'Oasis West': What's a Lawyer to Do?

Lisa Perrochet Contact All Articles
The Recorder | April 18, 2011

Lisa Perrochet, Horvitz & Levy LLP
Image: Jason Doiy/The Recorder

By all accounts of the oral argument on April 6 in *Oasis West Realty, LLC v. Goldman*, the California Supreme Court was troubled by a lawyer's decision, after representing a client who sought approval for a real estate development plan, to turn around and take overt, public action to undermine the former client's efforts with regard to that development after the attorney-client relationship was over. Assuming the justices write an opinion that says the lawyer's conduct may have been unethical and may give rise to a tort cause of action by his former client, it will be interesting to see how the court defines lawyers' duties on a going-forward basis, and whether the court believes its rule is sufficiently novel to warrant prospective-only application.

The reason for thinking that the opinion may reflect some novelty in the rules governing professional conduct is that the justices referred repeatedly during the argument to the lawyer's duty of loyalty to the former client. That was a bit odd. Courts in the past have said that attorneys' broad duty of loyalty prevents them from concurrently representing a client in one matter and opposing them in another matter, even if the two matters are completely unrelated. Clients in that situation need to know the attorney is 100 percent on their side. But courts have typically viewed attorneys' duties to a former client differently, emphasizing that attorneys can certainly take on representation adverse to the former client unless it's in the same matter or one that is substantially related to the prior matter. Why this restriction on activity contrary to the interests of a former client? Because a lawyer is conclusively presumed to have gained all kinds of client confidences from the prior representation, and will be in a position to use those confidences against the former client in future related matters where those confidences will be relevant.

In other words, the duty to preserve client confidences is critical in situations involving former clients, but the duty of loyalty not so much. For example, the client whose attorney defended her in a car crash case might be irritated and might even feel betrayed when the attorney later represents her business partner who is suing her for breach of contract — she thought the lawyer was her champion. But reasonable as her feelings may be, innumerable cases make clear that she, as a former client, generally can't complain about a conflict of interest in that situation.

On April 6 at oral argument, the justices seemed to meld the current-client duty of loyalty and the former-client "substantial relationship" test into one when they expressed sympathy with the idea that a new rule should be created to restrict an attorney's personal activities that have a potential negative impact on a former client. Without focusing on the question whether the attorney's efforts, essentially as a community activist, against his former client threatened the use or disclosure of confidential information, the justices were plainly concerned about whether those efforts breached a duty of loyalty. The factual scenario seemed to have pushed buttons at a visceral level, as evidenced by Justice Ming Chin's exasperation when he asked rhetorically during argument, "What's wrong with this picture?"

So, no one will be surprised if the California Supreme Court announces a rule extending the duty of loyalty in the following way: A lawyer may not represent a client in a matter and then, after the attorney-client relationship ends, take any overt action against the former client with respect to the same matter while that matter is still pending. It does not matter whether the lawyer's overt action is performed on behalf of another client, or purely out of the lawyer's own personal interest.

r, will be in the details. Here are a few questions that may or may not be answered in the forthcoming opinion:

WHAT IS 'THE MATTER' AND WHEN IS IT NO LONGER 'PENDING'?

Some attorney-client relationships fit neatly into a clearly defined box whose contours are defined by time and subject matter. If I, as a lawyer, represent the defendant in a car crash case, *Smith v. Jones*, it's usually easy to figure out whether the matter is still "pending" — entry of a final judgment is a good hint that the matter is over. And if Justice Carol Corrigan's remarks at oral argument are an indication, the court is not likely to require a lawyer to forgo all action against a former client until the end of time — only until the end of the matter. Therefore, if I formerly represented Jones in this action by Smith, but Jones decides she wants her cousin to handle the defense instead, I'd better not do anything later, while the case is still pending, that would implicate any new duty of loyalty laid down by the court, such as using Jones' name and image in my public campaign for MADD, holding out Jones' act of plowing into Smith's car as an example of why we need stricter drunken driving laws.

But what about situations where "the matter" doesn't really have an end date? What if I consult with a client regarding its statewide strategy for ensuring compliance with the law in order to avoid future liability claims? Say, for example, that I advise Acme Insurance Co. about how courts have defined an insurer's duties in providing fire insurance policy benefits, and I help Acme develop an ongoing plan for training its people and updating its operating procedures to meet its obligations. I'm so impressed with their attitude that I buy Acme insurance for my own home. But then my consulting project is over, I close my file on the Acme matter, and a year later my house burns down. I make a claim, and Acme unreasonably denies it. The "matter" on which I advised Acme isn't "over" in any sense — the corporate policy on which I advised the company is still being refined and the company is still consulting with lawyers about it. Does this mean that I can't make a claim against the company challenging how they have implemented their corporate policies? By virtue of having previously advised them on claims handling practices, do I lose my ability as a private citizen to seek redress for the perceived wrong against me in the course of that claims handling?

Maybe the court would draw the line at forbidding a lawyer's private action alleging a tort or breach of contract by the former client. After all, we allow lawyers to sue their former clients for fees even while the matter that was the subject of the representation is still pending. But what if we change the scenario above — it wasn't my house that burned, but the house of a close friend whose insurance claim is denied five years after my representation of Acme ceases? What if I'm so incensed at the stories I'm hearing from my friend that, even though my friend has settled her claim and moved on, I want to write a letter to the consumer watchdog reporter for my local newspaper decrying the company's conduct? Is the subject matter of my prior representation still "pending" so as to make that letter a breach of my duty of loyalty?

