STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	SBC-22-O-30655
	)	
JOSEPH LAWRENCE DUNN,	)	ORDER
	)	
State Bar No. 123063.	)	
	)	

On February 27, 2023, Special Deputy Trial Counsel for the State Bar (SDTC) filed a petition for interlocutory review (petition) of a February 9, 2023 Hearing Department order dismissing count one and an allegation in count three of the Notice of Disciplinary Charges (NDC) as time-barred pursuant to rule 5.21(A) of the Rules of Procedure of the State Bar.[1] SDTC also filed a memorandum and an appendix in support of its petition pursuant to rule 5.150(C). On March 6, we ordered respondent Joseph Lawrence Dunn to respond to the petition. On March 20, Dunn filed an opposition to the petition and a memorandum.[2] SDTC filed its reply on March 29.

[1] All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted. The Rules of Procedure cited herein are substantially the same from July 2014 to the present. However, we make note of the July 2014 Rules of Procedure in effect where they are different or where the subdivision numbering has changed.

[2] Also on March 20, 2023, Dunn filed a request for judicial notice of an executive summary regarding a proposed amendment to rule 5.21 and SDTC filed its objection to the request on March 29. After consideration of the arguments from both parties, we deny Dunn's request as moot given our findings, *post.*

I. INTRODUCTION

Dunn was previously employed as the Executive Director of the State Bar of California (State Bar). The NDC, filed on July 5, 2022, alleges Dunn committed misconduct while working for the State Bar. The NDC charges three counts of violating Business and Professions Code section 6106 concerning the "commission of any act involving moral turpitude, dishonesty or corruption."[3] Two counts are characterized as moral turpitude—misrepresentation, and one count is characterized as moral turpitude—breach of fiduciary duties as Executive Director. Count One alleges that on May 6, 2014, Dunn recommended that the Board of Trustees of the State Bar (Board) sponsor Assembly Bill (AB) 852 and "stated in writing . . . that there [was] 'no known opposition to the measure' when [he] knew that statement was false and misleading." Count two alleges that in November 2013, Dunn told the Board that "no State Bar funds would be used to fund a trip to Mongolia in January 2014 when [he] knew that statement was false and misleading." Count three alleges that Dunn "repeatedly breached his fiduciary duties to the Board . . . by recommending that the Board sponsor AB 852, misrepresenting that there was no known opposition to AB 852, and misrepresenting that no State Bar funds would be used for the Mongolia trip."

On February 9, 2023, the hearing judge granted in part and denied in part Dunn's December 19, 2022 motion to dismiss. Count one of the NDC and the allegation in count three regarding AB 852 were dismissed with prejudice as time-barred under rule 5.21. SDTC argues that the five-year limitation of rule 5.21(A) does not apply because the disciplinary proceedings are not based "solely" on a complaint but are instead based on the May 4, 2017 final arbitration decision in *Dunn v. State Bar of California, et al.* (Super. Ct. Los Angeles County,

[3] All further references to sections are to the Business and Professions Code.

No. BC563715) (*Dunn v. State Bar*), which is an independent source of information that was the basis for the State Bar's investigation as permitted under rule 5.21(G).[4]

On interlocutory review, we must determine whether the hearing judge's February 9, 2023 order establishes abuse of discretion or error of law. (Rule 5.150(K).) Therefore, we evaluate whether or not the judge exceeded the "bounds of reason," given all the circumstances before the court. (*In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74, 78.) For the reasons discussed *post*, we disagree with SDTC's arguments and find no abuse of discretion or error of law. We affirm the judge's dismissals, and we order count one and the allegation in count three related to Dunn's misrepresentation to the Board regarding AB 852 dismissed with prejudice.

II. DISCUSSION

Rule 5.21(A) provides, in pertinent part, "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the initial pleading must be filed within . . . five years from the date the violation occurred . . . ." The Rules of Procedure allow for only one circumstance in which the five-year statute of limitations does not apply, and that is when disciplinary proceedings were "investigated and initiated by the State Bar based on information received from an independent source other than a complainant." (Rule 5.21(G).) SDTC asserts on behalf of the State Bar that its investigation was initiated on May 4, 2017, as a result of a March 20, 2017 final arbitration award in *Dunn v. State Bar*.[5] However, the record before us establishes that the charges in the 2022 NDC relate back to

[4] SDTC does not challenge the hearing judge's rulings in count two and the remainder of count three, and Dunn has similarly not challenged those rulings.

