

ZEALOUS REPRESENTATION: How Far is Too Far?

The Anthony M. Kennedy American Inn of Court
Team 7

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TABLE OF AUTHORITIES

Stu's Views

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I. CASES AND OPINIONS

1. Ananchian v. Xenon Pictures, Inc. (9th Cir. 2010) 624 F.3d 1253

“Defense counsel took knowing advantage of the constrained time to respond created by the local rules, the three-day federal holiday, and Ahanchian's lead counsel's prescheduled out-of-state obligation. Defense counsel steadfastly refused to stipulate to an extension of time, and when Ahanchian's counsel sought relief from the court, defense counsel filed fierce oppositions, even accusing Ahanchian's counsel of unethical conduct. Such uncompromising behavior is not only inconsistent with general principles of professional conduct, but also undermines the truth-seeking function of our adversarial system.”

2. Gallagher v. Municipal Court of City of Los Angeles (1948) 31 Cal.2d 784

“An attorney has the duty to protect the interests of his client. He has a right to press legitimate argument and to protest an erroneous ruling. ... An attorney may assert that which he believes to be correct in a forthright manner, if he is acting in the due course of a judicial proceeding.”

3. Hawk v. Superior Court (1974) 42 Cal.App.3d 108

“An attorney's reference to prosecution's lawful exercise of peremptory challenge as ‘act of racism,’ after repeated admonishments by court not to attempt to influence prospective jurors by interjection of prejudicial comments into jury selection proceedings will constitute contempt of court's authority.”

An “attorney, as an officer of the court, owes a duty of respect for the court as well as fidelity to his client.”

“The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”

4. In re Aubrey Grossman (1972) 24 Cal.App.3d 624

Attorney accusing the court of favoring the prosecution in rulings on the admissibility of evidence by stating, “unless there’s a different rule for him than for me,” and falsely accusing the court of calling him a liar made in loud, disorderly, contemptuous, insolent and rude manner and tone of voice, supported order adjudging attorney in contempt.

However, a charge of bias made in plain English, cannot be the basis of a contempt charge unless it (a) was uttered in a loud and boisterous tone, or (b) actually disrupted the court proceedings.

5. In re Davenport (2011) 194 Cal.App.4th 1507

Zealous advocacy does not equate with “attack dog” or “scorched earth” tactics; nor does it mean a lack of civility. Zeal and vigor in the representation of clients are commendable, as are civility, courtesy and cooperation. They are not mutually exclusive.

6. Janus v. American Federation of State, County, and Mun. Employees, Counsel 31 (2018) 138 S.Ct. 2448

Past decisions will not be overturned unless there are strong grounds for doing so.

Cases identify five factors that should be taken into consideration in deciding whether to overrule a past decision: (1) the quality of the reasoning of the precedent (2) the workability of the rule the precedent established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.

7. Kirsch v. Duryea (1978) 21 Cal.3d 303

An attorney has an obligation not only to protect his client’s interests, but also to respect legitimate interests of fellow members of the bar, judiciary and administration of justice. When an apparent conflict exists between an attorney’s duty to his client and his public obligation to refrain from championing a cause which lacks merit, an attorney will not be held liable in damage for choosing to honor the public obligation, unless his decision is shown to be manifestly erroneous.

8. People v. Chong (1999) 76 Cal.App.4th 232

An attorney, however zealous in his client’s behalf, has, as an officer of the court, a paramount obligation to the due and orderly administration of justice and must not willfully disobey a court’s order and must maintain a respectful attitude towards the court.

By repeatedly ignoring the court’s ruling, arguing with the court about its rulings, interrupting a witness during questioning, interjecting improper and prejudicial information to the jury, and accusing the court of lying, attorney failed to maintain respect due to the court of justice and judicial officers in willful violation of Business & Professions Code section 6068(b).

9. People v. McKenzie (1983) 34 Cal.3d 616

“The duty of a lawyer both to his client and to the legal system, is to represent his client zealously within the bounds of the law.”

10. People v. Sanchez (2014) 228 Cal.App.4th 1517

Prosecutor’s argument on rebuttal that defendant hoped that “one of you” will be “gullible enough,” “naive enough,” and “hoodwinked” by the defense arguments so that

he “can go home and have a good laugh at your expenses” constituted prosecutorial misconduct at grand theft trial since comments were directed at any juror who might consider being a lone holdout for acquittal and since it undermined the defendant’s right to the individual judgment of each juror and unanimous verdict; comment that defendant was going to go home improperly suggested that a hung jury equaled an acquittal and comment that defendant was going to laugh at jurors’ expense was unsupported by any facts in evidence, all of which left defense counsel without a way to respond.

