Recent Decisions Where Zealous Advocacy Crossed The Line

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Over the past two years, the news has seen an uptick in reports highlighting a lack of civility in society. Among lawyers, of course, concerns about a lack of civility date far further back. For instance, in 2007 the California State Bar adopted the *Attorney Guidelines of Civility and Professionalism* to "provide best practices for civility in the practice of law."[i] Likewise, in 2014, Rule 9.7 of the Rules of Court was amended to modify the attorney oath for new lawyers to expressly include a pledge to conduct oneself with "dignity, courtesy, and integrity." More recently, the September 10, 2021 report from the California Civility Task Force—a collaboration by the California Lawyers' Association and California Judges Association—highlights the ongoing concern and presents four proposals aimed at creating more concrete measures to ensure that lawyers display a level of civility (including a proposed change to the disciplinary rules).[ii]

Perhaps one reason that lawyers may sometimes grapple with maintaining civility is that a lawyer's perception about the obligation to advocate for a client may cause the lawyer to lose sight of the fact that zealous advocacy must be tempered by the lawyer's ethical obligations. Indeed, for this reason, the Civility Task Force's proposed change expressly calls for a clarification that "civility is not inconsistent with zealous representation."[iii] Conversely, a client's perception may be that the most effective lawyer is one that is overly aggressive and uncivil, which may influence the instructions the client gives a lawyer. The entertainment industry's depictions of "successful lawyers," for instance, often present examples of attorneys that embrace a "take no prisoners" approach. While saying "no" to a client's instructions is often difficult, it sometimes is ethically necessary.

In this regard, a number of recent appellate opinions highlight instances where lawyers' efforts to provide zealous representation have come into conflict with some of the ethical rules that govern lawyers' interactions with courts and opposing counsel. The following paragraphs will discuss some recent decisions that provide guidance regarding a lawyer's obligations to present meritorious claims and contentions and of candor to the tribunal.

I. PURSUING MERITORIOUS CLAIMS AND CONTENTIONS

Rule 3.1 of the California Rules of Professional Conduct provides, *inter alia*, that a lawyer shall not "(1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person," and shall not "(2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law."

Litigators will recognize the similarity of this ethical rule with standards for assessing sanctions for pursuing frivolous claims, both at the trial court level and on appeal.[iv] These standards were at issue in *Malek Media Group, LLC v. AXQG Corporation*,[v] where, after losing

an arbitration and having the award confirmed, the appellant sought to challenge the award on the ground that the arbitrator—a decorated retired ambassador—had failed to disclose the arbitrator's "self-proclaimed status as a gender, social, female and LGBTQ activist."[vi] The appellant argued that, because its principal was Catholic and the Catholic Church has found itself at odds with the LGBTQ movement on critical issues, the arbitrator's background cast doubt on the arbitrator's impartiality.[vii]

The Court of Appeal concluded the argument was objectively and subjectively frivolous. Objectively, the underlying arbitration was a commercial dispute and neither the Catholic Church nor LGBTQ rights had any real connection to the dispute, making the alleged non-disclosure inconsequential.[viii] Subjectively, the Court of Appeal cited appellant's "war-like" mentality and unsupported assertions of an overarching conspiracy.[ix] Based on its findings, the Court of Appeal imposed a sanction of $46,000 for fees and costs, plus an additional $10,000 against the appellant *and* its lawyer. It also ordered the appellant's lawyer to report the sanction to the State Bar.[x]

More recently, in *Clarity Co. Consulting, LLC v. Gabriel*,[xi] the Court of Appeal sanctioned a lawyer for pursuing a frivolous appeal of a frivolous anti-SLAPP motion. The lawyer, who was representing himself, filed an anti-SLAPP motion on what the Court of Appeal deemed to be a purely private breach of contract dispute.[xii] Consequently, the Court of Appeal held that the issue in the case was not "unique" but instead involved a "garden-variety" issue under the anti-SLAPP statute.[xiii] The court concluded it was plain that the claims did not target protected conduct and therefore were not within the purview of the anti-SLAPP statute. Finding egregious conduct and assessing sanctions, the Court of Appeal cautioned against lawyers developing blinders over the course of litigation:

> We … observe that trial attorneys who prosecute their own appeals, such as appellant [and his law firm], may have 'tunnel vision.' Having tried the case themselves, they become convinced of the merits of their cause. They may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice.[xiv]

II. CANDOR TO THE TRIBUNAL

A lawyer's duty of candor toward a tribunal precludes, *inter alia*, the lawyer from knowingly making a false statement of fact or law or failing to correct a false statement of material fact or law previously made to the tribunal.[xv] Likewise, the duty of candor prohibits a lawyer from failing to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel, or knowingly misquote to a tribunal the language of a book, statute, decision or other authority.[xvi]

In *Levine v. Bernschneider*,[xvii] the Court of Appeal instructed that the duty of candor "is not simply an obligation to answer honestly when asked a direct question by the trial court" but also an "affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events."[xviii] In *Levine*, after the plaintiff's attorney filed a motion to enforce a settlement based on the failure to deliver the settlement payment required by

the parties' settlement, the defendants delivered the settlement payment three days prior to the hearing on the motion to enforce the settlement.[xix]

