January 30, 2024

Via TrueFiling

Sixth District Court of Appeal
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

Re: *Brady v. Wu* (Case Nos. H050657 & H050719)
Publication Request (Cal. Rules of Court, rule 8.1120)

Dear Honorable Justices:

On behalf of the Association of Certified Family Law Specialists (ACFLS) Amicus Committee, I write to request publication of your recent decision in *Brady v. Wu* (Jan. 11, 2024, H050657 & H050719) (*Brady*).

1. Brief Introduction

Brady meets the standards for publication because it clarifies and addresses a conflict in the law regarding grounds for the mandatory and discretionary set aside of judgments under Code of Civil Procedure, section 473. (See Cal. Rules of Court, rule 8.1105(c)(4)-(6).) Specifically, *Brady* clarifies the meaning of what constitutes a "default or dismissal" for purposes of mandatory relief under the statute by analyzing two lines of cases differently interpreting the issue and selecting the better reasoned line to apply. It does so by making clear that the nonappearance at a duly noticed trial is not a default or dismissal under the statute. *Brady* further clarifies the law on what attorney conduct constitutes "inexcusable" versus "excusable" neglect for purposes of seeking relief under this statute. Finally, *Brady* provides a significant contribution to the law on a legal issue of continuing public interest regarding impermissible attorney rhetoric and tactics in briefing and seeking sanctions on appeal.

2. Grounds for Publication

"An opinion of a Court of Appeal [. . .] should be certified for publication [. . .] if the opinion: [. . .] (4) Advances a new interpretation, clarification, criticism, or construction of a provision

of a constitution, statute, ordinance, or court rule; (5) Addresses or creates an apparent conflict in the law; [or] (6) Involves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105.) Each of these three standards are met here.

a. *Brady* resolves a conflict in the law regarding whether nonappearance at trial constitutes a "default or dismissal" for purposes of mandatory relief under section 473.

As *Brady* acknowledges, section 473 offers mandatory set aside relief from a "resulting default judgment or dismissal entered against" the client due to the attorney's "mistake, inadvertence, surprise, or neglect." (*Brady,* at p. 8.) *Brady* describes a split in the law, however, regarding whether mandatory relief is strictly available to default judgments or dismissals only, or whether it also applies to "procedural equivalents" of the same. (*Id.* at p. 9.) The majority view strictly interprets section 473's mandatory relief to include only true defaults or dismissals. (*Ibid.*) A minority view applies mandatory relief to proceedings that are "analogous" to default or dismissal proceedings. (*Ibid.*) Ultimately, *Brady* determined the more persuasive view was the majority view because the appellate court's role is to determine what the Legislature meant, and to strictly interpret unambiguous terms like default and dismissal, rather than extending those terms to encompass "analogous" situations. (*Id.* at p. 10.)

In arriving at its conclusion, *Brady* relies on *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 147 (*English*) and *The Urban Wildlands Group, Inc. v. City of Los Angeles* (2017) 10 Cal.App.5th 993, 998-1002 (*Urban Wildlands*), which each took the majority approach in finding that (1) the failure to file an opposition to summary judgment is not a default or dismissal for purposes of mandatory relief under section 473 (*English*) and (2) a plaintiff's failure to lodge an administrative record in a CEQA action resulting in denial of their petition was not a default or dismissal for purposes of mandatory relief under section 473 (*Urban Wildlands*). In each of these decisions, the "default" claimed was the failure by an appearing party to submit a filing or lodge a record. (See also *Hossain v. Hossain* (2007) 157 Cal.App.4th 454, 457-459 [attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement not a default or dismissal].)

