

**PUBLIC MATTER – DESIGNATED FOR PUBLICATION**

**FILED October 15, 2004**

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of	)	<b>Case No. 02-O-10193</b>
	)	
<b>Respondent AA,</b>	)	<b>OPINION ON INTERLOCUTORY</b>
	)	<b>REVIEW</b>
A Member of the State Bar.	)	
_____	)	

This interlocutory review “arises out of a typo.” (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 252.) Shortly after the filing of this formal disciplinary proceeding by the State Bar’s Office of Chief Trial Counsel (State Bar), respondent AA<sup>1</sup> moved to dismiss it on the ground that, due to an inadvertent error made by his paralegal and respondent in informing the State Bar of his change of address, respondent did not receive notices from the State Bar that he could participate in certain procedures that could have obviated the filing of formal charges. After notice to the parties and an opportunity to brief the issues, the hearing judge dismissed the proceeding in the furtherance of justice, without prejudice to the proceeding

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<sup>1</sup>Because there might not be a pending public proceeding involving respondent should our opinion become final, we follow our practice in similar matters of omitting respondent’s name in this published opinion. (E.g., *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 444, fn.1.)

being refiled. (Rules Proc. of State Bar, rule 262(e)(2).)<sup>2</sup> The State Bar has sought our review, claiming that the hearing judge erred by dismissing the proceeding.

We hold that the hearing judge did not abuse her discretion nor did she commit legal error. The procedural opportunities denied respondent prior to the filing of the formal charges were significant, including the right to request an “Early Neutral Evaluation Conference” (ENE) conducted by a State Bar Court judge, pursuant to rule 75. Accordingly, we apply our decision in *In the Matter of Respondent Q* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 18 to warrant oversight of the State Bar’s actions in denying respondent the opportunity to request an early neutral evaluation in this case where the State Bar had invoked our Court’s jurisdiction by filing formal charges. We also hold that the hearing judge neither erred nor abused her discretion in dismissing the proceeding without prejudice in the furtherance of justice as a remedy for what the undisputed evidence showed was a typographical error by respondent and his staff in the course of reporting his address change.

### **I. Statement of the case.**

The essential facts important to this proceeding are undisputed, although the parties see the effect of some of those facts differently.

Respondent was admitted to practice over 30 years ago and has no record of prior discipline. Prior to December 2001, the State Bar commenced a disciplinary investigation as to whether in a one-client matter, respondent wilfully failed to act with the ethically required standard of competence or wilfully failed to follow legal duties in communicating with his client.

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<sup>2</sup>Unless noted otherwise, all future references to “rules” are to the Rules of Procedure of the State Bar

Between December 2001 and April 2002, respondent communicated with a State Bar complaint analyst and a State Bar investigator about the matter but it was not resolved at that time.

According to respondent, in about April 2003, he moved offices to a different city in Northern California. He directed his paralegal to prepare address change notices to his clients and to the State Bar.<sup>3</sup> This paralegal mistakenly listed the name of respondent's *city* in place of the name of the *street* on which his law office was sited.<sup>4</sup> Although respondent signed the change of address notice to the State Bar, he did not detect the error.<sup>5</sup> He heard nothing more about the Bar's investigation until in December 2003, when he received a notice of disciplinary charges (NDC)<sup>6</sup> which, though addressed certified mail to the incorrect street listed on the State Bar's records, found its way to respondent's office. As soon as respondent received the misaddressed NDC, he contacted the State Bar attorney assigned to the case and on

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<sup>3</sup>Business and Professions Code section 6002.1, subdivision (a) requires that members of the State Bar maintain on the official records of the State Bar a current office address, in addition to other information, and that changes to the office address be reported to the State Bar within 30 days of the change. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

<sup>4</sup>Moreover, the first letter of respondent's office's city matched the first letter of the name of the street on which the office was located and the city contained a street bearing the city's name. By way of example, if respondent's office were located at 9903 Charles St., Cupertino, California, the change of address notice to the State Bar incorrectly reported the address as "9903 Cupertino St., Cupertino, California."

<sup>5</sup>The record includes a declaration by respondent stating in part that his paralegal mistakenly completed his change of address form to the State Bar and that, although respondent signed the incorrect form, he did so inadvertently due to his failure to review the form carefully. The record also includes a declaration by the paralegal attesting to his incorrect completion of this change of address form, to his presentation of it to respondent for signature and to respondent's signature of it without any mention of any error.

<sup>6</sup>The NDC is the initial pleading which starts most public State Bar Court disciplinary proceedings. (Rules 2.64, 20, 101(a).)

