HOW LAWYERS GET IN TROUBLE AND HOW YOU CAN AVOID THE SAME FATE: THE SLIPPERY SLOPE FROM DILIGENT REPRESENTATION TO OVER-ZEALOUS ADVOCACY AND DISCIPLINE

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As lawyers, we have a duty to represent our clients zealously ***but within the bounds of the law***. *Hawk v. Superior Court (People)* (1974) 42 Cal.App.3d 108, 126. As one court has stated, we are free to inflict hard blows on our opponents but not low blows. *Caro v. Smith* (1997) 59 Cal.App.4th 725, 739.

Those of us who represent lawyers have seen a dramatic rise in the number and severity of situations in which over-zealous advocacy on behalf of clients has crossed the line and compromised the attorney's ethical obligations to the courts and the legal system. As a result, and because judges are increasingly less tolerant of zealous advocacy that crosses the line, we are spending more or our time representing and advising lawyers who face sanctions in the judicial system and then often find themselves as respondents in the State Bar disciplinary process.

In California, the Rules of Professional Conduct and the State Bar Act, along with applicable case law, define our obligation to stay "within the bounds of the law" as we represent our clients (in transactions or litigation). The key provisions of the Rules and State Bar Act that help us define the line we cannot cross include:

- We have a duty to employ, for the purpose of maintaining causes confided to us, those means only as are consistent with truth. Business and Professions Code §6068(d); Rule of Professional Conduct 5-200(A);
- We may never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law. Business and Professions Code §6068(d); Rule of Professional Conduct 5-200 (B);
- We are prohibited from suppressing any evidence we have a legal obligation to reveal or to produce. Rule of Professional Conduct 5-220;
- We are prohibited from seeking, accepting or continuing employment if we know or should know that the objective of the employment is to proceed without probable cause and for the purpose of harassing or maliciously injuring another person. Rule of Professional Conduct 3-200(A);

- We are prohibited from seeking, accepting or continuing employment if we know or should know that the objective of the employment is to present a claim or defense that is not warranted under existing law unless it can be supported by a good faith argument for an extension, modification or reversal of existing law. Rule of Professional Conduct 3-200(B);
- We are prohibited from advising the violation of any law, rule or ruling of a tribunal unless we believe in good faith that it is invalid, in which case we can test its validity. Rule of Professional Conduct 3-210;
- We are prohibited from committing any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the practice of law or otherwise, and whether the act is a felony or misdemeanor or not. Business and Professions Code §6106.

And, when we practice in federal courts, we also can face discipline within the federal system for violating American Bar Association Model Rules 3.1, 3.3 and 3.4, which are similar in scope, but in many respects broader than, the California rules and statutes cited above.

Our obligations to stay within the bounds of the law are also described in case law which, because it is fact specific, provides the best understanding of where the lines are drawn.

Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal.App.4th 282

A shareholder of a merged corporation brought an action for intentional concealment of material facts against the law firm that represented the acquiring corporation in the merger. The shareholder alleged that the law firm concealed the fact that the financing involved "toxic" stock under which the investors received convertible preferred stock that diluted the shares of all other shareholders of the acquiring corporation. The shareholder also alleged that the law firm knew that "toxic stock financing is a desperate and last resort of financing for a struggling company and that 95% of companies who engage in such financing end up in bankruptcy." Although the law firm prepared a two-page disclosure of the toxic stock financing, it never provided plaintiff or plaintiff's lawyers with that disclosure, knowing that to do so would have killed the deal and led to the demise of the firm's client.

In allowing the shareholder of the merged corporation to sue the attorney for the acquiring corporation, the court of appeal held that a fraud claim against a lawyer is no different than a fraud claim against anyone else; while a "casual expression of belief" is not actionable, active concealment of material facts, such as existence of a "toxic" stock provision, is actionable fraud.

