COURT OF APPEAL CIVIL CASE NUMBER: B220482

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION 8

LISA SCAROLA aka MELISSA COHEN, Cross-Complainant

v.

DEDICATED TALENT AGENCY, INC. dba

THE JERRY PACE AGENCY, Cross-Defendant/Respondent

BAYLEIGH JORDAN PETTIGREW, Appellant

Appeal From The Superior Court Of California

For The County Of Los Angeles

The Honorable James Kaddo, Judge

(Case No. LC084653)

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either (1) an ownership interest of ten percent (10%) or more in the party or parties filing this certificate (Cal. Rules of Court, Rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, Rule 8.208(e)(2));

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(e)(3)).

Dated: April 8, 2012

MORRIS & ASSOCIATES

By:________________________
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I. STATEMENT OF APPELLATE JURISDICTION

This appeal seeks reversal of that part of the September 21, 2009 order requiring BAYLEIGH JORDAN PETTIGREW (hereinafter "MS. PETTIGREW) to be held jointly and severally liable with her client LISA SCAROLA (hereinafter "MS. SCAROLA") for sanctions awarded to DEDICATED TALENT AGENCY, INC, dba THE JERRY PACE AGENCY (hereinafter "DEDICATED") in the amount of $2500.00 for MS. SCAROLA's failure to appear at her deposition. The order is appealed by MS. PETTIGREW.

In *Barton v. Ahmanson Developments, Inc.*, 17 Cal. App. 4th 1358, 22 Cal. Rptr. 2nd 56 (1993), the court interpreted California Civil Code of Procedure § 904.1(b) to hold that a discovery sanction against an attorney who had substituted out of a case was appealable because the order was final to the attorney. The *Barton* court found that the Appellant's particular problem was ripe for determination and that no particular purpose was served by delaying its resolution. The Minute Order sanctioning attorney MS. PETTIGREW was entered on September 21, 2009. AA 255-256. The Order Granting Attorney's Motion To Be Relieved As Counsel, allowing MS. PETTIGREW's release from her representation of MS. SCAROLA was granted on October 12, 2009. AA 261-263. The notice of appeal filed on November 12, 2009 was immediately appealable and timely. AA 264-266.

II. LEGAL ISSUES PRESENTED

Whether the trial court abused its discretion in sanctioning Defendant's attorney for her client's failure to attend a deposition where the court found that: (1) there was no evidence of MS. PETTIGREW encouraging her client not to cooperate or to refuse to appear; and (2) where

admittedly the attorney had done everything required of her, but ordering sanctions against that attorney because the court found that insufficient notice was given to DEDICATED, albeit three (3) days prior to the scheduled deposition and immediately upon MS. PETTIGREW being made aware by her client that the client would not appear?

III. STATEMENT OF FACTS

A. The Parties

1. BAYLEIGH JORDAN PETTIGREW (hereinafter "MS. PETTIGREW") was the attorney of record for LISA SCAROLA (hereinafter "MS. SCAROLA"), the Defendant in the original case of GERALD V. PACE and MARCIA ROBINS v. LISA SCAROLA.

2. Respondent, DEDICATED TALENT AGENCY, doing business as THE JERRY PACE AGENCY, is the Cross-Defendant in the primary case of PACE v. SCAROLA and is owned by GERALD V. PACE and LISA SCAROLA with MARCIA ROBINS claiming to be a 10% shareholder.

B. The Proceedings

1. This appeal stems from an order issued by the trial court after a hearing on September 21, 2009 wherein MS. PETTIGREW was found to be jointly and severally liable with MS. SCAROLA for her client's failure (not MS. PETTIGREW's) to appear at a deposition. AA 255-256. The trial court acknowledged that the misconduct was that of the client when the court noted that, "…at least you are doing what an ethical, professional lawyer should be doing with an unruly client" and that "…it seems to me that she [MS. PETTIGREW] did everything required of her, even beyond that". RT 2:23-25; RT 3:13-26.

