Court of Appeal, Fifth Appellate District
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ASCDC
Association of Southern California Defense Counsel

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REQUEST FOR PUBLICATION

JURISDICTION EXPIRES: 07/20/2020

July 1, 2020

Acting Presiding Justice Herbert I. Levy
Associate Justice Rosendo Peña, Jr.
Associate Justice Donald R. Franson, Jr.
Court of Appeal of the State of California
Fifth Appellate District
2424 Ventura Street
Fresno, California 93721

Re: ***Cortina v. North American Title Company***
Court of Appeal No. F077659
Request for Publication; Opinion filed June 18, 2020

Dear Acting Presiding Justice Levy, Associate Justice Peña, and Associate Justice Franson:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests the publication of the court's June 18, 2020 opinion in *Cortina v. North American Title Company*, which addresses novel issues concerning the disqualification of defense counsel in the class action context.

ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

ASCDC seeks publication of the court's opinion in *Cortina* because it provides important guidance concerning whether, and in what circumstances, class action defense counsel may be disqualified for having ex parte communications with members of a decertified class under State Bar Rules of Professional Conduct, rule 4.2 (rule 4.2), and its predecessor, former State Bar Rules of Professional Conduct, rule 2-100, repealed and replaced by rule 4.2 on November 1, 2018,[1] which prohibit unauthorized communications with represented parties about the subject matter of the representation. ASCDC has an interest in the publication of this opinion because many of its members specialize in defending class action cases and other cases involving professional responsibility and attorney disqualification issues.

First, this court should certify the opinion for publication because it "establishes a new rule of law." (Cal. Rules of Court, rule 8.1105(c)(1).)

It is well-established that, to disqualify defense counsel for having ex parte communications with class members, plaintiffs must show, among other things, that the "class members were represented by counsel during the relevant time period." (Typed opn. 2-3.) Here, the parties agreed that, under California law, " ' once a class is certified, class counsel represent absent class members for purposes of the ethical rule that prohibits communication with represented parties. ' " (Typed opn. 10, quoting *Walker v. Apple* (2016) 4 Cal.App.5th 1098, 1107.) And plaintiffs conceded, and the opinion stated, that "the representation ends upon decertification of the class." (Typed opn. 10.)

ASCDC, however, is unaware of any published opinion holding that, for purposes of rule 4.2, representation of absent class members ends upon final decertification of the class. Indeed, the opinion here does not cite or rely on any California authorities for that proposition. (See typed opn. 10.) Rather, the opinion cited only a single federal district court case from New York, *Daniels v. City of New York* (S.D.N.Y. 2001) 138 F.Supp.2d 562, 564-565, which itself does not cite or rely on any California authorities. (Typed opn. 10.) Thus, the opinion's statement that representation of absent class members ends upon decertification of the class represents a new rule in California,[2] notwithstanding the fact that this rule may be

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[1] All subsequent references to rule 4.2 incorporate references to its predecessor rule.

[2] The opinion itself acknowledges the paucity of case law analyzing the "representation" element under rule 4.2 in the class action context, observing that "there is little or no authority" concerning the related issue of "whether the attorney-

established in other jurisdictions, like New York, or under different class action regimes, like Federal Rules of Civil Procedure, rule 23.

Moreover, this new rule provides important guidance to trial courts and attorneys when considering attorney disqualification motions in the class action context; namely, that because representation of absent class members terminates upon decertification of the class, defense counsel do not violate rule 4.2 by having ex parte communications with members of a decertified class (at least when the decertification order is final). The opinion's establishment of this new rule by itself makes the opinion appropriate for publication. (See Cal. Rules of Court, rule 8.1105(c)(1).)

Second, this court should also certify the opinion for publication because it "explains" various "existing rule[s] of law" and then "applies [those] existing rule[s] of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, rule 8.1105(c)(2)-(3).)