Brady clarifies and expands the majority view of the law even further by establishing that a party's complete nonappearance at a hearing resulting in (1) adverse relief being granted against them and (2) denial of their responsive relief, is also not a default or dismissal for purposes of mandatory relief. Unlike the cases cited above, the "equivalent" to a default in this case was not merely the failure to file or lodge a document, but the complete nonappearance at the duly noticed cross-restraining order trial. (*Brady* at p. 11.) Nevertheless, *Brady* equates the respondent's nonappearance here (despite a prior appearance and notice of the hearing) to the failure to lodge the administrative record in *Urban Wildlands* in finding a lack of default or dismissal.

Brady should be published because it not only further cements the majority line of cases following *English* as the prevailing approach to permitting set aside relief only for "true" defaults or dismissals, but also because it is unique in holding the defendant's complete nonappearance at trial does not result in a requisite default or dismissal for mandatory relief. This will have a significant impact on civil harassment restraining orders which—like their sister-statute domestic violence, workplace, and elder abuse restraining orders—involve "quick, simple and truncated procedures," in which the "proceeding [is] to be completed in a matter of weeks [. . .] with the expectation that victims often would seek relief without the benefit of a lawyer." (*Yost v. Forestiere* (2020) 51 Cal.App.5th 509, 521.) Accordingly, the likelihood of recurrence of this factual scenario (an unwitting respondent fails to appear at their restraining order proceeding and then seeks set aside relief) is high, and *Brady* will establish clarity for those cases in the future.

b. *Brady* clarifies the law on what attorney conduct constitutes "inexcusable" versus "excusable" neglect for purposes of seeking relief under section 473.

Brady also provides clarity on what form of attorney conduct will ordinarily constitute "excusable" neglect, meriting discretionary set aside relief under section 473. In *Brady,* Wu's insistence that excusable neglect occurred in this case was based solely on his attorney's calendaring error with respect to the trial. (*Brady,* at p. 12.) But Wu ignored the "series of unfortunate acts" that led to the calendaring error, including failure to submit a proposed order and failure to properly seek removal from the case. (*Brady,* at pp. 12-13.) This "broader professional failure did not justify the failure to detect an otherwise excusable clerical error as to the trial time." (*Brady*, at p. 13.)

Brady provides clarity on this issue of excusable neglect by presenting a line of attorney-neglect cases that are readily distinguished from the facts in *Brady*, including a justifiable confusion about suing state versus city entities (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270) and a justifiable calendaring error when such error was represented to the attorney's staff by the court's staff (*Melde v. Reynolds* (1900) 129 Cal. 308). *Brady* was different, however, because rather than reasonably failing to "timely correct a mistaken understanding," Wu's attorney's mistakes were based on facts demonstrating "carelessness and inattention."

Efforts to seek set aside relief based on attorney neglect are, unfortunately, quite common. *Brady* contributes to this growing body of law by drawing a distinction between cases such as *Bettencourt* and *Melde*, where attorney mistake occurs despite due diligence, and *Brady*, where attorney mistake occurred due to carelessness. If published, *Brady* will serve future cases of this kind by offering precedent for these commonly recurring factual scenarios.

c. *Brady* provides a significant contribution to the law on attorney civility involving rhetoric and tactics in briefing and seeking sanctions on appeal.

Lastly, in addition to its review of the law related to section 473, *Brady* offers a helpful contribution to the law regarding not only appellate sanctions, but appellate attorney rhetoric related thereto.

Appellate courts routinely publish cases as direct messages to litigants and counsel alike to establish precedent on issues of incivility and counterproductive rhetoric. (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1156 [publication "to send a loud and clear message" the court would "not tolerate the disgraceful tactics which hallmark the defense in this action"; see *Finton Const., Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 204-205 [the "lack of civility demonstrated in this case is a matter of public interest," "[w]e … publish … as an example to the legal community of the kind of behavior the bench and the bar together must continually strive to eradicate"]; see also *Hansen v. Volkov* (2023) 96 Cal.App.5th 94, 107 [highlighting counsel's "mutual lack of civility in this case" as support for the recommendations of the California Civility Task Force concerning improvement of civility in the profession].)