[5] The dissent states that "one of the original sources of the information that formed the basis for the alleged misconduct may well have been the Supreme Court of California." Not only is this wholly speculative, but not even SDTC asserts that this is the case.

July 31, 2014, when former Chief Trial Counsel Jayne Kim issued two memos complaining about various issues, of which the State Bar then became fully aware shortly thereafter.

One memo issued by Kim, directed to Robert A. Hawley, former Deputy Executive Director of the State Bar, requested an outside examiner under rule 2201 (rule 2201 memo). Rule 2201 provides that a SDTC may be appointed when there is an "inquiry or complaint" regarding a member employed by the State Bar. The rule 2201 memo concerned Dunn's possible misrepresentations regarding the Mongolia trip. On August 29, 2014, Heather Rosing, chair of the Regulations, Admissions and Discipline Oversight Committee (RAD), which was composed of a subset of members of the Board,[6] appointed Daniel E. Eaton as the SDTC for Kim's rule 2201 referral. Hawley informed Eaton that the matter referred to him was the result of a State Bar initiated investigation pursuant to rule 2402, which stated, "The State Bar may open an inquiry or investigation on its own accord or upon receipt of a communication concerning the conduct of a member of the State Bar." He further informed Eaton that the allegation might reveal a violation of section 6106. Eaton received the rule 2201 memo and its attachments, and later recommended closing the investigation in a preliminary report sent to RAD. He sent a supplemental report to RAD on September 19, again recommending the matter be closed.

The hearing judge stated that Kim's complaint alleged wrongdoing in connection with AB 852. The rule 2201 memo did not mention AB 852, although Kim attached to the memo a Daily Journal article purportedly co-written by Dunn, or written at Dunn's direction, that stated the State Bar supported AB 852. Nevertheless, the second memo written by Kim, also on July 14, 2014, did allege wrongdoing on the part of Dunn regarding AB 852. This memo, entitled "Report of Improper Activity" (improper activity memo), was sent to Hawley and the

[6] The Board is the governing body of the State Bar. (§ 6010.)

State Bar Office of Human Resources. Kim alleged, among several complaints about Dunn and others, that California Supreme Court staff advised Dunn of the "Court's thought that the State Bar should halt its legislative efforts . . . [and] asked specific questions related to AB 852 and questioned the State Bar's justification for advancing that legislation." One week later, during a May 9, 2014 Board meeting, Dunn failed to inform the Board regarding the Court's concerns about AB 852, and he instead advocated for Board support of AB 852.

Hawley submitted the improper activity memo to the State Bar Audit Committee (Audit Committee). The then-President of the State Bar, Luis Rodriguez, also received the improper activity memo. He recused himself from the matter and directed Craig Holden, the Vice-President and President-elect, to work with the Audit Committee to determine the State Bar's response. After advising the full Board, the Audit Committee hired Munger, Tolles & Olson (MTO) in September 2014 to investigate the allegations raised in the improper activity memo. The MTO report concluded that Dunn made misrepresentations about AB 852. Specifically, the report stated Dunn, having been notified by the Supreme Court that it did not support AB 852, nonetheless informed the Board shortly thereafter that the Board should sponsor AB 852 and "no known opposition" to the bill existed.

The MTO report was presented to the Board on October 17, 2014, and the Board voted to accept the factual findings of the MTO report on October 30. On November 4, the Board issued a reprimand to Dunn, stating that, based on the report, he had a "lack of candor" and "'[failed] to provide adequate or truthful information to the Board with respect to material matters pending before the Board," which included AB 852. The reprimand later reiterates that Dunn withheld "material information" from them when they voted to move forward on AB 852. On November 7, the Board voted to terminate Dunn's employment under his contract with them,

and, on November 18, Dunn sued the State Bar for wrongful termination, eventually resulting in the arbitration proceedings that occurred in 2017.