Here the court addressed lawyers who engage in "half-truths:" Even if the duty to disclose would not otherwise exist, the law firm having specifically undertaken to disclose the transaction cannot conceal a material term by providing a sanitized version of a disclosure schedule.

The court also rejected the law firm's contention that there was no basis for the concealment claim because the information it was accused of concealing was available in the public domain.

The bottom line is that lawyers are not free to omit material information even if the adversary could find that information by a search of public records.

In the Matter of Maloney and Virsik (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774

"This case illustrates how over-zealous advocacy compromised the ethical obligations of respondents . . . to the courts and the legal system."

Respondents were retained by RVN, a dissident faction of an Indian Tribe engaged in an intra-tribal power struggle, to advise about a strategy to effect a bloodless coup. RVN held an election that did not comply with federally mandated procedures and then unilaterally declared an election victory. The governing council of the Tribe (RVIT) declared the election a sham and disavowed it.

Immediately after the election, and with full knowledge that the election was hotly disputed, RVN's attorneys actively participated in efforts to perfect the coup by assisting RVN in appropriating bank accounts and by notifying banks that RVIT had been dissolved and that RVN was the official and legal Tribal Government.

At the same time, RVIT was pursuing a lawsuit against one of RVN's leaders. On numerous occasions respondents (the attorneys for RVN and its leaders) attempted to act as attorney for RVIT in its lawsuit against Bettega, one of RVN's leaders, suggesting that as a result of the election they were now empowered to act as counsel for RVIT and to dismiss RVIT's suit against her. The attorneys did so without disclosing the intra-tribal power struggle between RVIT and their clients, RVN and Bettega. In addition, the attorney Maloney filed a declaration with the court describing the election as conclusive and uncontested – when in fact it was the subject of a heated contest. The declaration also alleged that RVN had terminated the attorneys for RVIT so that respondents were now counsel for RVIT.

The trial court issued an order finding Maloney was not the attorney for RVIT in the lawsuit and that RVN (Maloney's client) was not a party to the lawsuit. Thereafter, respondents continued to file pleadings in the lawsuit and notified the court that the new sovereign (RVN) had filed new counsel to dismiss RVIT's lawsuit against Bettega.

The trial court ultimately sanctioned respondents, finding that but for the diligence of RVIT's counsel and the court clerk, the surreptitious attempt by respondents to dismiss RVIT's action against Bettega and to perpetrate a fraud on the court and opposing counsel would have gone undetected. The trial court also found that respondents falsely represented they were counsel for RVIT.

As often happens, sanctions in the court system led to a disciplinary proceeding before the State Bar. Here, the Review Department of the State Bar Court concluded that respondents committed acts of moral turpitude by knowingly making repeated misrepresentations to the court:

Acts of moral turpitude include concealment, half-truths and false statements of fact. Also, it is not necessary that respondents actually succeeded in perpetrating a fraud on the court." (*Id.* at p.786; citations and internal quotes omitted.)

The Review Department concluded that the attorneys engaged in acts of moral turpitude because (a) their pleadings and representations were "permeated with half-truths, omissions, and outright misstatements of fact and law" and (b) their deception was not the result of carelessness. Rather, the court found, ***respondents intentionally wove a tapestry of deception in their over-zealous efforts to effectuate a legal strategy.*** Taken as a whole, respondents' conduct reflects an indifferent disregard of their duty to adhere to the requirements of the law and their professional responsibilities as officers of the court, which is additional evidence of moral turpitude. The Review Department then dismissed the charge of misleading a judge on grounds it was duplicative of the violation of section 6106, and the finding of moral turpitude under section 6106 supports identical or greater discipline.

After reviewing the mitigating and aggravating circumstances, both respondents were suspended for one year stayed and placed on probation for two years on condition that Maloney, the senior partner, was actually suspended for 90 days, and that the associate, Virsik, was actually suspended for 60 days.

