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 • http://ernestalongadr.com

LaSalle v Vogel 6/11/19

Default; Motion to Set-Aside; CCP section 473

From 2011 to 2015, Appellant Attorney Joanna T. Vogel (Vogel) represented plaintiff/respondent Angele Lasalle (Lasalle) in the dissolution of a registered domestic partnership with Minh Tho Si Luu. Lasalle repeatedly failed to provide discovery in that case, and the court defaulted her as a terminating sanction. She said her failure to provide discovery was caused by Vogel not keeping her informed of discovery orders, so she sued Vogel for legal malpractice.

Vogel was served with the complaint on March 3, 2016. Thirty five days went by. On the 36th day, Thursday April 7, Lasalle's attorney sent Vogel a letter and an email – the content was the same – telling her that the time for a responsive pleading was "past due" and threatening to request the entry of a default against Vogel unless he received a responsive pleading by the close of business the next day, Friday April 8. Our record does not include the time of day on Thursday when either the email was sent or the letter mailed, so we cannot evaluate the chance of the letter reaching Vogel in Friday's post except to say it was slim.

Counsel did not receive any response from Vogel by 3 p.m. the following Monday, April 11. He filed a request for entry of default and emailed a copy to Vogel at 4:05 p.m. That got Vogel's attention and she emailed her request for an extension at 5:22 p.m., but by then the default was a fait accompli.

Vogel acted rather quickly now that her default had been entered. She found an attorney by Friday April 15th, and that attorney had a motion to set aside the default on file a week later. Here is a quote from Lasalle's declaration in support of the set aside motion :

"I am an attorney at law, and the defendant in this matter.

When I was served with the summons and complaint, I was in the middle of a number of family law matters in court as the attorney.

I was also involved in my own divorce, wherein I had just discovered my husband failed to pay the mortgage on the family residence and it went into default.

I received the summons and complaint and the discovery and had met with an attorney to represent me. I then learned that the lawyer had just associated with one of the other defendants in this matter

I therefore, determined to find a new attorney and contacted the plaintiff's attorney to request a brief extension to respond to the complaint. While waiting to hear back and without having the courtesy of the extension, I received the notice of default.

…

I am a single mother and between taking care of the family, the practice of law,

and trying to revive [*sic*] the files of from the plaintiff, I did fail to timely file my answer.

As soon as I could, I contacted the attorney who filed the motion and retained him to represent me. I provided for him the summons and complaint, but have yet to gather the files together to answer what appears to be an unverified complaint.

I have attached hereto my proposed answer

I state the above facts to be true and so state under penalty of perjury this 16th day of April in Fullerton, California."

Vogel's set-aside motion was made pursuant to those provisions of subdivision (b) of section 473 that commit the matter to the trial court's discretion in cases of "mistake, inadvertence, surprise, or excusable neglect." There was no "falling on the sword" affidavit of fault that might have triggered application of those provisions of section 473 *requiring* a set-aside when an attorney confesses fault.

In opposing relief, respondent's counsel asked the trial court to take judicial notice of state bar disciplinary proceedings against Vogel stemming from two unrelated cases, which had resulted in a stayed suspension of Vogel's license to practice. The court denied the set-aside motion in a minute order filed June 9, 2016, in which the trial judge expressly took judicial notice of Vogel's prior discipline. A year later, a default judgment was entered against Vogel for $1 million. She has appealed from both that judgment and the order refusing to set aside the default.

Three decades ago, in the First District, dealing with a case they

attributed to a "fit of pique between counsel," addressed this entreaty to California attorneys, "We conclude by reminding members of the Bar that their responsibilities as officers of the court include professional courtesy to the court and to opposing counsel. All too often today we see signs that the practice of law is becoming more like a business and less like a profession. We decry any such change, but the profession itself must chart its own course. The legal profession has already suffered a loss of stature and of public respect. This is more easily understood when the public perspective of the profession is shaped by cases such as this where lawyers await the slightest provocation to turn upon each other. Lawyers and judges should work to improve and enhance the rule of law, not allow a return to the law of the jungle." (*Lossing v. Superior Court* (1989) 207 Cal.App.3d 635, 641.)

In 1997, another appellate court urged bench and bar to practice with more civility. "The law should not create an incentive to take the scorched earth, feet-to-the-fire attitude that is all too common in litigation today." (*Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 17.)