We find that with respect to both July 2014 memos, Kim was a complainant within the wording and meaning of the Rules of Procedure, and her complaints triggered the statute of limitations period contained in rule 5.21(A). Per rule 5.4(14) (2014), a complainant is "a person who alleges misconduct by a State Bar member." Additionally, a complaint is described in rule 5.4(13) (2014) as "a communication alleging misconduct by a State Bar member sufficient to warrant an investigation that may result in discipline of the member if the allegations are proved." These rules were written broadly and certainly encompass Kim's allegations about Dunn in both memos. The fact that Kim was also the Chief Trial Counsel, as opposed to a member of the public making the allegations to her, does not diminish Kim's status as a complainant.[7] Nor does the fact that she elected to not include allegations about AB 852 in her rule 2201 referral memo. Both memos prompted investigations initiated by the State Bar—one investigated by Eaton and one investigated by MTO.

Although we do not believe that the Rules of Procedure, including the statute of limitations rule, were written so broadly as to encompass a misdirected complaint of which the Office of Chief Trial Counsel of the State Bar (OCTC) or the State Bar as a whole would be

[7] SDTC relies on *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 to justify its argument that Kim was not a complainant in a manner that would trigger the application of rule 5.21(A). We find *Wolff* to be inapplicable here because the key fact in that case was that a superior court sanctions order, as opposed to an individual complaint, initiated the State Bar's investigation. As stated previously, we see no reason to decline to consider Kim's improper activity memo to be a complaint or decline to consider her to be a complainant given how expansively the rules were written. Additionally, to adopt the State Bar's interpretation of *Wolff* would mean, for example, that an attorney employed at the State Bar could never file a report that could be considered a complaint within the meaning of the Rules of Procedure to report misconduct of another attorney employed by the State Bar even if the first attorney had been subjected to misconduct in violation of rule 8.4.1(b) of the Rules of Professional Conduct regarding prohibited discrimination, harassment, and retaliation. We find such an interpretation to be untenable.

altogether unaware, this is not the case here.[8] As Chief Trial Counsel, OCTC operated under Kim's direction. (Rule 5.4(38) (2014).) Kim reported to RAD, a subset of the Board; thus, RAD had oversight over OCTC. Kim sent both memos to Hawley and sent copies to James Fox, a Special Assistant in OCTC. Fully aware of OCTC's responsibilities, Kim elected to not request referral to SDTC to investigate the allegations concerning Dunn and AB 852. Nevertheless, the MTO investigation was initiated at the State Bar's behest and solely because of Kim's improper activity memo. Fox, not long after the memos were issued, was appointed to the Board, received the MTO report, and voted to terminate Dunn based on that report. It cannot be said that the left hand did not know what the right was doing.

Our dissenting colleague opines that only if Kim *intended* that her complaint be a complaint within the meaning of the Rules of Procedure should it be considered as such. This interpretation imposes a requirement of intentionality that simply does not exist in the Rules of Procedure. Moreover, it has no basis in our case law. We have previously found that even when a complainant withdraws a complaint, the State Bar may still prosecute. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 694.) Intentionality of a complainant is immaterial to the State Bar's power to investigate and prosecute. Additionally, our dissenting colleague relies on *In the Matter of Wolff*, *supra*, 5 Cal. State Bar Ct. Rptr. 1 to argue that Kim cannot be considered a complainant, because she is not a third-party complainant. We note that

[8] Nor is there a concern that the rules discussed *ante* would encompass *all* complaints received by the State Bar Office of Human Resources, because only those that fall within the definition of a "complaint," as contemplated by the Rules of Procedure, would trigger the statute of limitations.

nowhere in the Rules of Procedure is there a requirement that a complainant be a third party.[9] Crucially, the dissent's argument ignores that there was no evidence in *Wolff* that the State Bar was aware of the attorney's misconduct prior to the superior court's transmittal of its sanctions order, which caused the State Bar to investigate and file disciplinary charges. As discussed *post*, the State Bar was intimately aware of the details of Dunn's charged misconduct years prior to the arbitrator's decision, because it relied on those allegations of misconduct (originally brought to its attention by Kim) in issuing Dunn's reprimand and defending itself in Dunn's wrongful termination lawsuit.