In the Matter of Downey (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151

Downey regularly represented landlords in unlawful detainer ("UD") actions. UD complaints must be verified by the client, but can be verified by the attorney if the client is absent from the county.

On July 11: (a) Clients asked Attorney to prepare UD complaint; (b) Attorney prepared the UD complaint; (c) Attorney's office was unsuccessful in three efforts to reach client to come verify the complaint; (d) Attorney verified the complaint attesting under penalty of perjury that the clients were absent from LA County – assuming that was the most plausible explanation for the unreturned calls.

Tenant then moved to strike the complaint claiming (erroneously) that if the landlord resided in LA County, Attorney could not verify the complaint. Attorney then met with clients who confirmed they were in LA on July 11 (making the original verification invalid) but signed new and accurate verifications. The new declarations were then filed with the opposition to the motion to strike the UD complaint.

In opposition to the motion, Attorney Downey argued: (a) I never said the clients "resided" outside of LA County, but only said they were "absent from" the County; (b) whether they were absent from the county on the day the verification was signed and filed is a question of fact; and (c) it is all moot because new verifications have been filed.

The Review Department of the State Bar Court found that Attorney Downey originally had no intent to defraud, but was grossly negligent in unreasonably jumping to the conclusion his clients

were out of the county and then executing and filing a false verification. The grossly negligent misconduct was central to the practice of law and misled opposing counsel and the court.

As is often the case, when attorney Downey found himself in a hole, he did not acknowledge his wrongdoing and apologize, but rather kept digging an ever deeper hole. Noting that once Downey knew the verification he executed and filed with the court was in error, he did not promptly demonstrate recognition of his mistake and take steps to rectify it. To the contrary, he twice concealed his mistake [in his opposition to the motion to strike and in his letter to opposing counsel] through legal semantics. Again stating that no distinction can be drawn among concealment, half-truth, and false statement of fact, the Review Department added that it was particularly troubled by Downey's intent to conceal his wrongdoing. "An attorney's false statements violate the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice."

Attorney Downey was found to have willfully engaged in an act of moral turpitude in violation of Business & Professions Code §6106. And, in light of a prior disciplinary matter, he was suspended for two years, stayed, with a 150-day actual suspension (relying upon disciplinary standard 1.7(a) – discipline in second matter generally more severe than discipline in first matter).

Kearny v. Foley & Lardner LLP (9th Cir. 2009) 582 F. 3rd 896):

In a state court action, Foley & Lardner, LLP (FL) represented the Ramona Unified School District (RUSD) in an eminent domain proceeding against Kearney. Kearney's attorney gave RUSD permission to perform percolation tests on her land in exchange for receiving the test results. Throughout discovery and trial, RUSD and FL denied that new percolation testing had been performed. However, after the valuation trial, Kearney discovered that the tests had been performed and could have supported a higher valuation of her property. After losing her appeal in state court, Kearney sued RUSD and its attorneys, FL, in federal court asserting federal claims based on violations of 42 U.S.C. §1983 and RICO, and also asserting several state causes of action including for fraud and spoliation of evidence.

The Ninth Circuit found that *Noerr-Pennington* immunity (those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct) applied to the claims against both RUSD and the FL lawyers. However, the Ninth Circuit then found that the "sham" exception to the *Noerr-Pennington* doctrine applied because of ***misrepresentations*** made to the trial court by the FL lawyers regarding the alleged absence of percolation tests. The Ninth Circuit therefore remanded the federal claims to the District Court for adjudication.

The Ninth Circuit also dismissed all of the state law claim claims except intentional spoliation of evidence because they were barred by the absolute litigation privilege (Civ. Code §47(b)). While spoliation claims are exempted from the litigation privilege, the Court nevertheless dismissed that claim as well. The court's rationale was that (a) California courts have limited the tort of intentional spoliation to the point of nearly eradicating it, and (b) the claim properly was

dismissed because of the availability of other remedies for the misconduct (i.e., criminal prosecution under Penal Code §135, State Bar discipline, and the federal RICO claim based on roughly the same conduct).