December 15, 2003, corrected his office address on the State Bar's official records. That same day, he hired his current counsel who advised him of two opportunities in a disciplinary case prior to the filing of the NDC, a "20-day meeting" with the State Bar and an ENE under rule 75. Before that time, respondent did not receive notice of either of these opportunities, but he alleged that he cooperated fully in the investigation process and would have participated in both the 20-day meeting and the ENE if he had received timely notice of those opportunities.

The record shows that on September 30, 2003, the State Bar sent a letter "Notice of Intent to File Notice of Disciplinary Charges" to respondent at his incorrectly-entered address of record summarizing the disciplinary investigation to date, including respondent's previous reply to the nature of the investigation and stating that, "unless a pre-filing settlement" was reached, the State Bar intended to file a NDC. This letter stated that the Bar was "interested in resolving this matter before filing" the NDC and invited respondent to meet within 20 days with the State Bar attorney assigned to prosecute the case. The letter further stated that, if the planned meeting were unsuccessful in reaching a settlement, either party may request an ENE conducted by a State Bar Court judge per rule 75. This letter notice was returned undelivered to the State Bar because of the incorrect address.

Since the State Bar was unwilling to recall the NDC and afford respondent the opportunities of a 20-day meeting and an ENE based on what respondent claimed was a purely inadvertent error in changing his address of record, he moved to dismiss under rule 262(d)<sup>7</sup> on the ground that the proceeding was barred by other rules.

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<sup>7</sup>Rule 262(d) provides: "A proceeding may be dismissed on the ground that it is barred by any applicable statute or rule."

The State Bar opposed this motion on two primary grounds: that our court had no power to require a 20-day meeting or ENE as those steps exist only prior to the filing of an NDC and thus prior to the start of our jurisdiction over State Bar Court proceedings; and that rule 262(d) did not apply as no rule barred the bringing of the NDC in this matter and that respondent had a duty to maintain a correct address of record on the State Bar's official records. The State Bar offered to reconsider its position if it could be shown that respondent was not responsible for the incorrect address. When the State Bar researched the change of address filed by respondent in April 2003, it determined that respondent had signed the form showing the incorrect address. The State Bar accordingly deemed that respondent was responsible for the error and refused to afford him an opportunity to participate in a 20-day meeting or an ENE.

On January 30, 2004, the State Bar Court hearing judge assigned to this proceeding issued an order to show cause stating her intent to dismiss the NDC, under rule 262(e)(2), in the furtherance of justice without prejudice to its refileing, based on the inadvertence, mistake or excusable neglect of respondent as to the reasons he did not receive his pre-NDC opportunities. Per rule 262(e)(3), the hearing judge invited responses from the parties. The State Bar replied that the principles of mistake, inadvertence and excusable neglect did not apply to the relief sought by respondent. Respondent reiterated why he believed that he was entitled to an opportunity to a 20-day meeting and an ENE.

On February 25, 2004, the hearing judge dismissed this proceeding without prejudice in the furtherance of justice. She gave as her reasons that, solely due to respondent's mistake, surprise, excusable neglect or inadvertence, he did not learn of his pre-filing opportunities and was unable to seek to resolve the proceeding before the NDC was filed. The judge stated that

she had considered the provisions of section 473 of the Code of Civil Procedure, the facts set forth by respondent and that no prejudice would result to the State Bar from a dismissal without prejudice. According to the hearing judge, her dismissal would allow respondent the possibility of an opportunity to resolve this matter before the filing of formal proceedings; however, her order did not require that the parties engage in such proceedings. This interlocutory review followed.

On review, the State Bar repeats its contentions made below, especially that inadvertence and mistake do not support this dismissal in the furtherance of justice.

We invited the respondent's reply to the State Bar's position, and because of the importance of deciding several issues, including the scope of our decision in *In the Matter of Respondent Q*, *supra*, 3 Cal. State Bar Ct. Rptr. 18, we set this matter for oral argument.

## **II. Discussion.**

### **A. The State Bar Court's oversight authority over pre-NDC steps.**

We review the hearing judge's order under interlocutory review. (Rule 300.) Accordingly, our review is limited to deciding whether the hearing judge committed legal error or abused her discretion. (Rule 300(k); *In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 94, citing former rule 300(j), now rule 300(k).)