Turning to the alleged misconduct, Kim's allegation that Dunn did not inform the Board of the Supreme Court's concerns about AB 852 and advocated for Board support of it is one that is sufficient to warrant an investigation that may result in discipline if the allegation was proved, in accordance with the Rules of Procedure. The Supreme Court has found a violation of section 6106 for concealment, noting that if a statement is misleading, there is "[n]o distinction . . . among concealment, half-truth, and false statement of fact." (*Grove v. California*

[9] The dissent argues that we should follow a statement in *Wolff* and limit application of rule 5.21(A) to only "those instances where the proceedings are initiated as a result of a third-party complaint." (*In the Matter of Wolff*, *supra*, 5 Cal. State Bar Ct. Rptr at p. 9.) First, we consider this statement to be dicta with no force as precedent as the facts in *Wolff* involved a State Bar investigation initiated after it received a sanctions order issued by a superior court and therefore did not involve a complainant at all. (See generally 9 Witkin, California Procedure (6th ed. 2021) Ratio Decidendi and Dicta, § 530, pp. 563-564; see also *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 ["Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered"].) Ultimately, we concluded in *Wolff* that a statute of limitations defense allowed under rule 5.21(A) was inapplicable because the superior court was an independent source and thus the issue was resolved by former rule 51(e), substantially similar to current rule 5.21(G), discussed *ante*. (*In the Matter of Wolff*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 9.) Second, since *Wolff* was issued by this court in 2006, it has never been cited or relied on as precedent for that proposition again, though *Wolff* has been often cited in subsequent published cases for other issues.

(1965) 63 Cal.2d 312, 315 [finding attorney violated § 6106 when attorney failed to inform judge of opposing counsel's request for continuance].)

SDTC argues that Eaton was not aware of Kim's allegation regarding Dunn and AB 852 contained in the improper activity memo, and the hearing judge incorrectly stated that Eaton could have investigated the matter. The same day Eaton accepted appointment as the SDTC, Rosing informed him that there was a concurrent human resources investigation "examining these same allegations," and he could decide if he wanted "to be informed by the outcome of that investigation." The record before us does not reveal whether further discussion occurred about it, and it is unclear if the MTO investigation results were ever sent to Eaton. But it does not matter whether Eaton was aware of the MTO report or not, because we have already determined that the improper activity memo contained a viable complaint about Dunn and his alleged misrepresentation concerning AB 852, and the State Bar was aware of it.

It is true that the NDC makes an allegation that was not made in Kim's two memos—namely, that Dunn made a "false" statement to the Board by asserting there was no known opposition to AB 852, when he was aware of the Supreme Court's concerns. In support of its argument that disciplinary proceedings were not based solely on a complaint,[10] SDTC points to a May 4, 2017 Intake Face Sheet (Intake Sheet), completed by an unknown individual, that states

[10] We also disagree with our colleague's implication that we are not giving "solely," as used in rule 5.21(A), its ordinary meaning because "the arbitration decision has a more fulsome narrative of the extent to which Dunn misled the Board regarding AB 852, well beyond what Kim articulated in the improper activity memo." This is simply a distinction without a difference. When one compares Kim's complaints in the improper activity memo regarding Dunn's actions related to AB 852 as well as the Board's understanding of Dunn's actions that later led to the reprimand and his termination, it is clear that he was accused of misrepresentation, which is exactly the allegation made in count one and the root of the allegation in count three of the NDC. The arbitrator may have learned of evidence that could have bolstered SDTC's case if these counts had gone to trial, but such evidence was substantively the same as what the Board received from Kim in July 2014 and knew by November 2014.