In re Girardi, Lack, Traina (9th Cir. 2010) 611 F.3d 1027

The *Girardi* and *Lack* law firms created a joint venture to represent Nicaraguan claimants in litigation against Dole Food *Company* and other multi-national corporations concerning the effects of a pesticide on banana plantation workers. Most of the work on the case in Nicaragua was handled by local attorney Angel Espinoza with the Lack law firm overseeing the representation. The plaintiffs' complaint erroneously named non-existent Dole Food *Corporation* (hereafter "*Corporation*"), as a defendant instead of naming Dole Food *Company* (hereafter "*Company*").

Thereafter, the plaintiffs obtained a $489 million default judgment against *Corporation*. The judgment did not name *Company* other than to state that *Company* had not been a party to the case. A Writ of Execution was obtained that was in English and that again indicated that the judgment debtor was (non-existent) *Corporation*. Thereafter, a Nicaraguan notary public issued a Notary Affidavit translating the English-language Writ into Spanish. In translating the Writ, the Notary Affidavit substituted "*Company"* for "*Corporation"* making the document internally inconsistent by stating that *Company* was a judgment debtor (an error that arose from the author of the Affidavit replacing all references to the word "*Corporation"* in the Writ with the word "*Company*") but that *Company* was not named as a defendant (an accurate statement that arose from the author of the Affidavit correctly maintaining all references to the word "*Company*" in the Writ).

The Girardi and Lack firms filed a complaint in the US to enforce the judgment. While the complaint indicated that the Lack firm had the Writ in its possession, that statement was not accurate. The lawyers from the Girardi and Lack firms never spoke with the lawyer handling the case in Nicaragua and did not see the Nicaraguan Judgment or (English-language) Writ until very late in the game. The Girardi and Lack firms therefore attempted to enforce the judgment against *Company* in the US relying upon the erroneous Affidavit. In ruling on various motions (including one dismissing the lawsuit) the trial judge concluded the Affidavit was "suspect," specifically noting the lack of authenticity of the Affidavit, its preparation months after the Writ, and its internal inconsistencies to the effect that *Company* was not a named party in the underlying case but was nevertheless a judgment debtor.

The case to enforce the judgment having been dismissed, the plaintiffs appealed delegating the work to a junior associate in the Lack law firm. During the course of the appeal, the Nicaraguan court issued another writ confirming that *Company* had never been a party to the original judgment. The junior associate expressed his concerns about proceeding with the appeal, noting the firm could face sanctions. However, after consulting with his bosses at the firm, the young associate prepared a reply brief stating that the plaintiffs had a final judgment in their favor against "Dole," apparently not specifying *Company* or *Corporation.* After briefing but as the

appeal was still pending, the defendants finally obtained the original Writ from Nicaraguan counsel (following a concerted effort by the Lack firm not to produce it) and moved for sanctions.

A week before oral argument, a member of the Girardi firm was asked to handle the argument. Upon review of the file, he concluded the appeal had to be dismissed because it was based upon a mistaken premise the Writ named *Company*, a thesis contradicted by the recently-produced original Writ. The appeal was promptly dismissed. The court then issued an "Order to Show Cause" re sanctions including discipline against the lawyers.

In addition to ordering the lawyers and law firms to pay ***$390,000 in monetary sanctions***, the District Court concluded that the because of a variety of "red flags" the attorneys (except the one who came in and immediately called for the dismissal of the appeal) should all be disciplined. In sanctioning the lawyers, the court relied upon the Federal Rules of Civil Procedure, ABA Model Rule 3.1, similar to California Rule 3-200, and 3.3, similar to California Rule 5-200, as well as California Rule or Professional Conduct 5-200 and Business and Professions Code §6068(d).

