and was acting as an attorney in being the person responsible for the handling of the Gutierrez suit. Nothing in 473 suggests corporations with in-house attorneys should be at a disadvantage with regard to the negligence of their attorneys that would not apply if they hired outside counsel. Both in-house and outside lawyers have the same duty to their clients. Gutierrez argues that since Gray was a vice-president of G & M, a corporate officer, and he was acting for the corporation. The Justices disagreed. Turning again to 473, the Court noted that there is no differentiation between attorneys who are officers of a corporate employer and those that are not. The core idea is the attorney is responsible for the default judgment and there is an attorney-client relationship. Only attorneys may represent clients in court (Business and Professions code section 6125).Thus if an attorney is responsible for a default, by definition that responsibility implicates the attorney's services as an attorney, not as a corporate officer.

Since there is nothing in 473 separating inside and outside counsel, or parsing in-house lawyers from corporate officers, and because there is an attorney-client relationship between Gray and G & M, the Justices reason that the mandatory provision of 473 protects corporations represented by in-house attorneys as much as any other class of litigants represented by counsel.

Corporations cannot appear in court by an officer who is not an attorney, and cannot appear *in propria persona*. (*Paradise v Nowlin* (1948) 86 Cal.App.2d 897) The corporate form treats in-house attorneys as agents separate from the corporation itself, whether they are corporate officers or not.

Gray declared that he was not acting as a corporate officer when he hid the complaint from the ownership of the company. He was representing, or trying to represent, the corporation in court. Negligent conduct on his part clearly can be defined as performing legal services, to which 473 should apply. In this case, Gray never had any management responsibility and only did law.

The order setting aside the default judgment is affirmed. Because the case involves an issue of first impression, each side will bear its costs on appeal.