an inquiry was opened as a result of the arbitration award. The Intake Sheet also discusses MTO's 2014 conclusions that Dunn committed serious misconduct in that he provided to the Board inadequate or inaccurate information, and that the testimony of Board members suggested Dunn had deceived the Board and breached his fiduciary duty. First, the misrepresentation alleged regarding AB 852 in count one and referred to in count three (the breach of fiduciary duty flowing from the misrepresentation), merely supports Kim's allegation of concealment, and as discussed *ante*, both a false statement and omission of a material fact can be described as potential breaches of section 6106. Second, these facts were not revealed for the first time to the State Bar due to the arbitration decision in *Dunn v. State Bar*, but were made known to the State Bar in 2014, when the Board received, eventually voted to accept, and utilized the factual findings contained in the MTO report to support its letter of reprimand and termination of Dunn.[11] Stated another way, the MTO report put the State Bar on notice of Dunn's alleged misrepresentation about AB 852, along with the breach of fiduciary duty that the State Bar presented as evidence to the arbitrator and which was later relied on by the arbitrator. Therefore, the arbitration decision in *Dunn v. State Bar* was not an "independent source" under rule 5.21(G) that would make the limitations period inapplicable as SDTC argues.[12] The Intake Sheet does

[11] Indeed, the thrust of the State Bar's defense to Dunn's wrongful termination complaint that he was fired in retaliation for whistleblowing was that the Board would have taken the same action notwithstanding his whistleblowing activity. In this regard, several Board members testified during the arbitration proceeding about their respective states of mind in 2014. In explaining their rationale for voting to terminate Dunn, almost all cited their belief that Dunn was dishonest to the Board. Additionally, some mentioned Dunn breached his fiduciary duty, and others asserted his misrepresentations amounted to conduct involving moral turpitude. This is language that closely tracks section 6106, making it evident that by November 2014, the Board believed Dunn had engaged in professional misconduct that violated the State Bar Act.

[12] It also cannot be said that the MTO investigation was an "independent source" to avoid the statute of limitations, because the MTO investigation was initiated by the Board as a result of Kim's improper activity memo, with the findings reported to, accepted by, and acted upon by the Board as the basis for Dunn's termination.

not prove that the State Bar learned of the pertinent facts after the arbitration decision was issued. Rather, we find that the Board, as the governing body of the State Bar, concluded no later than November 2014 that Dunn had not been truthful with them concerning the Supreme Court's position and direction on AB 852, which is the gravamen of count one and partially of count three.

We disagree with SDTC's argument that a new investigation, without a time limitation, could be initiated on the basis of the arbitration decision, as the allegations discussed therein and charged in the NDC concerned information already known to the State Bar since 2014. The five-year statute of limitations applies here. Tolling would be permissible in this case pursuant to rule 5.21(C)(3), while "civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." The latest tolling period for these charges ended when the arbitrator issued his decision on March 20, 2017. The dismissed charges before us were filed on July 5, 2022, which exceeds the statute of limitations period in rule 5.21(A).

III. ORDER

We find no abuse of discretion or error of law with the hearing judge's February 9, 2023 order that dismissed count one and part of count three. We order count one and the allegation in count three related to Dunn's misrepresentation to the Board regarding AB 852 dismissed with prejudice. This matter is remanded to the Hearing Department for further proceedings consistent with this Order. Accordingly, our March 24, 2023 order staying the proceeding in the Hearing Department is vacated.

RIBAS, J.

I CONCUR:

McGILL, J.

Dissent of HONN, P. J.

By this order, the majority and the hearing judge disregard our consistent interpretation of the rule of limitations in State Bar disciplinary matters. The action of the hearing judge and the approval of that action by the majority resulted in the dismissal of allegations involving serious misconduct based on an error of law that Jayne Kim, the Chief Trial Counsel, filed a "complaint" which started the running of the five-year rule of limitations. The Chief Trial Counsel was *not* a complainant and her allegations were not *solely* the basis of the disciplinary charges that were eventually dismissed by the hearing judge. Because OCTC or its then chief, Kim, are not complainants, it is irrelevant when OCTC learned of the misconduct because there is no rule of limitations as to when an NDC can be filed.

I. THE CHIEF TRIAL COUNSEL WAS NOT A COMPLAINANT

A person who never intended to be a complainant cannot become one merely by the actions of others.