2. The court then went on to order the sanctions against Ms. PETTIGREW based upon her client's late notice of unavailability (three days before the scheduled date of the deposition), stating that, "Unfortunately, she's your client. You have to carry the burden". RT 2:25-26.

3. In its subsequent Minute Order, the court stated that, "There is ***no evidence presented*** showing the existence of a Court order, numerous attempts to get compliance, nor plaintiff's [MS. SCAROLA'S] willful failure to comply" to justify terminating sanctions (emphasis added). AA 255. Likewise, there was ***no evidence presented*** showing the existence of any wrongdoing on the part of MS. PETTIGREW. On the contrary, the court acknowledged her ethics and professionalism while representing an unruly client throughout a difficult situation. In response to this Order awarding sanctions against MS. PETTIGREW, MS. PETTIGREW filed Notice of Appeal. AA 264-266.

4. The underlying suit upon which the motion for sanctions was bought began when GERALD V. PACE and MARCIA ROBINS, claiming to be the majority shareholders of DEDICATED TALENT AGENCY doing business as THE JERRY PACE AGENCY (hereinafter "DEDICATED"), filed suit against remaining shareholder, LISA SCAROLA on March 5, 2009. AA 1-34. Plaintiffs GERALD PACE and MARCIA ROBINS had knowledge of MS. SCAROLA's New York residence address from MS. SCAROLA prior to the filing of this lawsuit as they accused MS. SCAROLA of sending payroll checks to "DEFENDANT's [MS. SCAROLA] New York address. AA 12: 8-9. (*See also:* AA 3:14; AA 4 (c) stating that, "The checks are already being directed away from DEDICATED's California address to DEFENDANT's other address in New York State; AA 11:26-27; AA 19 and AA 22 showing New York address at top of letterhead; and AA 23-25).

5. On or about June 12, 2009, DEDICATED sent an email notifying MS. SCAROLA of its intent to take her deposition. AA 195:8-12; AA 202. On or about June 15, 2009, MS. PETTIGREW advised DEDICATED that MS. SCAROLA had been in New York for several weeks and that she was still in New York, but that MS. SCAROLA planned to return to Los Angeles after July 4, 2009 and requested that the deposition be scheduled for mid-July. AA 195:13-15; AA 204.

6. On or about June 26th, 2009, MS. PETTIGREW learned of and informed DEDICATED of MS. SCAROLA's change of plans to stay at her residence in New York indefinitely to assist her aunt who was ill. AA 195:22-26; AA 206.

7. On Monday, June 29, 2009, MS. PETTIGREW received notice via email of DEDICATED's intent to depose MS. SCAROLA in New York on July 10, 2009. AA 196:27-197:8; AA 216; AA 218. On Tuesday, June 30, 2009, MS. PETTIGREW replied via email to DEDICATED that MS. SCAROLA had been notified of the intended date, but that MS. PETTIGREW was not confirming MS. SCRAOLA's availability at that time. AA 197:17-24; AA 222.

8. On Tuesday, July 7, 2009, MS. PETTIGREW learned from MS. SCAROLA that she could not attend the deposition scheduled that Friday, July 10, 2009. MS. PETTIGREW ***immediately*** sent an email to DEDICATED to inform them that MS. SCAROLA could not attend the deposition and to request that it be rescheduled. AA 198:15-19. DEDICATED was specifically told, "She is not able to make it". AA 197:26-28; AA 224.

9. DEDICATED responded to the email stating that they refused to reschedule and that DEDICATED's counsel insisted on flying to New York and incurring additional costs in order to create a record showing that MS. SCAROLA would not appear. Specifically,

DEDICATED's counsel said, "No, it cannot be rescheduled at this late notice." AA 198:2-14; AA 226.

10. DEDICATED's counsel then contacted MS. PETTIGREW by telephone. AA 198:15-17; AA 252. MS. PETTIGREW restated that MS. SCAROLA would not be at the deposition. AA 198:17-26. At that, DEDICATED's counsel became irate and threatened a variety of legal actions that he would take against MS. SCAROLA and MS. PETTIGREW. DEDICATED's counsel flew to New York and incurring the additional costs associated therewith, despite notification days prior to the deposition. AA 198:11-14; AA 226.