In sanctioning the lawyers, the 9th Circuit concluded that: (a) Lack and Girardi knew the wrong defendant had been named in Nicaragua and that the error could doom the enforcement proceeding; (b) even if they had not seen the original Judgment or Writ, the affidavit was a red flag because of its inconsistencies; and (c) the complaint included the false statement that the Lack firm had the original Writ in its possession when it did not. The Court seemed even more displeased with the attorneys' subsequent actions:

"Respondents' subsequent actions were more obfuscation than investigation." Confronted with evidence undermining the basis for their enforcement action, they "doubled down on their increasingly untenable position." And, they did virtually nothing to investigate and determine the veracity of their statements. The decision to fight the efforts to produce the Writ, which directly contradicted the Affidavit upon which they relied, was a signal of increasing culpability.

The lawyers admitted their behavior was reckless but denied they knowingly submitted false information to the court.

Discipline meted out by the 9th Circuit:

Girardi: Because he took no active role in the case, but because he allowed his name to be used on briefs filed with the court that contained falsehoods, his conduct is at most reckless and the recklessness is in the way he practices law not in connection with the enforcement of the appeal. Mr. Girardi was formally reprimanded.

Lack and Traina: In yet another example of a court's response to lawyers digging the hole in which they placed themselves even deeper, the 9th Circuit stated, **"the attempt to salvage their case became indistinguishable from a knowing submission of false documents."** Mr. Lack and Mr. Traina were both suspended from practicing in the Ninth Circuit for six months; and

they were both also suspended from practicing in the United States District Court for the Central District of California for six months.

Lack firm junior associate: He made an earnest but unsuccessful effort to persuade his more experienced colleagues not to pursue the appeal. But, because he allowed them to overcome his instincts and drafted briefs with false statements, he received a private reprimand.

What about the State Bar? No further discipline required because none of the lawyers had any "intention to knowingly misrepresent to any court that the document they proffered (the Affidavit) was not what they said it was."

In the Matter of Field (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171

Field, a deputy district attorney in Santa Clara County, was found to have disregarded prosecutorial accountability in favor of winning cases by, among other things, withholding evidence, misleading a judge and committing acts of moral turpitude, dishonesty or corruption.

In one habeas proceeding, Field filed a status conference statement in which he withheld a witness's location and interview which tended to exonerate the two defendants who had been convicted. He also directed his investigator, by email, to submit a declaration that did not reveal the witness's location or interview. He continued to withhold the information when it was relevant in an in-chambers conference, and urged the court to proceed promptly when his adversary sought a continuance to locate the witness. He only provided the information when defense counsel found the witness and learned of the interview. Field's rationale for concealing the information was: (1) he did not believe he had a legal duty to provide discovery in a habeas proceeding; and (2) he felt the defense had not been forthcoming and that if they were holding back he could as well. The State Bar court found this suppression of evidence to constitute an act of moral turpitude which includes creating a false impression by concealment as well as by affirmative misrepresentation. The State Bar court noted it was particularly concerned because the misconduct "escalated over time."

In a second matter, Field did not disclose another exculpatory interview with a witness until counsel for the defense interviewed the same witness. This was another act of moral turpitude as there was compelling evidence he intended from the start to withhold the interview statement. Again, his conduct was deemed to be intentional and dishonest, and to involve moral turpitude. (Charges under Rule of Professional Conduct 5-220 – the rule prohibiting the suppression of evidence – were dismissed as duplicative of the violation of Business and Professions Code §6106 regarding acts of moral turpitude.

In aggravation, Field committed multiple acts of misconduct (there were others such as violating court orders, failing to obey the law, disrespecting the court, etc.) and his misconduct harmed the administration of justice. In mitigation, the court found cooperation, good character as attested to by 36 character witnesses including retired judges, attorneys, public officials, community leaders, crime victims and others, as well as pro bono service.

Discipline: Four-year actual suspension with five-year stayed suspension and five-year probation with proof of rehabilitation before he can be reinstated.