Neither the rule 2201 memo nor the improper activity memo was a "complaint" within the meaning of rule 5.21. While "complainant" is defined as **"**a person who alleges misconduct by a State Bar attorney" (rule 5.4(14)), we have interpreted the term "complainant" in this context to refer to a *third- party*. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1.) As stated in *Wolff*, the limitations period in former rule 51(a)[13] only applied "in those instances where the proceedings are initiated as the result of a third-party complainant." (*Id.* at p. 9.) We held in *Wolff* that the limitations period did not apply because the matter was

[13] Former Rule 51(a)'s language is substantially similar in pertinent part to that used in rule 5.21(A).

initiated by the State Bar, not a third-party complainant.[14] This is not simply a technical distinction. Prosecutors in OCTC routinely learn of misconduct from sources other than a complainant. Examples include newspaper articles, television news, and courts.[15]

A. The Rule 2201 Memo

The rule 2201 memo was not a "complaint," but a *referral* of a matter to a Special Deputy Trial Counsel. (Rule 2201(c)(1).) The Chief Trial Counsel considered OCTC to be recused because the respondent, State Bar Executive Director Joseph Dunn, was an attorney employed by the State Bar. (Rule 2201(a)(1)(ii) [Chief Trial Counsel shall recuse OCTC when an inquiry or complaint is about an attorney employed by the State Bar].) Had Dunn not been an attorney employed by the State Bar, the Chief Trial Counsel most certainly would have simply caused the case to be filed by OCTC in the normal course of business. In such event, the matter would have been treated like any other State Bar investigation case filed by OCTC, and there would be no rule of limitations under rule 5.21(A) or (G).

B. The Improper Activity Memo

Unlike the rule 2201 memo which was referred to the Special Deputy Trial Counsel for prosecution as a disciplinary violation, the improper activity memo was filed as a confidential human resources matter, seeking to have Dunn disciplined or terminated for improper activities

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[14] In footnote seven of their order, the majority seeks to distinguish and minimize the holding of *Wolff* by asserting that to adopt the State Bar's interpretation of the case would mean that "an attorney employed at the State Bar could never file a report that could be considered a complaint." This is an unfair reading of *Wolff*. Certainly, an employee of the State Bar could act as a third-party complainant in his or her individual capacity to bring a complaint against an attorney. But *Wolff* made clear that the complainant was not a third-party but was the State Bar.

[15] In fact, in this case, one of the original sources of the information that formed the basis for the alleged misconduct may well have been the Supreme Court of California. We do not know this information yet because the dismissal of the case prevented the admission of evidence of the original sources. But we do know that the underlying misconduct involved Dunn's alleged misstatement to the Board of Trustees as to the Supreme Court's position on an issue.

conducted on the job while he was Executive Director. Significantly, it was others—as noted *post*—not Kim, that caused the improper activity memo to be passed among several bodies within the State Bar and eventually transformed into a disciplinary matter.

Among the improper activities claimed were the following: (1) the impropriety of Dunn's trip to Mongolia; (2) improper use of State Bar dues to conduct activities of an ideological or political nature, including lobbying for the passage of AB 852; (3) funding an unauthorized practice of law unit; (4) self-dealing and overlapping duties by an authorized vendor of the State Bar; (5) excessive speaker costs at a Board retreat; (6) cronyism; (7) excessive salary for a new chief of communications position; (8) improper expenses of a former OCTC investigator and his appointment as a public information officer reporting to the Executive Director; (9) issues involving the appointment of a General Counsel that Kim felt was not qualified and lacked independence; and (10) lack of transparency in the Executive Director's office in violation of the State Bar's strategic plan. A review of these categories of grievances shows that these were not intended to be characterized as disciplinable offenses.

The improper activity memo is not a third-party complaint under *Wolff*. First, divisions within the State Bar are not "third parties" to the entity itself; nor is an OCTC employee acting within the course and scope of his or her employment. Kim, as a high-ranking State Bar executive, wrote the lengthy improper activity memo to a human resources executive about the head of the State Bar. The improper activity memo communicated information discovered by her inside the State Bar on a wide array of issues and dealt with institutional governance and personnel matters in order to raise awareness of Dunn's conduct to the State Bar Office of Human Resources.