11. After DEDICATED's counsel insisted on flying to New York, MS. PETTIGREW immediately informed MS. SCAROLA that DEDICATED refused to cancel the deposition and urged MS. SCAROLA to try to appear. AA 198:27-199:2; AA 200:6-10.

12. On July 10, 2009, DEDICATED held the deposition in New York. MS. PETTIGREW appeared telephonically as planned in case her client appeared. AA 199:8-19; AA 231-232. DEDICATED's counsel stated on that record that the deposition was to be the only attempt to meet and confer. AA 121:4-11. DEDICATED made no further attempts to meet and confer prior to filing the Motion for Sanctions and Dismissal. AA 191:2-10.

13. On or about August 17, 2009, DEDICATED filed a Motion For Sanctions Of Dismissal and $18,878.00; Alternatively For Sanctions of $18,878.00 And To Compel The Deposition Of LISA SCAROLA, which also alleged that MS. PETTIGREW had violated the discovery rules. AA 53:11-19; AA 54:21-55:17.

14. On September 21, 2009, the hearing on DEDICATED's Motion for Sanctions was held. The court awarded

DEDICATED $2,500.00 in sanctions to be paid jointly and severally by MS. SCAROLA and MS. PETTIGREW. AA 255-256.

15. When MS. PETTIGREW objected to the sanctions against herself, it was then that the court stated in response, "…your position is noted on the record. I am sympathetic, but he [counsel for DEDICATED] has an obligation to his client to prosecute his case. And if that is the situation, then at least you are doing what an ethical, professional lawyer should be doing with unruly, uncooperative client. ***Unfortunately, she is your client. You have to carry the burden***." (Emphasis added) RT 2:20-26.

16. At MS. PETTIGREW's assertion that she had done everything that she could do in order to facilitate the deposition, that she always advises her clients to attend depositions, and that she has no reason not to want her client to attend her deposition. The court stated "… it seemed to me that ***she*** [MS. PETTIGREW] ***did everything required of her, even beyond that*.**" (emphasis added) RT 3:19-21.

17. The court ultimately held that its tentative decision awarding the sanctions to DEDICATED jointly and severally by MS. PETTIGREW and her client would stand because "…notice [of unavailability three days before the deposition] is insufficient". RT 4:21-6:18.

18. Subsequently, the court's Minute Order stated that MS. PETTIGREW was jointly and severally liable for sanctions with her client for "…failing to appear at the deposition". AA 255-256. MS. PETTIGREW did appear telephonically at the deposition as scheduled. AA 65-66.

19. On October 26, 2009, the court granted MS. PETTIGREW's motion to be relieved as counsel, filed with the court on July 21, 2009. AA 261-263.

20. On or about November 12, 2009, MS. PETTIGREW filed Notice of Appeal with the Los Angeles Superior Court. AA 264-266.

21. On or about November 23, 2009, MS. PETTIGREW filed the Appellant's Notice Designating Record On Appeal. AA 268-270.

IV. STANDARD OF REVIEW

An order imposing discovery sanctions is reviewed under the abuse of discretion standard. *New Albertsons, Inc. v. Superior Court of Los Angeles County*, 168 Cal.App.4th 1403, 1422, 86 Cal.Rptr.3d 457 (2008). The *New Albertson's* court found that "an abuse of discretion occurs if, in light of the applicable law, and considering all of the relevant circumstances, the court's decisions exceed the bound of reason and results in a miscarriage of justice." *Id*. (citing *Shamblin v. Brattain*, 44 Cal.3d 474, 478-479 (1988). The court also found that the discretion of the trial judge is limited to the legal principals governing the subject of its actions, and is subject to reversal on appeal where no reasonable basis for the action is shown. *Id*. (citing *Westside Community for Independent Living, Inc. v. Obledo*, 33 Cal.3d 348, 355 (1983). The trial court's basis for imposition of sanctions is not supported by the record. Therefore, the imposition of sanctions against MS. PETTIGREW should be reversed.

