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PROFESSIONAL CONDUCT

Does the First Amendment Provide a Limit on the Duty of Loyalty?

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Special to the Legal

We all know that lawyers owe ongoing duties of loyalty and confidentiality to former clients, but how far do those duties extend? Does a position we have previously taken on a client's behalf preclude us from advocating a conflicting position when we represent our own personal interests in the future? What about our First Amendment rights?

A California court of appeal recently considered these interesting questions in *Oasis West Realty, LLC v. Goldman*. Goldman is an attorney who personally and publicly opposed a proposed real estate development in his neighborhood; unfortunately, his opposition occurred two years after he represented the developer in its efforts to seek approval for the very same development. The court concluded that Goldman's efforts in opposition to his former client were protected by the First Amendment and that no duty of confidence or loyalty had been breached. This is an intriguing case and one worth a closer look.

We begin by examining the facts. For about a year, Goldman's representation of the developer included strategy related to project planning, obtaining approvals, and generating public support. Later, the developer claimed that it specifically hired Goldman for the project because "he was an expert in civic matters and because he was a well respected, influential leader who was extremely active in Beverly Hills politics." The representation ended, and two years later, the developer sued Goldman, claiming $4 million in damages allegedly resulting from Goldman's advocacy against the project.

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This advocacy consisted of two primary activities: first, Goldman spoke at a City Council hearing in opposition to a rule requiring citizens seeking signatures on a project referendum petition to carry around a 15-pound set of relevant documents; and second, Goldman and his wife spent time soliciting neighbors' signatures for the referendum petition and left notes at four or five houses "expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition."

The California court of appeal concluded that there was no violation of a California Rule of Professional Conduct titled "Avoiding the Representation of Adverse Interests" because "there was no second representation." It explained that although an attorney can violate the rule even if the second representation does not implicate an attorney/client relationship, here, Goldman "never undertook a second employment, or developed any other relationship which could create conflicting fiduciary duties." Additionally, the court found no evidence that Goldman revealed any confidential information or announced his former involvement with the project, which could potentially encourage others to think that he was basing his opposition on that information.

There was no breach of the duty of loyalty because with respect to the statements to City Council, Goldman merely "expressed his opinion on good government practices." As to soliciting signatures, the court said that Goldman "unquestionably acted against the interest of his former client" but the duty of loyalty does not apply when an attorney is acting on his own behalf instead of on behalf of a new client. According to the court, lawyers may take

positions adverse to a client, as long as current representations or confidentiality are not compromised: "Loyalty to a client does not require permanent extinguishment of a lawyer's deepest convictions or forfeiture of the constitutional right to speak on matters of public interest."

Putting aside for the moment the question of whether Goldman's conduct constituted good business, let's look at whether it was good ethics. Pennsylvania Rule of Professional Conduct 1.9 sets out attorneys' duties to former clients. Under 1.9(a), a lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or substantially related matter if the new client's interests are materially adverse to the former client's unless the former client gives informed consent. The rule's drafters note that direct involvement in a specific transaction "clearly" prohibits a lawyer from subsequent representation of materially adverse clients.

Rule 1.9 also ensures that even after a client-lawyer relationship has terminated, the lawyer understands his or her continuing obligation of confidentiality. To that end, subsection (c) prohibits the disclosure of information related to past representations, much less the use of it to the disadvantage of former clients.

As in California, there is a dearth of case law on point here. One case with very different facts, but a related holding is *Office of Disciplinary Counsel v. Murphy*. In *Murphy*, the attorney took advantage of former clients whom he had represented in a bankruptcy filing. After the Chapter 7 proceedings concluded, Murphy purchased a junior mortgage on the clients' land, telling them that the acquisition was part of a procedure for having the mortgage cleared off the books. Later, Murphy foreclosed on the mortgage, bought the property at a sheriff's sale, and evicted his former clients.

The disciplinary board found a clear connection between Murphy's bankruptcy work and his "subsequent representation of his own interests" in these real estate transactions. Thus, Murphy violated Rule 1.9 by representing himself in a substantially related matter where his own interests were materially adverse to those of his former clients. As we say, this is an "extreme" case and these determinations are very fact specific, but there is a chance that this case can be interpreted as holding that a lawyer acting on his own behalf can constitute a subsequent representation.

The California *Oasis West Realty* case resulted in an explosion of discussion on a listserv in which we participate, hosted by APRL, the Association of Professional Responsibility Lawyers. As often happens on the listserv, opinions varied widely, but two camps of opinion struck us as particularly interesting. Diane Karpman of Karpman & Associates and Ellen Pansky of Pansky Markle Ham, both ethics experts in California, agreed that the "court got it right."

Pansky's opinion is "predicated on the fact that Goldman never used any confidential information of any sort in taking a public position as a private citizen as it affected his personal property rights." Karpman said, "This is a case about lawyers having free speech just like any other citizen. Taking a position about a neighborhood development is grass roots politics at its most basic level. Being a lawyer doesn't mean you don't have ideas, or want to take positions which may be contrary to a former client's position."

However, Simon Lorne of Millennium Management, another noted ethics expert, found Goldman's conduct "objectionable" because it provided an opening for opponents of a former client to argue that "even his former lawyer is now opposed to the project."

We find ourselves agreeing with both viewpoints. Surely, representation of a client cannot bind us to the client's position forever and prevent us from exercising our First Amendment rights to speak out on issues that personally affect us. However, we strongly feel it is both bad form and bad business to publicly oppose a client on an issue where we were previously their advocate. Perhaps, the real question is, if Goldman had such strong feelings about the real estate development, why didn't he refuse the engagement in the first place?

Firm litigation associates Oleg V. Nudelman and Jennifer E. Canfield contributed to the research and drafting of this article. •