After discussing the "representation" element of rule 4.2 (see typed opn. 10), the remainder of the opinion focuses on analyzing the well-established rule that, to disqualify defense counsel for having ex parte communications with members of a decertified class, plaintiffs bear the burden to establish a "likelihood the unauthorized conduct would have a substantial continuing effect on the proceedings in the case" (typed opn. 3, 10-11). In doing so, however, the opinion provides important guidance on the application of this rule in several novel contexts, including whether, and in what circumstances, the party seeking disqualification is excused from its burden under this rule to establish prejudice. (See typed opn. 11-14.)

For example, the opinion considers a line of cases in which courts have held that, where a nonlawyer employee or expert consultant hired by one side's counsel has a prior professional relationship with the other side's counsel—and the employee or consultant possesses confidential information material to the pending litigation—there is a rebuttable presumption that the consultant disclosed this information to the current counsel and that disqualification may be required. (See typed opn. 11-12, citing *Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (1996) 46 Cal.App.4th 778, 782; *Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067; *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572.) But the opinion then explains that this line of cases does not extend to cases involving a defense counsel's

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client relationship between class counsel and absent class members continues in the interim between an order of decertification and the formal entry of dismissal." (Typed opn. 10; see *ibid.* [stating that the issue is an "unsettled question of law"].)

ex parte communications with absent class members. (Typed opn. 12-13.) In distinguishing those cases, the opinion explains that, unlike an employee or consultant, absent class members generally possess no information material to the pending litigation, let alone confidential information. (Typed opn. 12.) Thus, there is no presumption that a defense counsel's ex parte communications with absent class members disclosed confidential information material to the litigation. (*Ibid.*)

Similarly, the opinion considers whether, under general principles of evidence law, plaintiffs were excused from their burden to establish prejudice because defense counsel purportedly obstructed their ability to identify the absent class members who defense counsel contacted and to determine the substance of their communications with defense counsel. (Typed opn. 12-14.) But the opinion explains that, even assuming defense counsel obstructed plaintiffs' ability to sustain their evidentiary burden to establish prejudice, plaintiffs who seek to disqualify defense counsel based on ex parte communications with absent class members nonetheless remain subject to ordinary principles of waiver and forfeiture. (Typed opn. 13-14 & fn.5.) Thus, plaintiffs who contend that defense counsel obstructed their ability to establish prejudice must raise those objections and request appropriate relief from the trial court in the first instance—for example, by seeking limited discovery into the circumstances concerning defense counsel's ex parte communications. (*Ibid.*)

As a final example, plaintiffs argued that, under Evidence Code section 412,[3] the court must discount the reliability of defense counsel's evidence that there was no prejudice resulting from their ex parte communications with absent class members. (See typed opn. 15.) But the opinion clarifies that Evidence Code section 412 does not excuse plaintiffs from their threshold burden under rule 4.2 to establish prejudice; as the opinion explains, "[a]ny shortcomings in the evidence [that defense counsel] elected to proffer . . . cannot excuse plaintiffs' failure to meet their own evidentiary burden." (Typed opn. 15.)

These rulings provide trial courts with important guidance on the nature of a moving party's burden to establish prejudice when seeking to disqualify opposing counsel, including whether, and in what circumstances, the moving party is excused from this burden. And yet, ASCDC is unaware of any published decisions that address these issues in the context of attorney disqualification motions under rule 4.2 based on a defense counsel's ex parte communications with absent class members. The opinion's explanation of these existing rules, and its application of those rules to

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[3] Evidence Code section 412 provides that "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and satisfactory evidence, the evidence offered should be viewed with distrust."

this new context, makes this opinion appropriate for publication. (Cal. Rules of Court, rule 8.1105(c)(2)-(3).)

In short, California Rules of Court, rule 8.1105(c)(1)-(3) provides that an opinion "should be certified for publication" if it (1) "[e]stablishes a new rule of law," (2) "explains . . . an existing rule or law," or (3) "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinion." Here, the court's opinion in *Cortina* satisfies all three criteria, any one of which is sufficient to merit publication of the opinion. ASCDC therefore asks this court to certify the opinion for publication.

Respectfully submitted,

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cc: See attached Proof of Service

PROOF OF SERVICE

Cortina et al v. North American Title Company
Case No. F077659

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On July 1, 2020, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

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Executed on July 1, 2020, at Burbank, California.

Jill Gonzales

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Case No. F077659

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