V. SUMMARY OF THE ARGUMENT

The trial court's order against MS. PETTIGREW should be reversed. MS. PETTIGREW never advised nor encouraged her client, MS. SCAROLA, not to attend her deposition scheduled for July 10, 2009 (AA 193:2-3; AA 200:6-10) and indeed, the court not only found no evidence of any such misconduct by MS. PETTIGREW, but acknowledged her professionalism in dealing with circumstances outside MS. PETTIGREW's

control. RT 2:23-25; RT 3:20-21. The trial court had no statutorily authorized purpose for then imposing sanctions upon MS. PETTIGREW for her client's conduct.

Under the circumstances, MS. PETTIGREW was justified in not notifying DEDICATED of MS. SCAROLA's unavailability prior to July 7, 2009 because July 7, 2009 was the first time that MS. PETTIGREW had been informed of MS. SCAROLA's unavailability and therefore it was the first possible opportunity that MS. PETTIGREW could have notified DEDICATED (AA 47:10-15; AA187:12-14; AA 224), and she did so notify DEDICATED via both email and telephone immediately after she received the information from her client. AA 187:14-21; AA 197:26-198:26; AA 250:4-12. Any insufficient notice to DEDICATED was due to MS. SCAROLA's failure to inform MS. PETTIGREW prior to July 7, 2009 and was not based on act or omission by MS. PETTIGREW.

VI. ARGUMENT

A. The Trial Court Abused Its Discretion And Did Not Meet Any Statutorily Authorized Purpose In Imposing Sanctions Against MS. PETTIGREW After Stating That MS. PETTIGREW Had Acted Appropriately And Finding Responsibility With The Client.

1. The Trial Court Did Not Find That MS. PETTIGREW Had Advised Her Client To Misuse The Discovery Process In Violation of CCP §§ 2023.010 or 2023.030.

No evidence was presented that MS. PETTIGREW encouraged her client's lack of cooperation. In the hearing, the court commended MS. PETTIGREW'S conduct, acknowledging that she was "…doing what an ethical and professional lawyer should be doing with an unruly client", and

that MS. PETTIGREW "…did everything required of her, even beyond that". RT 2:23-25; RT 3:20-21. At no point did the court ever even suggest that MS. PETTIGREW's conduct had been questionable, nor did it find any evidence that MS. PETTIGREW improperly advised her client, for, in fact, no such evidence could exist. AA 255-256; RT 1-6. MS. PETTIGREW encouraged her client to appear at the deposition upon counsel for DEDICATED insisting on proceeding with the deposition. AA 198:27-199:2.

In its Motion for Sanctions, DEDICATED accused MS. PETTIGREW of violating California Code of Civil Procedure § 2023.010(d) and (h) (AA 53:11-19) by "failing to respond or submit to an authorized method of discovery' and "making or opposing, unsuccessfully and without substantial justification, a motion to compel or limit discovery." CCP § 2023.010(d). Prior to DEDICATED's Motion for Sanctions, there had been no motions to compel or limit discovery filed by MS. PETTIGREW or any other party. Therefore MS. PETTIGREW could not have made or opposed a motion that did not exist, so subsection (h) is inapplicable as to MS. PETTIGREW.

MS. PETTIGREW never personally failed to respond or submit to an authorized method of discovery. Despite her attempts on July 7, 2009 to cancel and reschedule the deposition (AA 178), when DEDICATED refused, she appeared telephonically at July 10, 2009 deposition (AA 65-66) after encouraging her client to appear. AA 198:27-199:2. CCP § 2023.010 does not itself authorize the imposition of sanctions. Monetary sanctions against a party or attorney for violations of CCP § 2023.010 are authorized by CCP § 2023.030, which states that, "…the court may impose a monetary sanction ordering that one engaging in the misuses of the discovery process, ***or any attorney advising that conduct***, or both pay the reasonable expenses…incurred by anyone as a result of that conduct."