11. Platnauer v. Superior Court in and for Sacramento County (1917) 32 Cal.App.463

Every court has the right to protect its dignity by compelling litigants and attorneys appearing before it to conduct themselves with decorum and in a respectful manner and the proceedings of a trial in an orderly way.

12. U.S. v. Thoreen (9th Cir. 1981) 653 F.2d 1332

An attorney may be found in criminal contempt for pursuing a course of zealous advocacy or representation of his client in a criminal proceeding such that, without the Court’s permission or knowledge, he substituted someone for the client at counsel’s table with intent to cause misidentification, resulting in the misleading of the court, counsel and witnesses and resulting in delay with government reopened its case to identify defendant, all in violation of court orders to exclude witnesses from the courtroom and the custom of having only the parties and counsel seated at counsel’s table.

II. STATUTES

1. Business & Professions Code section 6068

It is the duty of an attorney to do all of the following:

- (a) To support the Constitution and the laws of the United States and of this state
- (b) To maintain the respect due to the courts of justice and judicial officers
- (c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just except the defense of a person charged with a public offense
- (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or jury or any judicial officer by an artifice or false statement of fact or law.

...

- (f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged

...

2. Business & Professions Code section 6103

A willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to

do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitutes causes for disbarment or suspension.

3. Code of Civil Procedure section 1209

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

(1) Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

(2) A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

...

(5) Disobedience of any lawful judgment, order, or process of the court.

...

(9) Any other unlawful interference with the process or proceedings of a court.

4. Penal Code section 166

(a) Except as provided in subdivisions (b), (c), (d), a person guilty of any of the following contempts of court is guilty of a misdemeanor:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice, in the immediate view and presence of the court, and directly tending to interrupt its proceedings or to impair the respect due to its authority.

...

(3) A breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court.

III. RULES AND STANDARDS OF PROFESSIONAL CONDUCT

1. ABA Model Rule 1.3-Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment-

“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a layer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

2. ABA Model Rule 3.1-Meritorious Claims & Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment-

“The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse the legal procedure...What is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions. Such action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.”

3. ABA Model Rule 3.3-Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail 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

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

...

4. California Rules of Court, Rule 9.7

In addition to the language required by Business & Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the

following: “As an officer of the Court, I will strive to conduct myself at all times with dignity, courtesy and integrity.”

5. California Rule of Professional Conduct, Rule 1.3-Diligence

(a) A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client.

(b) For purposes of this rule, “reasonable diligence” shall mean that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.

6. California Rules of Professional Conduct, Rule 3.1-Meritorious Claims and Contentions

(a) 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; or

(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 such existing law.

...

7. California Rules of Professional Conduct, Rule 3.2-Delay of Litigation

In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.

8. California Rules of Professional Conduct, Rule 3.3

(a) A lawyer shall not:

(1) knowingly made a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail 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; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the

lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal, unless disclosure is prohibited by Business and Professions Code section 6068, subdivision (e) and rule 1.6. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

...

9. California Rules of Professional Conduct, Rule 3.4-Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence, including a witness, or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) suppress any evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce;

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

...

(e) advise or directly or indirectly cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness;

....

10. California Rules of Professional Conduct, Rule 3.8-Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause;

...

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights unless the tribunal has approved the appearance of the accused *in propria persona*;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or mitigates the offense, or mitigate the sentence, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

...
(f) exercise reasonable care to prevent persons under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6
...

11. California Rules of Professional Conduct, Rule 8.4-Misconduct

It is professional misconduct for a lawyer to:

(a) violate these rules or the State Bar Act, knowingly assist, solicit, or induce another to do so, or do so through acts of another;

...
(c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

...

IV. ARTICLES

1. A Delicate Balance: Ethical Duties and Zealous Advocacy, San Diego County Bar Association, May 23, 2016
2. Alex Jones Cases Show It's Time to Rethink Zealous Advocacy, Winstron & Strawn, December 15, 2022
3. Ethics Spotlight: Limits of Zealous Advocacy in California, California Lawyers Association, February 2, 2022
4. Florida Supreme Court issues discipline opinion reminding lawyers not to engage in "zealous advocacy" in violation of Bar Rules, Lawyer Ethics Alert Blog, July 20, 2022
5. Is it Time to Remove "Zeal" From the ABA Model Rules of Professional Conduct?, Ethics & Professionalism-American Bar Association Litigation Section, May 26, 2001

V. GUIDELINES OF CIVILITY AND PROFESSIONALISM

1. California Attorney Guidelines of Civility and Professionalism, The State Bar of California, Adopted by the Board of Governors on July 20, 2007
2. Standards of Professional Conduct, Sacramento County Bar Association

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