By 2002, lawyers were doing and saying things that would have beggared the imagination of the people who taught us how to practice law. A lawyer named John Heurlin who wrote to opposing counsel, "I plan on disseminating your little letter to as many referring counsel as possible, you diminutive shit." Admonishing counsel to "educate yourself about attorney liens and the work product privilege," Mr. Heurlin closed his letter with the clichéd but always popular, "See you in Court." That and other failures resulted in Mr. Heurlin being sanctioned $6,000 for filing a frivolous appeal and referred to the State Bar. Our court thought publishing the ugly facts of the case, which

they did in *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, would get the bar's attention. It didn't.

Almost a decade later, in a case called *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1537, the First District tried again. They said, "We close this discussion with a reminder to counsel – all counsel, regardless of practice, regardless of age – that zealous advocacy does not equate with 'attack dog' or 'scorched earth,' nor does it mean lack of civility. Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."

Six months later, our court said this, "Our profession is rife with cynicism, awash in incivility. It's time to stop talking about the problem and act on it. For decades, our profession has given lip service to civility. We have reluctantly concluded lips cannot do the job; teeth are required. In this case, those teeth will take the form of sanctions." We sanctioned counsel $10,000. (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 293)

This is not an exhaustive catalogue. "Incivility in open court infects the process of justice in many ways. It compromises the necessary public trust that the system will produce fair and just results; it negates the perception of professionalism in the legal community, and it erodes respect for all people involved in the process." (*In re Hillis* (Del. 2004) 858 A.2d 317, 324.)

It's gotten so bad the California State Bar amended the oath new attorneys take to add a civility *requirement*. Since 2014, new attorneys have been required to vow to treat opposing counsel with "dignity, courtesy, and integrity."

That was not done here. Dignity, courtesy, and integrity were conspicuously lacking. Perhaps the problem is not so much a personal failure as systemic one. Court and counsel below are merely indicative of the fact practitioners have become inured to this kind of practice. They have heard the mantra so often unthinkingly repeated that, "This is a business," that they have lost sight of the fact the practice of law is *not* a business. It is a profession. And those who practice it carry a concomitantly greater responsibility than businesspeople.

So what the Fourth DCA will review in this case is not so much a failure of court and counsel as an insidious decline in the standards of the profession that must be addressed. "The term 'officer of the court,' with all the assumptions of honor and integrity that append to it must not be allowed to lose its significance."

Warning and notice play a major role in this scrutiny. Six decades ago, when bench and bar conducted themselves as a profession, another appellate court, in language both apropos to our case and indicative of how law ought to be practiced, said, "The quiet speed of plaintiffs' attorney in seeking a default judgment without the knowledge of defendants' counsel is not to be commended." (*Smith v. Los Angeles Bookbinders Union* (1955) 133 Cal.App.2d 486, 500)

In contrast to the stealth and speed condemned in *Bookbinders*, courts and the State Bar emphasize warning and deliberate speed. The State Bar Civility Guidelines deplore the conduct of an attorney who races opposing

counsel to the courthouse to enter a default before a responsive pleading can be filed. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681) Accordingly, it is now well-acknowledged that an attorney has an *ethical* obligation to warn opposing counsel that the attorney is about to take an adversary's default.

In that regard the Justices heartily endorse the related admonition found in The Rutter Group practice guide, and note the authors' emphasis on *reasonable time*: "Practice Pointer: If you're representing plaintiff, and have had *any* contact with a lawyer representing defendant, don't even *attempt* to get a default entered without first giving such lawyer *written* notice of your intent to request entry of default, and a *reasonable time* within which defendant's pleading must be filed to prevent your doing so." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) § 5:73, p. 5-19)

To be sure, there is authority to the effect giving any warning at all is an "ethical" obligation as distinct from a "legal" one. The appellate case usually cited these days for this ethical-legal dichotomy is *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038. The majority opinion in *Bellm* lamented the "lack of professional courtesy" in counsel's taking a default without warning (See *Bellm,* at p. 1038) but deemed it an ethical issue rather than a legal one and affirmed the trial court's denial of relief. The *Bellm* dissent would have found an abuse of discretion. (*Bellm,* at p. 1040)

But *Bellm* was handed down on January 19, 1984. That was only two weeks after section 583.130, quoted above, went into effect. The section obviously could not have been briefed or argued in that case, so the *Bellm* court did not have the benefit of the statute. The statute was passed to curb what the