(emphasis added). CCP § 2023.030(a). This statute also states that if the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust, the sanction shall not be imposed. CCP § 2023.030(a).

In *Moyal v. Lanphear*, 208 Cal.App.3d 491, 501 (1989), the court stated "the imposition of sanctions, monetary or otherwise, is within the discretion of the trial court. That discretion must be exercised in a reasonable manner with one of the statutorily authorized purposes in mind and must be guided by existing legal standards as adapted to current circumstances."

In statutory interpretation, the court starts by "Examining the statute's words, giving them a plain and common sense meaning" in order to effectuate the law's purpose, keeping in mind the nature and obvious purpose of the statute. *Sinaiko*, 148 Cal.App.4th at 407. CCP § 2023.030(a) states that the attorney must have ***advised*** the misuse of the discovery process (emphasis added). Case law has confirmed this interpretation. (See: *Ghanooni v. Super Shuttle of Los Angeles, Inc.*, 20 Cal.App.4th 256, 261 (1993), "…unlike monetary sanctions against a party, which are based on the *party's* misuse of the discovery process, monetary sanctions against the party's attorney ***require a finding the attorney advis[ed] that conduct***" (emphasis added) (citing *Corns v. Miller*, 181 Cal.App.3d 195, 200 (1986).).

Nowhere did the court find that MS. PETTIGREW advised her client to misuse the discovery process. AA 255-256; RT 1-6. In fact, the court stated that she had done more than what was required of her, (RT 3: 20-21) but determined that the notice was insufficient (RT 6:17), despite the fact that MS. PETTIGREW had no control over when she received notice of unavailability from MS. SCAROLA. DEDICATED's counsel received notice that MS. SCAROLA would not attend immediately after

MS. PETTIGREW did, (AA 224; AA 198:15-19) and that DEDICATED received notice of MS. SCAROLA's nonappearance *before flying to New York* and three (3) days prior to the deposition for which MS. SCAROLA had never confirmed her availability. AA 178; AA 179.

MS. PETTIGREW's actions show a desire to mitigate the expenses incurred by DEDICATED due to the late notice by her client. Had MS. PETTIGREW been trying to misuse the discovery process or had acted in bad faith, she would not have notified DEDICATED immediately, but rather would have waited until the day before the deposition when she could logically deduce that DEDICATED's attorney would be on route to or already in New York. MS. PETTIGREW also could have objected to the untimely Notice of the Deposition given by DEDICATED, but she did not, in the spirit of cooperation. AA 187:9-14. Notice of the Deposition was sent by DEDICATED via regular USPS mail on June 27, 2009. AA 197:2-6; 218. California Code of Civil Procedure requires a ten-day notice for a deposition, with an additional five (5) days added if the deponent is not personally served. CCP §§ 1013(a) (Service by mail in California requires an extension of five (5) extra days for Notices); 2016.050 (Applies CCP § 1013 to the Discovery Act); 2026.010 (service on out-of-state deponents same as in California); and 2025.270(a) (Deposition must be scheduled at least ten (10) days after service). Therefore service was untimely for a deposition on July 10, 2009 and would only have been timely for a deposition scheduled on or after Monday, July 13, 2009. In the spirit of cooperative discovery, MS. PETTIGREW chose in good faith to overlook this deficiency to schedule the deposition, particularly since on June 30, 2009 (***one day*** after notice of the deposition was received by MS. PETTIGREW), DEDICATED's counsel informed MS. PETTIGREW that tickets had been purchased for the trip to New York so no changes in the

date could be made unless MS. SCAROLA paid for the deposition costs in advance. AA 197:6-16; AA 220.