In *In the Matter of Respondent Q*, *supra*, 3 Cal. State Bar Ct. Rptr. at pages 22 to 23 we held that, except for our adjudication of a motion to quash an investigation subpoena under section 6051.1, our court had no jurisdiction over the State Bar's actions taken during an investigation prior to the commencement of formal charges. However, *Respondent Q* arose much differently than did the present case. In *Respondent Q*, there were no formal disciplinary

proceedings pending before our court. Rather, the attorney under State Bar investigation sought a protective order from a State Bar Court judge. When the judge granted one aspect of the relief sought by that attorney, the State Bar filed a motion for emergency relief before us. We concluded that the State Bar's motion warranted our review, and we also concluded that, except for the judging of a motion to quash a subpoena issued during investigation, no legal authority gave us jurisdiction "over State Bar disciplinary complaints *prior* to the filing of formal charges by the" State Bar. (*Id.* at pp. 21-22, italics added.)

The current case arose after the State Bar filed its NDC starting this proceeding in our court. As has been the well-established rule in other proceedings, "When the jurisdiction of a court has been properly invoked by the filing of a . . . charge, the disposition of that charge becomes a judicial responsibility. [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517; *People v. Roman* (2001) 92 Cal.App.4th 141, 145.) The important policy of separation between prosecution and adjudication functions, consistent with our decision in *Respondent Q*, would advise us to eschew reviewing the particular steps by which the State Bar chose to conduct its investigation, such as the number, type and nature of witnesses interviewed or documents examined. Nevertheless, we also conclude that when significant procedural opportunities are deprived a litigant by steps taken during investigation, which placed the litigant at a substantive disadvantage in the ensuing disciplinary proceeding, that is an appropriate subject for our exercise of jurisdiction, once a proceeding has been filed. Since the State Bar invoked our Court's jurisdiction by filing the NDC in this matter in November 2003, our court's hearing department had the jurisdiction to review those steps taken in the investigation which

involved deprivation of significant procedural opportunities, thereby placing the attorney litigant in this proceeding at a substantive disadvantage in the ensuing proceeding.

In our view and for the reasons we shall discuss *post*, both the deprivation of the opportunity for a 20-day meeting and an ENE are significant procedural opportunities which our court may review in an appropriate way, upon the filing of formal charges.

The opportunity of respondent to meet with the State Bar's prosecuting attorney 20 days prior to the issuance of the NDC in order to explore resolution of the matter in lieu of issuance of an NDC is not contained in the Rules of Procedure of the State Bar. However, it is considered a significant step by the State Bar and at oral argument we were advised that it is extended routinely, as a matter of policy, in State Bar disciplinary cases. The State Bar's September 2003 letter to respondent expressly offered this meeting based on the State Bar's claim that it was interested in resolving this matter before filing. Of course, there is no guarantee that a pre-filing resolution would succeed, but it is enough of a significant procedural opportunity in an appropriate case and has become an ordinary step utilized by the State Bar, that it warranted the hearing judge's scrutiny when respondent was deprived of the opportunity in a case identified by the State Bar as eligible for the meeting.

Respondent was deprived of an even greater opportunity when not afforded an opportunity to request an ENE before our court. Rule 75, in effect since February 1999, applies when a resolution between the State Bar and the respondent does not occur prior to filing of the NDC. In that case, either party may request an ENE before a State Bar Court judge which will result in an oral neutral evaluation of the alleged facts, charges and possibilities for a degree of discipline. The rule clearly contemplates that a resolution of the matter may occur before the

NDC is filed, for it is titled “Pre-Filing, Early Neutral Evaluation Conference”<sup>8</sup> and provides that, if court approval is required of an agreed-upon resolution, it shall be documented by the State Bar and submitted to the Early Neutral Evaluation judge before whom the matter is pending for approval or rejection. (Rule 75(b).)

In recent practice, State Bar Court ENE’s have resolved ultimately half of pending matters.<sup>9</sup> A fundamental difference between the 20-day meeting and the ENE is that the latter is conducted by this court and the conference and any resolution calling for discipline is subject to this court’s express oversight. (Rule 75(b).) Further, ENE’s generally are seen as important tools of effective court administration.<sup>10</sup>

However, the ENE’s conducted by our hearing department operate differently from those conducted by federal and state courts. Our ENE’s occur *before* formal charges are issued, as one of the key aims of this process is to offer both sides an objective view of the consequences of filing those charges. Because no formal charges have issued, our court is unaware of the cases which are eligible for the ENE until one is requested by one or both of the litigants. For practical purposes, therefore, the State Bar provides the notice to the respondent of the ENE to be conducted by our court.

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<sup>8</sup>Even though the title of a rule is ordinarily not part of the rule, we consider it relevant in the present situation.

<sup>9</sup>Our research shows that for the years 2002 and 2003 combined, ENE conferences were conducted by this Court’s hearing judges in a total of 248 cases. A resolution was reached in the State Bar Court, or outside of the court, in 128 of the cases – representing just over a 50 percent resolution rate.

