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PERSPECTIVE

Balancing Duty of Loyalty and Free Speech

What's more important — free speech rights or client loyalty? The 2nd Appellate District Court of Appeal struggled with this issue in *Oasis West Realty LLC v. Goldman*, 2010 DJDAR 3208. The answer is that if the lawyer is very very careful, the First Amendment wins. But should it?

Kenneth Goldman represented Oasis, a developer of the Beverly Hilton hotel site, for over a year and charged a fee of about \$60,000. Oasis claimed Goldman was “intimately involved” in planning the development of the property and attended many confidential strategy meetings. Goldman apparently quit working for Oasis in April of 2006 for unspecified reasons and then, two years later in 2008, publicly opposed the development of the Beverly Hilton.

A number of Beverly Hills residents sought to place approval of the project on the ballot so that the voters could decide whether the project should go forward. In furtherance of that effort, Goldman appeared before the Beverly Hills City Council to seek a rules change so that people gathering signatures on a petition to place approval of the development on the ballot would not have to carry around the 15-pound environmental impact report. In doing so, he used his status and relationships to influence the council members stating: “I know every single one of you...[The rule is] not fair and each of the five of you knows that.” More significantly, Goldman and his wife signed the petition, solicited additional signatures, and even wrote a letter to neighbors that they were concerned about the project and the traffic impact on the community. In one e-mail to a leading opponent of the project, Goldman expressly

discredited the environmental impact reports and traffic reports submitted by his former client, stating “I don't believe it and I am sure neither do you.” The petition succeeded and as a result, the project was put to a city-wide vote. Oasis claimed it had to expend \$4 million to fight the political campaign, but it was ultimately successful, with the measure barely passing. Oasis then sued Goldman for malpractice, claiming that Goldman breached his fiduciary duties, his duty of loyalty, and his duty of confidentiality, and violated a number of state bar rules.

Goldman filed an anti-SLAPP motion to strike. Whether such motions are available for attorney malpractice claims is a bit muddled. Here, the trial court determined that the gravamen of the case was attorney negligence and thus not subject to Code of Civil Procedure Section 425.16. The appellate court quickly brushed this ruling aside since the alleged wrong was literally Goldman's free speech and petitioning activity. Indeed, the anti-SLAPP statute was originally enacted for just the kind of conduct that Goldman engaged in, so the case demonstrates one clear exception to the general rule that attorney malpractice cases are not typically “slappable.” While most cases have held that attorney breach of loyalty cases cannot be summarily stricken, not all have done so. For example, in *Pergrine Funding Inc v. Sheppard Mullin*, 133 Cal.App. 4th 658, the court allowed a motion to strike where the lawyer's wrongful acts in the past involved handling Securities



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and Exchange Commission proceedings, which was deemed protected activity. Oasis is yet another example of the exception, and the trial court was properly reversed on this point.

More problematic is the discussion of the balancing of Goldman's personal First Amendment rights against the rights of his client to expect him to keep quiet. The appellate court pointed out that Goldman had not committed any violation of Rule 3-310 — prohibiting representation of adverse interests — because Goldman was not representing anyone as an attorney. He was simply exercising his own personal constitutional rights as a local citizen concerned about a public matter. This key distinction is what persuaded the court that Oasis could not succeed on the merits. The Oasis court noted that Goldman “unquestionably acted against the interest of his former client on the issue on which he was retained,” but nonetheless concluded that this did not breach the duty of loyalty. Justice Orville A. Armstrong, who wrote the unanimous opinion (Justices Paul Turner and Sandy R. Krieger concurring), exonerated Goldman



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while simultaneously acknowledging the California Supreme Court's holding that a lawyer "may not do anything which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." *Wutchmuna Water Co.*, 216 Cal at 573-574.

But isn't this just what Goldman did? The lawyer clearly acted against his client's interest and while he carefully avoided disclosing any confidential information to others or trumpeting his past professional representation of Oasis, how could he divorce himself from the confidential information he acquired at the expense of Oasis? After all, Oasis paid Goldman to study the project and become acquainted with all the issues. Even if he studiously avoided disclosing any confidential information, he could not forget or ignore what he knew. And why shouldn't an attorney give up his right of free speech under these circumstances? Since he was paid, shouldn't that compensation for his time also compensate him for his silence on this particular issue and require him to let others carry on a community fight, even if he is well qualified and one of the best able to contribute and advance the public debate?

The Oasis court's answer to these questions is only that "loyalty to a client does not require extinguishment of a lawyer's deepest convictions and there are occasions

where exercise of these convictions — even an exercise debatable in professional terms — is protected by the Constitution." The Constitution trumps, "We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest." This sweeping justification, however, clearly goes too far. It was only two years after Goldman's representation of the specific development.

Also key to the court's analysis is that Goldman did not disclose his confidential knowledge — no evidence existed that he had breached this duty. Had he divulged confidences the Oasis court says he would have been liable. What the court did not recognize sufficiently is Goldman's status in the Beverly Hills community and the inference that it was likely known that he had worked for Oasis on this project. Even if Goldman did not mention his past representation, it was undoubtedly a factor in the credibility of his opposition. Implicitly, lending his name and support to the anti-Oasis cause was a statement that he knows these people, he has attended their confidential meetings, and they are not to be trusted. Who would know better than an experienced and sophisticated expert who had access to the inner workings of the client? And how can Oasis effectively contradict the professional that they clearly recognized as a maven in the area — and whom they paid to educate?

Lawyers certainly argue against positions of former clients all the time and advocate

for changes to rules or laws, which may not be helpful to former clients. It is our duty as attorneys to try to effect positive change in the system by speaking out, and when we exercise our First Amendment rights, we may have specific clients in mind. But here, the nexus between the lawyer's work and his public petitioning efforts seems too close for comfort. Loyalty of an attorney, which is normally sacred, takes a back seat here to hallowed free speech rights — but why? Others could have and did have the expertise and the ability to contribute to the public debate this lawyer was not the only one in the community that was needed to bring this issue to the fore or explain it, and had he never been involved, the topic would still have been fully aired. However, the court made a very debatable value judgment by placing the importance of an individual lawyer's free speech rights first. And frankly, this result can undermine the confidence and trust of clients in attorneys. The public could have gone without this one attorney's voice, and the attorney — on agreeing to represent the client and collect a fee — was compensated for his loss of free speech rights.

Ironically, the court concludes that Goldman's acts did not cause the loss to Oasis, which was undoubtedly true. This terse comment alone is sufficient to support the court's reversal of the lower court's decision, and this point appears correct and supports the reversal regardless of the loyalty issue.

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