DEDICATED's motion for sanctions accused MS. PETTIGREW of violating CCP § 2023.010(d) and (h). "Insufficient notice" is not included in the list of misuses of the discovery process of which MS. PETTIGREW was accused of violating and the court never found that MS. PETTIGREW advised her client to fail to respond to an authorized method of discovery. AA 35-57. The court acknowledged it was the client's actions and nothing about MS. PETTIGREW's conduct that was being sanctioned when it stated, "Unfortunately, she's [MS. SCAROLA] your client. You have to carry the burden". RT: 2:25-26. Nowhere does the Code of Civil Procedure nor California case law contain law standing for this proposition that an attorney is liable for her client's actions based solely upon the fact that the attorney has agreed to represent the client. There is no statutorily authorized purpose for such a proposition and therefore no basis for sanctions.

2. MS. PETTIGREW Did Not Violate Any Other Discovery Misuse Statutes Upon Which DEDICATED Based Its Motion For Monetary Sanctions.

In its motion to compel sanctions, DEDICATED accused both MS. PETTIGREW and her client of violating CCP §§ 2025.450, 2023.010(d) and (h), and 2023.030. AA 53: 11-19, 54:22-56:17. In *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants, Inc.*, 148 Cal.App.4th 390, 410 (2007), the court interpreted the decision in *Deyo v. Kilbourne*, 84 Cal.App.3d 771, 797-798 (1978) as standing for "the unremarkable proposition that a party cannot be sanctioned for violating a discovery order that it did not, in fact, violate."

MS. PETTIGREW could not have violated CCP § 2025.450, which allows a deposing party to move for an order compelling a party or a

party's agent's deposition if they have failed to appear for a properly noticed deposition. Subsection (c)(1) states that if the motion to compel is granted, "… the court shall impose a monetary sanction … against the ***deponent or party with whom the deponent*** is affiliated" (emphasis added). MS. PETTIGREW is not and has never been a party to the action, nor did she ever receive notice to be deposed. Therefore, MS. PETTIGREW could not violate a statute that was inapplicable to her, and so the trial court could not sanction MS. PETTIGREW under CCP § 2025.450.

CCP § 2023.030, as discussed above, merely authorizes sanctions where there has been a misuse of the discovery process. As MS. PETTIGREW did not violate either CCP § 2023.010(d) or CCP § 2023.010 as discussed in Section V(A) above, there is no underlying statutorily authorized misuse of the discovery process for which CCP § 2023.030 would be applicable against MS. PETTIGREW.

As there was no statutorily authorized purpose for sanctioning MS. PETTIGREW for violating these statutes, the imposition of sanctions under any of these codes would constitute an abuse of discretion calling for reversal of the sanctions against MS. PETTIGREW.

B. The Trial Court Abused Its Discretion In Failing To Find That MS. PETTIGREW Acted With Substantial Justification And That The Circumstances Made The Imposition Of The Sanctions Unjust.

1. Under CCP § 2023.030(a), MS. PETTIGREW Is Not Subject To Sanctions Because She Acted With Substantial Justification In Notifying DEDICATED At Her Earliest Opportunity.

The trial court found that MS. PETTIGREW had done more than was required of her and acted as an ethical and professional attorney should. RT 2:23-25, 3:20-21. On July 7, 2009, MS. PETTIGREW first learned of her client's unavailability. AA 187:12-14; AA 197:26-28.

Immediately thereafter, on July 7, 2009, MS. PETTIGREW informed DEDICATED via email (AA 178) of her client's unavailability for the deposition that DEDICATED had scheduled for three (3) days later, on July 10, 2009.[1] AA 178; AA 198:15-19. MS. PETTIGREW then confirmed MS. SCAROLA'S inability to appear a short time later when DEDICATED'S counsel called to insist on the deposition going forward regardless of MS. SCAROLA'S unavailability. AA 178, AA 198:15-26. MS. PETTIGREW told DEDICATED twice, firmly, on July 7, 2009 via email and telephone that her client would not attend and offered to discuss rescheduling but her efforts were shut down by DEDICATED'S counsel. AA 178, 198:15-26. MS. PETTIGREW could not notify DEDICATED any earlier because she had no knowledge prior to July 7, 2009; therefore even if "insufficient notice" constitutes misuse of the discovery process, it is against the client. MS. PETTIGREW'S notification was made as soon as she found out. It is impossible for MS. PETTIGREW to have notified DEDICATED any sooner.