<sup>10</sup>As a magistrate judge of the United States District Court, Northern District of California noted, in part, ENE’s importantly position a case “as efficiently as possible for fair disposition by settlement or trial.” (*GTE Directories Services, Corp. v. Pacific Bell Directory* (N.D.Cal. 1991) 135 F.R.D. 187, 190, fn.1.)

Collectively, the 20-day meeting and the ENE offer several significant benefits to the litigants should a resolution be reached at either of those stages. First, they permit appropriate resolutions of a case before the matter becomes public by the filing of formal charges. This, itself, is often a key motivator propelling resolution. Next, they permit the litigants to avoid the extra work and expense of drafting and defending, respectively, the NDC; and they save the State Bar Court time otherwise needed to conduct a series of status and pretrial conferences and oversee discovery and related matters. Finally, even if public discipline is reached as a resolution, the costs to be paid by respondent under section 6086.10 are more than \$300 lower contrasted to such results reached after an NDC issues.<sup>11</sup>

Any deprivation of the opportunity of either party to request a 20-day meeting or an ENE should be subject to the court's scrutiny in an appropriate manner. For the foregoing reasons, the State Bar Court did have the authority to assess whether respondent was deprived of these prefiling opportunities and, if so, to fashion an appropriate remedy.

**B. Propriety of the order of dismissal in the furtherance of justice.**

Since the September 1, 2002, effective date of subdivision (e)(2) of rule 262(e) authorizing proceedings to be dismissed in the furtherance of justice on the motion of the court, this is the first appeal raising questions about the subdivision's use. It is clear from the history of the adoption of rule 262(e) that it is designed to be construed in our court in the same manner as

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<sup>11</sup>According to the costs formula adopted by the State Bar Board of Governors effective January 1, 2003, the costs for an original proceeding imposing public discipline are \$1,983 plus a charge per investigation matter if the case is resolved before filing in the State Bar Court and \$2,296, plus the investigation matter charge, if the case is resolved within four months after filing in the State Bar Court.

its analog, Penal Code section 1385, is construed in criminal proceedings.<sup>12</sup> Parallel to Penal Code section 1385, rule 262(e) does not permit a motion to dismiss in furtherance of justice to be made by the respondent. The motion may be made only by the State Bar, as the prosecutor, or a dismissal may be entered on the court's own motion. (Rule 262(e)(1), (2); see, as to Pen. Code, § 1385, *People v. Hernandez* (2000) 22 Cal.4th 512, 521-522.)

As the Supreme Court has observed in the criminal law, there has been a "long history in this state of dismissals in furtherance of justice, which have been authorized since 1850" and construed in many decisions. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 520, and cases there cited.) As the many cases show, a court has broad power to dismiss in the furtherance of justice, but that power is not absolute or limitless. (E.g., *People v. Orin* (1975) 13 Cal.3d 937, 945.) Under case law, a court considering a dismissal in the "furtherance of justice" must consider the rights both of the defendant and the prosecution, representing society. (*Ibid.*) Actions may not be dismissed under Penal Code section 1385 solely for the benefit of "judicial convenience or for reasons external to the case." (*People v. Hernandez*, *supra*, 22 Cal.4th at p. 525.) The liberality in favor of the power to dismiss must be tempered in cases where probable cause exists that a conviction under the charges is warranted. (*People v. Orin*, *supra*, 13 Cal.3d at p. 947.) Yet, it is also clear that dismissals under Penal Code section 1385 may be ordered before, during or after trial. (*People v. Hatch* (2000) 22 Cal.4th 260, 268, quoting *People v.*

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<sup>12</sup>However, this comparison is not meant to suggest that State Bar Court proceedings are themselves comparable to criminal proceedings. (E.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 301-302.)

*Orin, supra*, at p. 946.)<sup>13</sup> Prior to ordering dismissal the judge must comply with the Penal Code duties to set forth the reason for the dismissal. (Pen. Code, § 1385(a); *People v. Orin, supra*, 13 Cal.3d at pp. 943-944.) The State Bar Court analog, rule 262(e)(2), (3), requires a judge to take added steps before ordering dismissal on her own motion, including invoking an order-to-show-cause procedure.

Viewing the criminal law principles surrounding Penal Code section 1385, and the terms of rule 262(e)(2), (3), we hold that the judge’s action here comported fully with applicable requirements. She issued an order to show cause to the parties, allowed for responses from them, considered all appropriate interests and stated in detail her reason for dismissal. (Rule 262(e)(2), (3).) Since she acted promptly after the proceeding was filed and since the dismissal was expressly without prejudice to refiling, we see no prejudice to the State Bar.

