THE LINE BETWEEN ZEALOUS ADVOCACY AND SANCTIONABLE CONDUCT

By Franklin R. Garfield

The duty of zealous advocacy on behalf of a client is an established tenet of the adversarial process that examines issues from both sides.

As a practical matter, attorneys who are acting as advocates are mandated to make every colorable argument on behalf of their clients (whether those arguments are rock solid or barely plausible) and to do so vigorously in an attempt to persuade the decision-maker to adopt those arguments; not to merely present them for the decision-maker to consider. Under these circumstances, it should surprise no one that in the name of zealous advocacy, attorneys may engage in conduct that is rude, offensive and abusive, and that they may also advance legal arguments that are patently frivolous. Two recent cases involve attorneys who crossed the line between conduct that they characterized as zealous advocacy and conduct the court considered sanctionable.

In *Moore v. Superior Court*, 2020 DJDAR 12235 (November 16, 2020), an attorney representing a trustee was convicted of four counts of civil contempt, fined $3,600 in total, and ordered to pay the opposing party's attorney's fees and costs. In brief, at a mandatory settlement conference before a temporary judge, the attorney persistently yelled at and interrupted other participants, accused opposing counsel of lying while providing no evidence to support his accusation, refused to engage in settlement discussions, and effectively prevented the settlement officer from invoking the aid and authority of the supervising judge.

In an effort to avoid conviction, the attorney offered inconsistent explanations for his behavior. For example, he did not file a settlement conference statement as required by local rules. According to the settlement officer, the attorney's associate stated that no settlement statement was filed on behalf of the trustee because "this case is only about damages." During the contempt hearing, the attorney blamed his associate for not filing the statement, but claimed that her failure was due to a medical emergency. The attorney's statement at the hearing was obviously inconsistent with the explanation given to the settlement officer.

Along the same lines, the attorney claimed during the contempt hearing that he just got carried away: "[W]hen I get passionate about a case, I get animated and so I was probably animated at that time. . . I'll accept [the settlement officer's opinion] that, okay, I was verbally aggressive." This testimony was consistent with his written opposition which conceded that "his frustration with this case and his zealous advocacy on behalf of his client got the better of him during the MSC, which regrettably caused [the other participants] to take offense. . . ." However, in his petition for a writ of review, the attorney acknowledged that his behavior was a "tactic" in representing his client. The Court of Appeal stated: "Moore elected to act like a bully to further his client's interest. He attempts to justify this conduct as an appropriate adversarial 'tactic.'

Moore is wrong. Such conduct has no place in any courtroom. It is contemptuous."

The Court of Appeal overturned three convictions, affirmed one conviction and the related punishment, ordered the Clerk of the Court to notify the State Bar "for whatever additional action the Bar may consider appropriate," and concluded that the award of attorney's fees and costs was precluded by statute. However, the Court pointedly noted: "Though [attorney's] petition is largely successful, that success in no way should be construed as an endorsement by this court of his behavior."

The lesson of this case should be taken to heart by all litigators and especially by those who litigate family law cases. In that context, tensions between the parties run high, and are often compounded by suspicion and distrust. An attorney must guard against the temptation to over-identify with his or her client and to demonize the other party. As the case of *Marriage of Davenport* (2011) 194 Cal.App.4th 1507 illustrates, giving into this temptation can be very expensive.

Following two years of exhaustive litigation that generated a 35-page register of actions and 19 volumes of court files, wife filed a pre-trial motion under *Family Code* section 271 seeking $600,861 in attorneys fees and $332,933 in costs. Husband responded with a Section 271 motion of his own.

Because wife's motion was filed prior to trial, the judge extracted a representation from wife's attorney that the facts were as "shocking and egregious" as in the *Feldman* case and justified an expedited hearing. (In *Feldman* [2007] 153 Cal.App.4th 1470, the trial court found that husband had intentionally sought to circumvent the disclosure process and that his conduct had frustrated the policy of promoting settlement by failing to disclose "untold millions of dollars in assets," which was deemed a "pattern of non-disclosure.")

After a five-day hearing, the trial court issued a 31-page decision denying wife's request and granting husband's, awarding him $100,000 in sanctions and $304,387 in attorney's fees. The trial court concluded that wife's proof fell far short of her attorney's "exuberant advocacy." Among the trial court's findings of sanctionable conduct: Wife failed to establish that the facts of her case were on all fours with *Feldman*; that there was no need for the motion to be heard prior to trial, that her attorney's correspondence with opposing counsel was "hostile and disrespectful," and that all of the fees related to wife's motion could have been avoided by her attorney. The trial court concluded: "The evidence presented was clear and convincing that uncivil, rude, aggressive and unprofessional conduct [by wife's attorney] has marred this case from the very beginning."

Wife's motion included a 52-page declaration from her attorney and attached 1,250 pages of exhibits. The appellate court began its analysis by observing that "[m]uch of the declaration was inappropriate, asserting hearsay, argument, opinion, and conclusions, and was improper on several bases." According to the Court of Appeal: "Family law cases are not supposed to be

conducted as ‘adversarial proceedings.’ Quite the contrary, the goal is to reduce acrimony and adversarial approaches common to general civil litigation and, instead, to foster cooperation between the parties and their counsel with a view toward settlement short of full-blown litigation.” In affirming the trial court’s award, the appellate court noted that the record was replete with evidence of attorney’s hostile and disrespectful communications with opposing counsel.

Taken together, these cases remind attorneys of the line that cannot be crossed in the name of representing their clients. Whether it is characterized as creative lawyering or zealous advocacy, attorneys must be careful not to engage in unprofessional conduct. Especially in the family law context, rude or abusive behavior masquerading as zealous advocacy cannot trump the requirements of civility, courtesy and cooperation.

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