CCP § 2023.030(a) states that where the court finds that the discovery process has been misused, it shall impose sanctions "…unless it [the court] finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust". CCP § 2023.030(a). Here, the imposition is on MS. PETTIGREW for insufficient notice from her client. MS. PETTIGREW could not have notified DEDICATED earlier of information that she herself had not

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[1] DEDICATED had only sent Notice of the Deposition on June 29, 2009 and had made no attempt to determine MS. SCAROLA'S dates of availability in New York before doing so. AA 196:27-197:2; AA 197:9-16; AA 218, AA 220. (See Also: *Superior Court Local Rules* § 7.12(e)(2) which states, "in scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent…").

received and had no way of knowing. The timing of the notification was completely beyond MS. PETTIGREW'S control; therefore her notification at her first knowledge was substantially justified and the order for sanctions as to MS. PETTIGREW should be reversed.

2. Under CCP § 2023.030(a), MS. PETTIGREW Is Not Subject To Sanctions Because The Circumstances Make The Imposition Of The Sanctions Unjust Where MS. PETTIGREW Is Unable To Present Exculpatory Evidence Due To Her Forthrightness In Maintaining The Confidentiality Of Her Client's Communications.

Due to California's lack of a self-defense exception to the attorney-client privilege rules, the circumstances found MS. PETTIGREW at an unjust disadvantage as she was unable to provide exculpatory written client communications to the court that would have exonerated her. In other states, the Federal Courts have provided for a self-defense exception to the attorney-client privilege rules. In California; however, the courts have determined that, "… while law is still not fully settled in this area, we assume that there is no exception to the duty to preserve client confidences in a case brought against an attorney by a third party." *Dietz v. Meisenheimer & Herron*, 177 Cal.App.4th 771 (2009). Nevertheless, courts must recognize the severe disadvantage that this can create for the ethical attorney who must forgo her strongest defense evidence in order to adhere to her ethical duties of protecting her client's communications in determining whether such circumstances make the imposition of the sanction unjust.

The Second Circuit has adopted a New York discipline rule that allows a lawyer to reveal confidences or secrets necessary to defend themselves against an accusation of wrongful conduct, and to support an attorney's right to support their version of the facts with suitable evidence.

Meyerhofer v. Empire Fire and Marine Ins. Co., 497 F.2nd 1190, 1194-95 (2d Cir. 1997) (see also *First Fed. Sav. and Loan Assn. Oppenheim, Appel, Dixon, & Co.*, 110 F.R.D. 557, 560-568 (S.D.N.Y. 1986), *Stirum v. Whalen*, 811 F. Supp. 78, 83-84 (N.D.N.Y. 1993), and *Louima v. City of New York*, 2004 WL2359943 at *70 (E.D.N.Y. Oct. 5, 2004). Other New York courts have found that it would ill serve the "truth finding function of the litigation process" and be "manifest injustice" to deny the attorney the ability to defend herself due to the attorney client privilege. *Oppenheim* at 565. While this is a narrow exception, the discipline rule does encompass circumstances where an attorney has been accused of misconduct, even by someone other than the client. *Id.*

The U.S. District Court in Central California, in discussing this friction between the legal doctrines of the law of evidentiary privileges and the rules governing the ethical conduct of lawyers, stated that the comment to model rule 1.6 is interpreted as "if the lawyer is charged with wrong doing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge" even where it arises in a civil proceeding or is based on a wrong alleged by a third person. *In re National Nat'l Mortgage Equity Mortgage Pool Certificates Sec. Litg.*, 120 F.R.D. 687, 691 (C.D. Cal. 1988) (see also *APEX Municipal Fund v. N-Group Securities*, 841 F. supp. 1423, 1430 (SD Tex. 1993) "when an attorney is sued by a third party, courts that have confronted the situation have concluded that an attorney can waive the privilege to defend himself against third party accusations even though the client has not agreed to waive the privilege.")