Here, when faced with (and ultimately choosing to deny) competing appellate sanctions claims, *Brady* takes the opportunity to issue a sharp rebuke of counsel's "gratuitous castigation" of one another. (*Brady*, at p. 6.) In denying both parties' requests for sanctions, Brady "invite[s] counsel to reconsider the prudence of their rhetorical tactics where it is undisputed that their clients are already embroiled in a high level of conflict." (*Brady*, at p. 6.) Publication of *Brady* will serve as a direct message and reminder to appellate attorneys about their duty to avoid personal embroilment in their clients' litigation. As noted in *Hansen* (also a civil harassment restraining order case), this sort of embroilment is one of the main reasons the California Civility Task Force was implemented. As cases like *Brady* and *Hansen* showcase, this message is direly needed in restraining order litigation, perhaps more than any other field, where attorneys are faced with uniquely difficult facts that seem to all but invite embroilment. As set forth in *Karton v. Ari Design & Construction, Inc.* (2021) 61 Cal.App.5th 734, 747, "Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears." Publication of *Brady* serves to advance this message to the bar in the context of restraining orders, appellate litigation, and sanction requests.

3. Requestor's Interest

ACFLS is an independent non-profit bar association, currently composed of 515 family law specialists certified by the State Bar. Since 1980, ACFLS has been dedicated to promoting and preserving the practice of family law in California. ACFLS members actively practice family law in California family courts and appellate courts. Our members also serve as court-appointed minors' counsel, mediators, private judges, judges pro tempore, and expert witnesses in child custody proceedings.

Since its founding at the inception of family law specialist certification by the State Bar, ACFLS has played an active public policy role, including regularly weighing in when the Courts of Appeal, Legislature, and Judicial Council consider matters of significance to family courts, family court populations, or the family law bar. ACFLS has appeared as amicus in many family law appellate cases, including cases where the organization's participation was invited by the Court of Appeal.

ACFLS has an active all-volunteer amicus committee currently with 23 members who review cases and make recommendations to the Executive Committee and Board of Directors regarding letters in support of publication or de-publication of opinions, letters supporting or opposing California Supreme Court review, and amicus briefs. ACFLS's amicus committee includes all eight California lawyers who hold dual certification as family law and appellate specialists, and other leaders in the family law community including Hon. Thomas Trent Lewis (ret.) and Garrett C. Dailey.

ACFLS's board of directors and amicus committee have no direct ties to or interest in the litigants or their attorneys in this matter. ACFLS is solely concerned with the development of the law for children and families in California.

4. Conclusion

Because *Brady* satisfies at least three of the standards for publication as set forth in rule 8.1105, and publication will benefit the bench and bar alike, ACFLS requests the Court publish.

Sincerely,
Association of Certified Family Law Specialists

John T. Sylvester, CLS-F[1]
Member, ACFLS Amicus Committee

[1] *Certified Legal Specialist – Family Law, State Bar of California

1296 E. Gibson Rd., Ste. A #253, Woodland, CA 95776 • (916) 217-4076 • FAX: (916) 930-6122
EMAIL: EXECUTIVE.DIRECTOR@ACFLS.org • WWW.ACFLS.ORG

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2. a. My ☐ residence ☑ business address is *(specify)*: **1615 Murray Canyon Road, Suite 450 San Diego, CA 92108**

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3. I electronically served the following documents *(exact titles)*:
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4. I electronically served the documents listed in 3. as follows:

   a. Name of person served: **Douglas D. Hughmanick / Dennis Scott Zell**
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   Mandy Brady / Lian Wu

   b. Electronic service address of person served: **DHughmanick@Terra-Law.com / dennis.zell@hogefenton.com**

   c. On *(date)*: **01/30/24**

   ☐ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment *(write "APP-009E, Item 4" at the top of the page)*.

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

Date: **01/30/24**

John T. Sylvester
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

/s/ John T. Sylvester
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