Honestly, Your Honor

Thursday January 26, 2017

Presented by: David Cameron Carr

1. High Value of Honesty

    a. Honesty is one of the most fundamental rules of ethics for attorneys. (Tomlinson v. State Bar (1975) 13 Cal.3d 567, 577, Gold v. State Bar (1989) 4 Cal.3d 908, 914.

    b. Act of "dishonesty, corruption or moral turpitude" is cause for disbarment or suspension. Bus. & Prof. Code section 6106.

    c. Proposed Rule Prof. Conduct Rule 8.4 (Adopted on October 21–22, 2016.) It is professional misconduct for a lawyer to:… (c) engage in conduct involving dishonesty, fraud, deceit or reckless or intentional misrepresentation.

2. Duty of Candor

    a. It is the duty of an attorney to do all of the following:…(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 any judicial officer by an artifice or false statement of fact or law. Bus. & Prof. Code section 6068(d).

    b. In presenting a matter to a tribunal, a member: (A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth; (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law; Rule Prof. Conduct 5-200 Trial Conduct.

    c. Proposed Rule Prof. Conduct Rule 3.3. (Adopted on October 21–22, 2016.)
    (a) A lawyer shall not:
    (1) knowingly 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 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 § 6068(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. (b*) A lawyer who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures to the extent permitted by Business and Professions Code § 6068(e) and Rule 1.6. (emphasis added.)*

d. Comment [5] to Proposed Rule 3.3 Remedial Measures
Reasonable remedial measures under paragraphs (a)(3) and (b) refer to measures that are available under these Rules and the State Bar Act, and which a reasonable lawyer would consider appropriate under the circumstances to comply with the lawyer's duty of candor to the tribunal. See, e.g., Rules 1.2.1, 1.4(a)(4), 1.16(a), and 8.4; Business and Professions Code §§ 6068(d) and 6128. Remedial measures also include explaining to the client the lawyer's obligations under this Rule and, where applicable, the reasons for the lawyer's decision to seek permission from the tribunal to withdraw, and remonstrating further with the client to take corrective action that would eliminate the need for the lawyer to withdraw. If the client is an organization, the lawyer should also consider the provisions of Rule 1.13. Remedial measures do not include disclosure of client confidential information, which the lawyer is required to protect under Business and Professions Code § 6068(e) and Rule 1.6.

3. A Critical Difference: California's Strict Duty of Confidentiality

a. It is the duty of an attorney to do all of the following:… (e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. (2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual. Bus. & Prof. Code section 6068(e.)

b. Proposed Rule 1.6 [3-100] Confidential Information of a Client
(Commission's Rule Adopted on October 21–22, 2016
(a) A lawyer shall not reveal information protected from disclosure by Business and Professions Code § 6068(e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this Rule.
(b) A lawyer may, but is not required to, reveal information protected by Business and Professions Code § 6068(e)(1) to the extent that the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual, as provided in paragraph (c).

c. 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;…
(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.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (emphasis added.)

d. ABA Model Rule 1.6 Confidentiality Of Information
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

e. Federal Court standards

i. USDC Southern District Local Rule 84(b) Standards of Professional Conduct. Every member of the bar of this court and any attorney permitted to practice in this court must be familiar with and comply with the standards of professional conduct required of members of the State Bar of California, which are now adopted as standards of professional conduct of this court. No attorney permitted to practice before this court will engage in any conduct which degrades or impugns the integrity of the court or in any manner interferes with the administration of justice within the Court.

ii. USDC Central District Local Rule L.R. 83-3.1.2 Standards of Professional

Conduct - Basis for Disciplinary Action. In order to maintain the effective administration of justice and the integrity of the Court, each attorney shall be familiar with and comply with the standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. These statutes, rules and decisions are hereby adopted as the standards of professional conduct, and any breach or violation thereof may be the basis for the imposition of discipline. *The Model Rules of Professional Conduct of the American Bar Association may be considered as guidance.* (emphasis added.)