Legislature considered an inappropriate rise in motions to dismiss for lack of prosecution – sometimes brought, like this one, as soon as a time limit was exceeded. As the Law Revision Commission phrased it:

"…the judicial attitude that began in the 1970's was stated by the Supreme Court: 'Although a defendant is entitled to the weight of the policy underlying the dismissal statute, which seeks to prevent unreasonable delays in litigation, the policy is less powerful than that which seeks to dispose of litigation on the merits rather than on procedural grounds.'" (*Wheeler v. Payless Super Drug Stores* (1987) 193 Cal.App.3d 1292, 1295, quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see also *Hocharian v. Superior Court* (1981) 28 Cal.3d 714.)

So to the extent it was possible for a party seeking a default with unseemly haste to commit an *ethical* breach without creating a *legal* issue, that distinction was erased by section 583.130. **The ethical obligation to warn opposing counsel of the intent to take a default is now reinforced by a statutory policy that all parties "cooperate in bringing the action to trial or other disposition." (§ 583.130.)**

Unreasonable deadlines do not qualify as "cooperation" and cannot be accepted by the courts. To do so would be contrary to legislative policy, as they are destructive of the legal system and the people who work within it. It would lead to increased litigation to set aside defaults, an unnecessary burden on the courts. It would force practitioners to choose between the civility we teach in law schools, require in their oath, and legislate in statutes like section 583.130, and their obligation to represent their client as effectively as possible. We owe ourselves an easier choice, and the legislature has given it to us in section 583.130.

Several factors lead to the Court's decision. The first is **the use of email to give "warning."** Email has many things to recommend it; reliability is not one of them. Lawyers learned in law school that due process requires not just notice, but notice reasonably calculated to *reach* the object of the notice. (See *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 318.) While there is no due process problem in the case before the Court now (Vogel has not complained she wasn't actually served), emails are a lousy medium with which to warn opposing counsel that a default is about to be taken. The members of the DCA find it significant that by law emails are insufficient to serve notices on counsel in an ongoing case without prior agreement and written confirmation. (§§ 1013, subd. (e); 1010.6, subd. (a)(2)(A)(ii); Cal. Rules of Court, rule 2.251(b).)

Indeed, **the sheer ephemerality of emails poses unacceptable dangers for issues as important as whether an *entire case* will be decided by default and not on the merits.** Courts have learned the hard way that spam filters can ambush important, non-advertising messages from lawyers who have an important legal purpose and keep them from reaching their intended destination – the court. The Justices have, on occasion, had to reschedule oral arguments because notices to counsel of oral argument dates and times sent by email got caught in spam filters and did not reach those counsel, or their requests for accommodation did not reach the Court.

The choice of email to announce an impending default seems to be hardly distinguishable from stealth. And since the other course adopted by respondent's trial attorney was mailing a letter on Thursday in which he

demanded a response by Friday, it is difficult to see this as a genuine warning – especially when 19th century technology – the telephone – was easily available and orders of magnitude more certain.

The second factor to consider is the **short-fuse deadline** given by respondent's counsel. It was *unreasonably* short. It set Vogel up to have her default taken immediately. "The quiet taking of default on the beginning of the first day on which defendant's answer was delinquent was the sort of professional discourtesy which, under *Bookbinder* justified vacating the default." (*Robinson v. Varela* (1977) 67 Cal.App.3d 611, 616)

The third factor is the total **absence of prejudice** to Lasalle from any set-aside, given the relatively short time between respondent seeking the default and Vogel asking to be relieved from it. "When evaluating a motion to set aside a default judgment on equitable grounds, the 'court must weigh the reasonableness of the conduct of the moving party in light of the extent of the prejudice to the responding party.'" (*Mechling v. Asbestos Defendants* (2018) 29 Cal.App.5th 1241, 1248-1249.) Setting aside *this* default would have involved little wasted time, and the de minimis expenses incurred could have been easily recompensed.

The fourth factor is the **unusual nature of the malpractice claim in this case**. Some cases are suited for defaults: An impecunious debtor who is sued for an unquestionably meritorious debt may very well make a rational decision not to spend good money after bad by contesting the case. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1751) But this legal malpractice action covering the entirety of a family law action lies at the opposite end of the

spectrum.

