TRYING THE COURT'S PATIENCE INSTEAD OF THE CASE:

COMMON LITIGATION MISTAKES

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Introduction

Zealous advocacy is a litigator's stock in trade, and many attorneys rightfully take pride in the fact that they are willing to advocate for their clients' interests to the fullest extent of their ethical obligations. However, the line between zealous advocacy and impermissible or injudicious tactics is not always clear, or clearly perceived. Moreover, even if an attorney's conduct does not rise to the level of an actual breach of the Rules of Professional Conduct, it ill serves the client for an attorney to pursue a case in a manner that tests the presiding judge's patience. Offered herein are examples of zealous advocacy that have proved to do more harm than good for both the client and the attorney.

Improper Opening Statements and Closing Arguments

The general rule regarding opening statements holds that argument is impermissible at this stage of a trial. Counsel's opening statements should be limited to stating what the evidence will show, leaving argument about the meaning of that evidence until after the jury has seen and heard it. Nevertheless, judges generally allow attorneys a certain degree of latitude with regard to introducing the plaintiff's or defendant's theory of the case to the jury at this stage. While closing arguments provide counsel with a significantly wider degree of latitude, they too must fall within acceptable bounds of professional conduct.

Article 3 of the American Bar Association's Model Rules of Professional Conduct, referred to herein as the Rules, addresses conduct before the court. It prohibits an attorney from "assert[ing] a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein[.]"[1] Accordingly, in an opening statement or closing argument, characterizing the opposing party as "fiendish" or "evil" is unacceptable.[2] Similarly, references to opposing counsel's compensation, resources or other matters clearly irrelevant to the issues at trial is objectionable.

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[1] Rule 3.4(d)(3).

[2] *See, e.g., State v. Mehralian*, 301 N.W. 2d 409 (N.D. 1981) (overturning the criminal conviction of a defendant for trespass upon the property of his estranged wife's parents in part on the grounds that the prosecution had inflamed the jury with inadmissible references to his Muslim faith).

Of course, lodging objections with the court during an adversary's opening arguments carries its own risks, and some judges consider such interruptions to be impermissible *per se*. An objecting attorney may telegraph messages to a jury by making a "speaking objection," or expounding upon the grounds for his or her objection – which is objectionable conduct in itself. In effect, speaking objections are a way for the attorney to present inadmissible testimony or impermissible argument to the jury. Even a brief objection on the grounds that opposing counsel is "lying" may be a violation of this rule. While it may be objectively true that opposing counsel's statements may have been factually inaccurate, the characterization of a statement as a lie carries with it a moral weight that threatens to unduly bias a jury.

A leading treatise on trial practice recommends that an objecting attorney simply make an objection, and then pause before stating the legal basis for the objection. "If the basis for the objection is obvious, the court will ordinarily sustain the objection without requiring you to state the legal basis. This is the best of all possible worlds, because the court's ruling is proper if there is *any* proper basis for the ruling."[3] Also, this eliminates the possibility that the jury will be unduly influenced by counsel's characterization of his or her adversary in his or her articulation of the grounds for the objection.

When faced with objectionable conduct in an opening statement or closing argument, opposing counsel must make a difficult choice: to object and risk the appearance of undue aggressiveness before the jury, or to remain silent and waive the right to an appeal on the grounds of the improper argument. Practitioners' concern is that objections give the impression that counsel is merely being obstructionist, and that the jury's affiliations may turn to the attorney who is being interrupted by a barrage of objections. Moreover, opening statements and closing arguments are generally considered sacrosanct, being the only time during a trial that an attorney has the opportunity to communicate directly with the jury. To object at this stage of the trial is considered by many members of the bar to be poor form, at best. However, remaining silent likely waives the objection altogether, resulting in a reviewing court's analyzing the alleged improper comments only if the conduct in question is "outrageous" and "pervasive"[4] because counsel's failure to object "deprives the trial

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[3] Thomas A. Mauet, Trial Techniques 469 (6th ed. 2002).