In *Qualcomm, Inc. v. Broadband Corp.*, 2008 WL66932 (S.D. Cal. Jan. 7, 2008) the court considered similar circumstances which were preventing access to all of the information necessary to reach an informed decision regarding the actual knowledge of many of the attorneys facing

sanctions. When *Qualcomm* asserted attorney-client privilege, thus denying the attorneys the ability to present exculpatory evidence in their defense, the court found that there was ***no direct evidence*** establishing that many of the lawyers actively worked with *Qualcomm* to hide the documents and gave great weight to that lack of evidence in their review of entire circumstances leading to the violations of the discovery process. *Qualcomm* at *12-*13.

California courts have declined to recognize a self-defense exception to the attorney-client privilege rules, but the same competing legal principals of one's due process rights to defend one's property rights and that of the public policy of an attorney's duty of maintaining the confidentiality of client information must be considered in determining whether the circumstances make the imposition of sanctions unjust. The absence of ***any evidence*** that MS. PETTIGREW improperly advised her client to misuse a discovery process, coupled with MS. PETTIGREW's inability to provide direct exculpatory evidence that would dispel any possible inferences of misconduct due to her adherence to her ethical duty to uphold the attorney-client privilege, create the precise sort of circumstances referred to above.

The court abused its discretion imposing sanctions on MS. PETTIGREW under such circumstances where the only wrong doing the court found was "insufficient notice" by the client that the client would not attend the deposition. RT 6:17. As there is no evidence that MS. PETTIGREW advised any discovery misuse, much less that she encouraged insufficient notice to DEDICATED, she cannot be sanctioned for violating a discovery rule that she did not violate. Therefore, the imposition of sanctions in this case is not exercised in a reasonable manner.

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VII. CONCLUSION

The court should reverse the order sanctioning MS. PETTIGREW.

DATED: April ___, 2012

MORRIS & ASSOCIATES

By:________________________
JAMES G. MORRIS
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scarola.appellate.brief/2/8/10/t

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rules 8.204(b)(4)(c)(1) of the California Rules of Court, the enclosed brief of Appellant, BAYLEIGH JORDAN PETTIGREW, is produced using 13-point Roman type including footnotes and contains approximately 4,807 words, which is less than the total 14,000 words permitted by Rule of Court 8.204(c)(1). Counsel relies on the word count of the computer program used to prepare this brief for this information.

I declare under the penalty of perjury under the laws of the State of California and the United State of America that the foregoing is true and correct, and that this certification was executed on April ___, 2012, in Burbank, California.

____
JAMES G. MORRIS
Attorney for Appellant,
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PETTIGREW

PROOF OF SERVICE BY MAIL

LISA SCAROLA aka MELISSA COHEN, Cross-Complainant v. DEDICATED TALENT AGENCY, INC. dba THE JERRY PACE AGENCY, Cross-Defendant/Respondent; BAYLEIGH JORDAN PETTIGREW, Appellant

U.S. Court Of Appeal, Second Appellate District, Division 8
Case No. B220482

I, **TRACEY DAVENPORT**, declare as follows:

1. At the time of service, I was at least 18 years of age and not a party to this legal action. I am a resident or employed in the county where the within-mentioned service occurred.

2. My business address is: 2312 West Victory Boulevard
Burbank, CA 91506-1227

3. On April ___, 2012, I served **APPELLANT'S BRIEF** by United States mail as follows: I enclosed a copy in separate envelopes, with postage fully prepaid, addressed to each individual addressee named below, and I deposited each sealed envelope with the United States Postal Service in Burbank, California, for delivery as follows:

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4. On February ___, 2010, a copy of this document was served electronically upon the Supreme Court of California located in San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: April ___, 2012

TRACEY DAVENPORT ______________________________