When defense counsel did not appear, the plaintiff's counsel indicated he did not know why defense counsel was not present to the trial court, neglecting to mention the payment.[xx] The trial court initially granted the motion, but when it learned why defense counsel was absent, it instead held the plaintiff in contempt and assessed sanctions for a lack of candor. The Court of Appeal, affirming the order, decried the plaintiff's counsel's "half-truths" and concluded that the delivery of payment was a change in material fact that needed to be brought to the trial court's attention.[xxi]

More recently, in *People v. Williams*,[xxii] the Court of Appeal gave a warning about counsel's obligation to cite to controlling authority. Although *Williams* was initially a published opinion, the California Supreme Court subsequently ordered the case de-published on May 11, 2022. Consequently, the opinion is no longer viable authority, although its reasoning remains noteworthy.

In *Williams*, the matter on appeal originated via a petition for modification of a sentence filed by a prisoner acting *in propria persona*.[xxiii] After the petition was denied, the plaintiff filed an appeal, at which point he was assigned counsel. Unfortunately for the plaintiff, existing authority—*People v. Chiad* ("*Chiad*")—held that the denial of the petition at issue was not an appealable order.[xxiv] The plaintiff's assigned counsel ultimately filed a brief using a procedure available in criminal law that permits a lawyer to file an informational brief when the lawyer finds no colorable ground on appeal. The brief, however, contained the statement "[a]ppellant filed a Notice of Appeal from the ruling as an order after judgment affecting substantial rights" when discussing the appealability of the at-issue order.[xxv]

The *Williams* court, in conducting its own research, noted the existence of *Chiad* and asked counsel to address the case and why it was not cited. Assigned counsel's response did not attempt to distinguish *Chiad*. Rather, counsel stated that (1) the brief counsel filed did not "advocate any legal position" regarding appealability and (2) taking a position on the matter would have been the equivalent to declaring the appeal to be frivolous.[xxvi] The Court of Appeal did not credit either position. As to the first, the court noted that rule 3.3 does not just prohibit affirmative misrepresentations about the law but also knowingly failing to cite controlling authority.[xxvii] But it also rejected the notion that counsel could evade responsibility for statements made in a brief by "phras[ing] in a sufficient ambiguous manner to later permit attribution solely to a client . . . ."[xxviii]

As to the second point, the court rejected the argument that citing *Chiad* would be a violation of counsel's duty to his client, finding it to be a "false choice" because " the duty of candor is one of disclosure, not acquiescence."[xxix] The court reminded counsel that the proper route would have been to cite *Chiad* and either attempt to distinguish it on the facts or argue that it was unpersuasively reasoned.[xxx] Ultimately, the *Williams* court warned that similar conduct could warrant disciplinary review by the State Bar in the future.[xxxi]

IV. CONCLUSION

The importance of zealous advocacy is often drilled into lawyers, and for good reason. Lawyers are meant to be zealous advocates. But lawyers must also remember that zealous advocacy also must always remain ethical advocacy. Indeed, overzealous conduct which crosses the line into unethical conduct will rarely ever serve a client, in the end.

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[i] *See generally* Attorney Civility and Professionalism, available at https://www.calbar.ca.gov/attorneys/conduct-discipline/ethics/attorney-civility-and-professionalism

[ii] *See* Beyond the Oath: Recommendations for Improving Civility, Initial Report of the California Civility Task Force, September, 2021, available at https://www.lacba.org/docs/default-source/news/california-civility-task-force-report-9-10-21-(002).pdf.

[iii] *Id.* at p. 3.

[iv] *See, e.g.*, Cal. Civ. Proc. Code §§ 128.5, 128.7.

[v] 58 Cal.App.5th 817 (2020).

[vi] *Id.* at 824.

[vii] *Id.*

[viii] *Id.* at 834-835.

[ix] *Id.*

[x] *Id.* at 836-837.

[xi] 77 Cal.App.5th 454 (2022).

[xii] *Id.* at 465-466.

[xiii] *Id.* at 466-467.

[xiv] *Id.* at 458.

[xv] Cal. Rules of Prof. Conduct, rule 3.3(a)(1).

[xvi] Cal. Rules of Prof. Conduct, rule 3.3(a)(2).

[xvii] 56 Cal.App.5th 916 (2020).

[xviii] *Id.* at 921.

[xix] *Id.* at 919-920.

[xx] *Id.*

[xxi] *Id.* at 922.

[xxii] 75 Cal. App.4th 584 (2022) (now de-published).

[xxiii] *Id.* at 587-588.

[xxiv] *Id.* at 588-589.

[xxv] *Id.* at 589.

[xxvi] *Id.* at 590.

[xxvii] *Id.* at 591.

[xxviii] *Id.*

[xxix] *Id.* at 592.

[xxx] *Id.* at 592-593.

[xxxi] *Id.* at 594.