[4] *See, e.g., Igo v. Coachmen Industries, Inc.*, 938 F. 2d 650 (6th Cir. 1991).

court of an opportunity to deal with those remarks then and there."[5]

In *Oxford Furniture v. Drexel Heritage Furnishings*,[6] the Court of Appeals declined to direct a new trial on the basis of, among other things, a closing argument by defense counsel that the appellant found objectionable. The Court of Appeals gave particular weight to the fact that plaintiff's counsel had made no objection at the time that the remarks were made. If the statements were so objectionable, the Court reasoned, counsel would not have remained silent when they were made. It also quoted an earlier opinion which set forth the rationale for the requirement that objections to arguments to a jury be made contemporaneously:

> Requiring timely objection prohibits counsel from "sandbagging" the court by remaining silent and then, if the result is unsatisfactory, claiming error. Second, there are a number of good reasons why skilled trial counsel may make a tactical decision not to object to improper argument: (1) an argument that looks highly improper in a cold record may strike counsel as being wholly lacking in effect; (2) because of the "chemistry" of the courtroom counsel may think that the improper argument may offend and in effect backfire; and (3) the improper argument may open the door to a response that will be of more value than a sustained objection.[7]

As the *Oxford* court points out, the reasons for choosing not to raise an objection during opening statements or closing arguments are many. However, declining to raise an objection is a calculated risk, calling upon an attorney to determine whether the potential advantage of letting the objectionable statement pass

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[5] *Greenway v. Buffalo Hilton Hotel*, 143 F. 3d 47, 51 (2d Cir. 1998).

[6] 984 F. 2d 1118 (11th Cir. 1993).

[7] *Id.* at 1128-29, quoting *Woods v. Burlington Northern R.R. Co.*, 768 F. 2d 1287, 1292 (11th Cir. 1985).

without comment is worth the likelihood that the trial judge will not intervene *sua sponte* and that the reviewing court will decline to overturn an adverse verdict on appeal.

Frivolous Objections, Motions and Actions

Rule 3.1 states in relevant part, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so and that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Objections which have no basis in law – for example, objecting to witness background testimony about civic or charitable activities associated with religious organizations as a violation of the First Amendment – are effective only at annoying the presiding judge.

Attorney Orly Taitz provides a notorious recent example of an attorney's conduct succeeding more at irritating the judge than at advancing the interests of her client. A member of the "birther" movement, which challenges President Obama's citizenship on the grounds that he had failed to adequately prove that he was born in the United States, Ms. Taitz filed a motion in connection with this litigation on behalf of a Captain[8] in the United States Army to enjoin her deployment to Iraq. District Judge Clay D. Land held that the motion was frivolous, and further found that "Plaintiff's motion is being presented for the improper purpose of using the federal judiciary as a platform to espouse controversial political beliefs rather than as a legitimate forum for hearing legal claims."[9] The court concluded:

> it is clear that Plaintiff's counsel seeks to continue to use the federal judiciary as a platform to further her political "birther agenda."... She supports her claims with subjective belief, speculation and conjecture, which have never been sufficient to maintain a legal cause of action.... Although the First

[8] After the motion was denied, Captain Connie Rhodes, Taitz's putative client, informed the court that she had not authorized the motion and intended to seek sanctions against Ms. Taitz. *See* PACER Document No. 18 in *Rhodes v. MacDonald*, Index No. 4:09-cv-106 (M.D. Ga. Sept. 18, 2009).

[9] PACER Document No. 17 in *Rhodes*, Index No. 4:09-cv-106, at 2.