Finally, we must decide whether the hearing judge abused her discretion in concluding that the circumstances surrounding respondent’s mistaken substitution of his city for the street name on his change of address form warranted the dismissal, without prejudice. We conclude that no abuse of discretion is shown.

By citing generally our decision in *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, the State Bar claims that it “indicates” that the application of Code of Civil Procedure section 473 is limited to cases in which a respondent seeks to set aside the entry of his default. However the State Bar does not direct our attention to any specific language in *Navarro* and nothing in our reading of *Navarro* supports the State Bar’s claimed limit. Indeed

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<sup>13</sup>*People v. Orin, supra*, 13 Cal.3d at page 946, notes that pretrial dismissals have been upheld for specified reasons, but we do not view such reasons as exhaustive of the permissible grounds of dismissals in the furtherance of justice.

the legislature has not limited Code of Civil Procedure section 473 to setting aside defaults, for the plain text of the law allows a court to relieve a party from “a judgment, order, or *other proceeding taken against him* through his mistake, inadvertence, surprise or excusable neglect.” (Italics added.) (See also *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th at pp. 254-255.) Moreover, in the absence of a specific statute or rule of procedure directing a specified mode of proceeding, it is not unreasonable or arbitrary for a hearing judge to utilize analogous civil procedures to resolve motions.<sup>14</sup> In *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 214-215, we reviewed some of the key legal authorities construing Code of Civil Procedure section 473, noting that inexcusable neglect bars relief but that, in general, the law is construed liberally in favor of the party seeking relief. (See also *Pearson v. Continental Airlines* (1970) 11 Cal.App.3d 613, 618-619.)

In *Zamora v. Clayborn Contracting Group, Inc.*, *supra*, 28 Cal.4th 249, in preparing an offer to compromise a civil action (Code Civ. Proc., § 998), an attorney’s legal assistant mistyped the word “against” instead of the words “in favor of.” Consequently, the offer sent to the opposing counsel purported to agree to entry of a judgment *against*, rather than *in favor of* the propounding party. The Supreme Court determined that a party propounding an offer to compromise could avail itself of Code of Civil Procedure section 473 relief. In affirming the Court of Appeal’s agreement with the trial court’s granting of relief under Code of Civil Procedure section 473, the Supreme Court noted that the moving party was diligent in seeking relief and that the opponent suffered no apparent prejudice. Further, the court concluded that the

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<sup>14</sup>In addition to default procedures, several other significant procedures used in State Bar Court proceedings follow applicable California civil procedure, including disqualification of State Bar Court judges (rule 106), discovery (rule 150, et. seq.) and rules of evidence (rule 214).

mistaken word usage was the type of mistake eligible for relief under Code of Civil Procedure section 473. The key factors existing in *Zamora* are also found in this case: respondent's diligence in seeking relief, the lack of prejudice to the opposing party and the nature of the mistake.

The State Bar may have concluded reasonably at the time it issued the NDC that respondent had no reason to be excused from the consequences of an incorrect change of address submission. However, once the hearing judge contemplated dismissal under rule 262(e)(2) and once the uncontroverted evidence emerged as to how respondent's change of address was mistakenly composed on the change of address form, and mistakenly approved by respondent – essentially a typographical error – the hearing judge was justified in considering the mistake to come within the ambit of rule 262(e).

Indeed, given the uncontroverted evidence before the hearing judge, and the type of mistake made – confusing the actual city of respondent's law office for the name of its street address when both start with the same letter – we cannot conclude that the hearing judge abused her discretion. This is hardly the case of a respondent's deliberate inattention to investigative steps or requirements, or even, in our view, inattention rising to gross negligence.<sup>15</sup> We conclude that the hearing judge did not abuse her discretion in ordering the dismissal based on the evidence before her.

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<sup>15</sup>At oral argument, the State Bar urged that upholding of the hearing judge's decision would place an administrative burden on the State Bar to take extra steps to communicate with attorneys under investigation, given the many investigations it conducts annually. However, the case before us is surely atypical. As we have noted, the attorney participated in the early stage of the investigation and promptly participated when he received the NDC. There is no evidence that, but for the mistaken address change, respondent would not have responded promptly to the Bar's September 30, 2003, letter notice.

### **III. Conclusion.**

For the foregoing reasons, we deny the petition seeking review of the hearing judge 's order dismissing this matter, without prejudice, in the furtherance of justice.

STOVITZ, P. J.

We concur:

WATAI, J.  
EPSTEIN, J.

Case No. 02-O-10193

**In the Matter of Respondent AA**

**Hearing Judge**

Hon. Patrice E. McElroy

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