Because of the facts alleged in the complaint – namely that Vogel had been responsible for losing Lasalle's *entire* dissolution case – Lasalle's damages called for litigation of multiple items of property characterization, credits, reimbursement claims, and perhaps even claims for support. (See *d'Elia v. d'Elia* (1997) 58 Cal.App.4th 415, 418) This means the malpractice claim here was going to require a trial within a trial about some complex issues indeed. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241) That's pretty much the opposite of simple debt collection.

A fifth factor favoring a set-aside here was the **presence of a plainly meritorious defense to at least part of Lasalle's default judgment**. That judgment eventually included emotional distress damages of $100,000. Those damages are contrary to law. In *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1038-1039, this court squarely held that emotional distress damages are not recoverable in an action for family law legal malpractice. Even if the Court is not directing the trial court to set aside the default, the DCA would have to reduce the judgment by at least this amount as contrary to law, and its inclusion only underscores the impossibility of respondent's 24-hour deadline for answering the complaint.

Next, there was the trial court's taking judicial notice of, and reliance on, Vogel's two previous instances of discipline for not having properly communicated with clients on previous cases. Evidence Code section 1101 represents the Legislature's general disapproval of the use of specific instances of a person's character to establish some bad act. We note the statute is not limited

to criminal cases by its terms, though it usually shows up in criminal cases. (See *People v. Nicolas* (2017) 8 Cal.App.5th 1165, 1176) Nonetheless, the point is the same: judicial decisions should fit the facts of a case and not be based on some general evaluation of a person's personal history. **The fact Vogel had failed to comply with standards of professional conduct in the past should not have colored the determination of whether she deserved an extension in this case.**

And finally, the Justices are disappointed that Vogel's explanation of her botched reply in this case was not considered adequate. A single mother who is juggling the inevitable pressures of that role and a caseload of family law matters, and has just learned that her ex- has failed to pay the property taxes or make the house payment – thus, ironically, throwing those into default – deserves some consideration.

To be sure, Vogel's declaration in support of her set aside might have been more polished – but then again she had very little time to prepare it. As noted, one of the considerations in a section 473 motion is how much time has elapsed since the default. The clock was ticking, and the obligations noted in the last paragraph were not about to disappear.

In a case like this one, where there would have been no real prejudice had the set-aside motion been granted, the rule is that a party's negligence in allowing a default to be taken in the first place "will be excused on a *weak showing*." (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 740) Vogel's declaration crossed that threshold.

The DCA does not hold that every section 473 motion supported by a

colorable declaration must be granted. Since every section 473 motion must be evaluated on its own facts, it will hold only that *this one* should have been granted. As stated, Vogel was notified by unsatisfactory means of an unreasonably short deadline (just being out of the office for one day – for example, *on another case* – would have prevented her from meeting it), and she had significant family emergencies of her own, including an urgent need to take care of taxes and unpaid mortgage payments lest she lose her home. *Her* neglect was excusable. (See *Robinson,* at p. 616) The Justices hope the next attorney in these straits will not have such a compelling set of facts to offer . . . and that opposing counsel will act with "dignity, courtesy, and integrity."

Supreme Court Chief Justice Warren Burger long ago observed, "Lawyers who know how to think but have not learned how to behave are a menace and a liability
. . . to the administration of justice. . . . The necessity for civility is relevant to lawyers because they are the living exemplars – and thus teachers – every day in every case and in every court and their worst conduct will be emulated perhaps more readily than their best." (Burger, Address to the American Law Institute, 1971, 52 F.R.D. 211, 215) Attorneys who do not acknowledge section 583.130 are practicing in contravention of the policy of the state and menacing the future of the profession.

Here is what Code of Civil Procedure section 583.130 says: "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that **all parties shall cooperate in bringing the action to trial or other disposition.**" That is not complicated language. No jury instruction defining any of its terms would be necessary if submitting it to a panel

of non-lawyers. The policy of the state is that the parties to a lawsuit "shall cooperate." Period.

Yet the principle the section dictates in support of civility and cooperation "is a custom, More honor'd in the breach than the observance." In this case, the Justices observe more evidence that our profession has come unmoored from its honorable commitment to the ideal expressed in section 583.130, and urges a return to the professionalism it represents.

The judgment is reversed. Appellant will recover her costs on appeal.

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