Bringing this question back to the facts of *Oasis West*, one can envision an argument that the development project on which the attorney consulted has no clearly defined subject matter or end date. Assume the developer has successfully obtained all approvals needed by meeting various state and local conditions, and the project is built and running smoothly. Ten years later, a question arises concerning whether the developer has breached a condition imposed on it, and the surrounding community (in which the developer's former lawyer lives) is in an uproar because of some resulting traffic or environmental concern. Is the lawyer, who advised the developer about those conditions, still barred from taking part in his own community's efforts to challenge the developer's activities?

DOES THE RULE IN VICARIOUS DISQUALIFICATION CASES APPLY?

Generally speaking, if one lawyer in a firm is ethically barred by a conflict of interest from taking action adverse to a current or former client, all lawyers in the firm have the same disqualifying conflict. Would the new duty of loyalty that may be announced by the court have the same effect? If so, imagine the consequences: Attorneys will have to perform a thorough conflicts check every time they do something in their private lives that could adversely affect anyone, to make sure that the person or entity on the "other side" of the lawyer's activity isn't a former client of the firm in some related matter.

How does this play out? If I want to picket against the opening of a strip club around the corner from my house (or, for that matter, I want to open a competing strip club), I'd better find out the corporate structure of the strip club and run the names through our firm's conflicts database to make sure no one in my firm advised any related entity about zoning rules, or helped to negotiate a lease for the club.

Here's another one: If I'm struck in a crosswalk by an Acme Delivery truck, I'll have to check our database for the company name before making any claim. After all, if someone else in my firm had advised Acme regarding how to meet duties for background checks on drivers or for regulatory maintenance requirements, I may be violating a new duty of loyalty by acting adversely to the interests of the former client if I assert, especially in public court documents, that the company engages in negligent hiring or maintenance.

COURT ACTION' AGAINST A FORMER CLIENT

The California Supreme Court may not use the phrase "overt action" when formulating a test to answer the question pending in the *Oasis West* case, but it seems likely the court will come up with something along those lines. Justice Marvin Baxter demonstrated the court's sensitivity to precisely describing the nature of activities that would be proscribed when he asked during oral argument whether a vote by the lawyer against the project in a local election would constitute improper action against the former client. The justices indicated no intent to go that far. On the other hand, they did not seem satisfied with drawing the line at "public" versus "private" activity because a lawyer could, perhaps merely through a private conversation with an influential local politician, inflict concrete injury on the former client.

But where does one draw the line between allowable private activity (voting along with everyone else in a citywide election) and prohibited "overt" activity (advocating against the former client's interest in a televised hearing before the city council)? Articulating the test in a way that suggests impact is the dividing line would set up a difficult test to administer.

If any significant impact on a former client is enough to land a lawyer in hot water, what is a lawyer to do when she makes no affirmative effort to inject herself into a position of harming the former client, and yet the lawyer has a pre-existing obligation to participate in some process that may nonetheless have that effect? For example, assume the lawyer is one of five members on a homeowners association board. She represented the developer of an adjacent shopping complex and assisted in getting that project approved. Two years after her representation is over, the developer approaches the lawyer's homeowners association, seeking consent to a variance from a zoning law. If the lawyer has a continuing duty of loyalty to the former client with respect to the project, even when the lawyer is not acting in her capacity as a lawyer for anyone, then the lawyer must vote for the variance. But if in her opinion the variance will be harmful to the members of her homeowners association, her duty to them is to vote against the variance. She is the tie-breaking vote. She has done nothing unethical, and has not even taken any purposeful action at all, to place herself in this situation. Is her only option to resign from the homeowners association board?

WHAT'S NEXT?

These are some of the sticky questions that may remain to be decided after the court issues the forthcoming *Oasis West* opinion. When considering such issues, and the "law of unintended consequences," the California Supreme Court may be mindful of the procedural posture of the case. The case is before the court at a very early stage — on appeal from the denial of an anti-SLAPP motion to strike the complaint against the lawyer. If the court were to find that the trial court properly denied the lawyer's motion because the plaintiff made out a *prima facie* case of wrongdoing by the lawyer, such a finding would (under established anti-SLAPP jurisprudence) carry no weight in the continuing proceedings on the complaint. The parties will still need to complete discovery and then present their evidence to a trier of fact to weigh any disputed questions. The Supreme Court, then, will likely be cautious before categorically announcing whether there was or was not a breach of a duty in light of the limited record before the court.

Some of the conundrums posed above may turn out to present fewer or different questions if the court ends up taking a different direction than was suggested during argument: Rather than expanding the duty of loyalty beyond its current bounds, the court could rely on established conflict-of-interest jurisprudence that focuses on the lawyer's duty to preserve confidences of a former client. In that situation, the test might turn on whether a lawyer's challenged activity against the former client appears likely to have involved the misuse of client confidences. Under any test — whether based on a duty of loyalty or a duty to preserve confidences — lawyers in California can expect a fair amount of confusion regarding the permissible scope of actions they take in their private lives, purely on their own behalf, as courts in the future interpret and apply the imminent decision in *Oasis West*.

Lisa Perrochet is not representing or affiliated with any party or counsel in the Oasis West *case, and was merely an interested observer at oral argument. She is a partner at Horvitz & Levy, where her appellate practice includes handling matters raising questions of professional ethics and responsibility.*

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at ***vgashpar@alm.com.***