4. Withdrawal

   a. Proposed Rule 1.16 [3-700] Declining Or Terminating Representation (Commission's Proposed Rule Adopted on October 21–22, 2016.) (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the lawyer knows or reasonably should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person*; (2) the lawyer knows or reasonably should know that the representation will result in violation of these Rules or of the State Bar Act…* (b) Except as stated in paragraph *(c), a lawyer may withdraw from representing a client if: … (2) the client either seeks to pursue a criminal or fraudulent course of conduct or has used the lawyer's services to advance a course of conduct that the lawyer reasonably believes was a crime or fraud; (3) the client insists that the lawyer pursue a course of conduct that is criminal or fraudulent; (4) the client by other conduct renders it unreasonably difficult for the lawyer to carry out the representation effectively;* (emphasis added.)

   b. Duty to dissuade client
   " An attorney must attempt to dissuade the client from committing perjury: "(A)t a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct." [Nix v. Whiteside (1986) 475 US 157, 169, 106 S.Ct. 988, 995; People v. Johnson (1998) 62 CA4th 608, 621, 72 CR2d 805, 811-812—"The persuasion solution, when it succeeds, is the ideal solution since it involves neither the presentation of perjured testimony nor disclosure of client confidences"] Applies equally to counsel in civil and criminal cases: The duty to discourage prospective perjury applies to all lawyers: "No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial." [United States v. LaPage (9th Cir. 2000) 231 F3d 488, 492 — criminal conviction overturned where prosecutor failed to correct prosecutorial

testimony known to be false. Vapnek, et al. California Practice Guide, Professional Responsibility Rutter Group 8:413-8:414.

c. Duty to withdraw in a criminal case. “If the client remains adamant, the attorney must make a motion to withdraw so as to not give implied consent to the use of perjurious testimony” People v. Brown (1988) 203 CA3d 1335, 1340

d. “Noisy withdrawal”

    i. Proposed Rule 1.16 [3-700] (c) If permission for termination of a representation is required by the rules of a tribunal, a lawyer shall not terminate a representation before that tribunal without its permission. (d) A lawyer shall not terminate a representation until the lawyer has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e).

5. Malicious Prosecution

a. Lawyers bring action fraud claims on behalf of client against client’s former attorney based on client’s allegations that lawyer made representations to her to induce her to settle a lawsuit. Lawyers then receive transcripts of hearings in the client’s first lawsuit that show that no such representations were made. Lawyers found liable for malicious prosecution for maintaining action after learning that there was no probable cause. Zamos v. Stroud (2004) 32 Cal.4th 958.

b. In general, a lawyer “is entitled to rely on information provided by the client.” [citations] If the lawyer discovers the client's statements are false, the lawyer cannot rely on such statements in prosecuting an action [citation: adversary provided verifiable facts disproving allegations made in demand letter].) But a letter from a litigation adversary merely suggesting it disagrees with the verity of the allegations in the lawsuit is not sufficient to put the lawyer on notice of the falsity of the client's allegations. (See Swat–Fame, Inc. v. Goldstein (2002) 101 Cal.App.4th 613, 627, 124 Cal.Rptr.2d 556 [declining to hold “boilerplate denial of the facts” puts “lawyers on notice of any specific fatal flaw” in claim], overruled on other grounds in Zamos, supra, 32 Cal.4th at p. 973, 12 Cal.Rptr.3d 54, 87 P.3d 802.) Daniels v. Robbins, (2010)182 Cal. App. 4th 204, 223, 105 Cal. Rptr. 3d 683, 698

Your Presenter

David Cameron Carr is senior counsel at Klinedinst PC in the Legal Ethics and Law Practice Management Group in San Diego, California.

Since 2001 he has specialized in representing attorneys in matters involving legal ethics and the law of lawyering, including discipline defense, bar admissions, attorney fee disputes, legal malpractice, attorney professional responsibility and ethics advice.

Mr. Carr graduated from Loyola Law School in 1986 and was admitted to the California Bar that year. After practicing in business litigation and commercial law, Mr. Carr spent 12 years as staff attorney, discipline prosecutor and manager at the State Bar of California, before returning to private practice.

He is an active member of the San Diego County Bar Association, where he serves on the Legal Ethics Committee. Mr. Carr is a member and served as president of the Association of Discipline Defense Counsel from 2008 through 2010. He is also a member of the Association of Professional Responsibility Lawyers and the ABA Center for Professional Responsibility. Mr. Carr is adjunct professor of law at Thomas Jefferson Law School where he teaches professional responsibility.

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