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Being a zealous advocate has its limits

By Joel A. Osman



In law school, lawyers are taught to be zealous advocates on behalf of their clients. This duty is perhaps best summarized in the Preamble to the ABA Model Rules of Professional Conduct which provides in part: "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others."

There are limits to a lawyer's duty to be a zealous advocate for their client. Various provisions of the Rules of Professional Conduct and the State Bar Act prescribe how far lawyers can go in their advocacy. Lawyers must know and observe these limits. Failure to observe the following limits on advocacy can lead to bad things!

Movies aside, attorneys cannot advise clients on committing crimes

California Rule of Professional Conduct 1.2.1 provides: "A lawyer shall not counsel a client to engage or assist a client in conduct that the lawyer knows is criminal, fraudulent, or a violation of any law, rule, or ruling of a tribunal." Comment 1 to RPC 1.2.1 draws a dis-

inction "between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

An attorney must be truthful

California Rule of Professional Conduct 4.1 states that in the course of representing a client, a lawyer may not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by the confidentiality provisions of Business and Professions Code section 6068, subdivision (e)(1) or RPC 1.6.

Comment 2 to RPC 4.1 makes clear the rule refers to statements of fact. The question of whether a statement should be regarded as one of fact depends on the circumstances in which it is made. "For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud."

An attorney cannot engage in criminal or dishonest conduct

California Rule of Professional Conduct 8.4 provides that it is professional misconduct to violate the Rules of Professional Conduct or the State Bar Act, knowingly assist, solicit, or induce another to do so, commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as

a lawyer in other respects or engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or engage in conduct that is prejudicial to the administration of justice.

Business & Professions Code Section 6106 provides some guidance with respect to the criminal acts prohibited by RPC 8.4 when it states: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

John Eastman: a cautionary example

The Office of Chief Trial Counsel of the State Bar of California charged Eastman with 11 counts of misconduct arising from certain activities surrounding his representation of former president Donald J. Trump and the 2020 presidential election. Eastman was charged with one count of failing to support the Constitution and laws of the United States (Bus. & Prof. Code § 6068, subd. (a)); two counts of seeking to mislead a court (§ 6068, subd. (d)); six counts of moral turpitude by making various misrepresentations (§ 6106); and two additional counts of moral turpitude (§ 6106).

The Notice of Disciplinary Charges made against Eastman by the Office of Chief Trial Counsel alleges misconduct surrounding Eastman's involvement in the efforts to reject, delay and/or obstruct the electoral vote after the 2020 presidential election. Despite the depth, breadth, and complexity of the case law and historical context cited by the parties, this disciplinary proceeding boiled down to an analy-

sis of whether or not Eastman, in his role as the attorney for then-President Donald Trump and his re-election campaign, acted dishonestly in his comments and advice given regarding the issue of whether then-Vice President Mike Pence had authority to unilaterally reject certain states' slate of electors and/or delay or recess the electoral count during the Joint Session of Congress on Jan. 6, 2021, and the manner in which he pursued legal action aimed at obstructing the lawful electoral process.

Notwithstanding the herculean efforts of Eastman's defense counsel, after full consideration of the record, in a 128-page written decision dated March 27, 2024, a State Bar Court judge found that Bar prosecutors had satisfied their burden of proving all charges except for count eleven, which the court dismissed with prejudice. In view of the circumstances surrounding Eastman's misconduct and balancing the aggravation and mitigation, the court recommended that Eastman be disbarred.



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