While it did include issues surrounding AB 852, the improper activity memo was not created for the purpose of requesting a rule 2201 disciplinary referral. Kim certainly knew how

to make such a rule 2201 referral—she wrote the rule 2201 memo on the same day as the improper activity memo. There is no reference to a rule 2201 referral or any other kind of disciplinary complaint in the improper activity memo.

II. THE CHIEF TRIAL COUNSEL WAS NOT *SOLELY* RESPONSIBLE FOR THE FACTS SET FORTH IN THE NDC

As noted *ante,* Kim was not a complainant. Through her improper activity memo, she made a request to the State Bar Office of Human Resources, not to a disciplinary body. The improper activity memo was, however, passed on *by others* to several individuals or groups and portions of its subject matter eventually found their way into the NDC. As the majority acknowledges, the contents of the improper activity memo changed hands many times with many of the recipients exploring similar conduct by Dunn. There is no evidence in the record that these transfers were made with the knowledge of Kim and there is no evidence that this was Kim's intention. It seems unreasonable, therefore, that Kim intended this to be a complaint within the meaning of rule 5.21. Had she wanted to file a disciplinary action, it is obvious that she knew a faster and much more direct avenue—either filing an NDC or referring it to a Special Deputy Trial Counsel for prosecution.

At each stage of the improper activity memo's journey, others contributed facts to the story. The hearing judge even acknowledged that the NDC is based, in part, on the arbitration decision. In that decision, the arbitrator relied on testimony from several witnesses in rejecting Dunn's arguments that the State Bar defendants had breached the covenant of good faith and fair dealing. Among those findings was that Dunn had failed to perform his contractual obligations by misleading the Board on AB 852 and the relocation of the State Bar headquarters. It is not reasonable to conclude that the NDC is based "solely" on information from the improper activity memo. The fact that MTO was retained to conduct an internal investigation because Kim elevated her wide-ranging concerns about Dunn does not render her a "complainant."

As to whether a "disciplinary proceeding is based solely on a complainant's allegations" under rule 5.21(A), we should give the term "solely" it's ordinary meaning. (Rule 5.3 [terms used in Rules of Procedure have their ordinary meaning unless specifically defined otherwise].) Even if Kim's memos were "complaints" and she was a "complainant" under rule 5.21(A), the dismissed counts are not based "solely" on those memos. For example, the arbitration decision has a more fulsome narrative of the extent to which Dunn misled the Board regarding AB 852, well beyond what Kim articulated in the improper activity memo. The arbitration decision has summaries of Board members' testimony that Dunn's misrepresentations about AB 852 affected their decisions. This testimony did not occur until years after the improper activity memo and the MTO investigation. The testimonial summaries are potentially direct evidence of Dunn's breach of his fiduciary duty (as alleged in count three of the NDC) and are far beyond what Kim documented in the improper activity memo. The arbitration decision also has a summary of Dunn's testimony about why he did not tell the Board about the Supreme Court's opposition to AB 852. Finally, all this additional information, generated by the arbitration and contained in the arbitration decision, is from an independent source as contemplated under rule 5.21(G).

III. IT IS IRRELEVANT THAT THE STATE BAR "KNEW" OF THE IMPROPER ACTIVITY MEMO FOR LONGER THAN FIVE YEARS

The majority carefully calculates the amount of time that the State Bar "knew" of the improper activity memo and concludes that it exceeded five years. But the State Bar Office of Human Resources' "knowledge" (and that of other entities of the State Bar) of the improper activity memo is irrelevant unless we reach to conclude that the State Bar and Kim were complainants. They were not, and, therefore, any action eventually taken by the Special Deputy Trial Counsel was not limited by rule 5.21.

IV. CONCLUSION

Chief Trial Counsel Jayne Kim was not a complainant for either her referral memo under rule 2201 or the improper activity memo. Further, to the extent she provided information that was eventually included in the NDC, she was not the *sole* source of that information. As such, the five-year time limit under rule 5.21(A) does not apply. Therefore, I dissent and find that the hearing judge erred in dismissing count one and the allegation in count three regarding AB 852. The judge should be ordered to reinstate the dismissed count one and the dismissed portion of count three so that the trial may resume based on all of the allegations originally pleaded in the NDC.