> Amendment may allow Plaintiff's counsel to make these wild accusations on her blog or in her press conferences, the federal courts are reserved for hearing genuine legal disputes and not as a platform for political rhetoric that is disconnected from any legitimate legal cause of action.[10]

Attorney Taitz followed this order with a motion that Judge Land recuse himself on the grounds that he was biased and had possibly had impermissible *ex parte* communication with members of President Obama's administration. Judge Land then issued a 43-page order summarizing counsel's multiple motions, all of which the judge deemed to be frivolous, and ordering a $20,000.00 sanction against her because "[t]his pattern of conduct reveals that it will be difficult to get counsel's attention [and so a] significant sanction is necessary to deter such conduct."[11]

Courts also find it bothersome when, given the opportunity to correct an inaccurate articulation of the law, counsel simply repeats the same mistake. In *Ageropoulos v. Exide Technologies and Ray Abrams*,[12] after briefing on a motion to dismiss, the court gave plaintiff's counsel leave to replead Ageropoulos's complaint for employment discrimination. In its moving memorandums, defense counsel had pointed out that, because sexual orientation is not a protected characteristic and an employee may not be held individually liable under Title VII, two of the plaintiff's claims failed to state a cause of action. The court agreed. However, to the court's annoyance, plaintiff's counsel included both claims in the amended complaint. The court held:

> Before filing Plaintiff's original complaint, Plaintiff's attorneys, Ismail S. Sekendiz and Derek T. Smith, had a professional and ethical obligation to investigate whether such claims could be brought under Title VII.... Had attorneys Sekendiz and Smith conducted such an investigation,

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[10] *Id.* at 6.

[11] PACER Document No. 28 in *Rhodes*, Index No. 4:09-cv-106, at 33.

[12] Civil Action No. 08-cv-3760 (E.D.N.Y. July 8, 2009).

> they would not have pled these claims in Plaintiff's original Complaint.
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> Here, the severity of Attorneys Sekendiz's and Smith's conduct is magnified because these claims did not just appear in Plaintiff's original Complaint, but in Plaintiff's Amended Complaint as well. And this Amended Complaint was filed after Defendants' attorneys filed well-briefed motions to dismiss which explained that these claims are frivolous. Thus, although obligated to do so, as a practical matter Attorneys Sekendiz and Smith did not need to conduct any independent investigation concerning the worth of these claims: they could simply have confirmed the truth of Defendants' representations in Defendants' motion to dismiss papers. Attorneys Sekendiz and Smith failed to do even that, by repleading these frivolous claims in Plaintiff's Amended Complaint.[13]

While the *Ageropoulos* court declined to issue sanctions, it warned counsel that *any* subsequent filings before it that did not comply with Rule 11[14] could result in sanctions, even in the absence of a motion by opposing counsel.

Notable in the *Ageropoulos* decision is the lack of any indication that the court suspected counsel was motivated by bad faith. Indeed, a finding of bad faith is not necessary to conclude that a violation of Rule 3.1 has occurred. A judge does not have to find that counsel was motivated by an intent to harass or maliciously injure his or her opponent to find a violation of this Rule. Instead, to conclude that an attorney's conduct was

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[13] *Id.* at 16-17.

[14] Because Rule 3.1 echoes Rule 11 of the Federal Rules of Civil Procedure, a violation of the proscription against asserting a patently frivolous claim may constitute a violation of them both.

frivolous, a reviewing court need only apply an objective "reasonable lawyer" standard: if no reasonable attorney would have presented the argument in question, it is frivolous and consequently sanctionable, even in those circumstances where an ostensibly well-meaning but unreasonable attorney believed that the argument may have had merit.[15]

Wasting Time and Failing to Object to Sanctionable Conduct

Rule 3.2 states simply that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." At its most obvious level, this includes being punctual and ensuring that clients and witnesses appear before the court when called. In extreme cases, courts have publicly censured counsel for failure to timely meet the responsibilities of the profession.[16]

In *Mruz v. Caring, Inc.*,[17] the court revoked an attorney's *pro hac vice* admission to practice in the District of New Jersey for conduct which the court found was "venomous, abusive, outrageous and personal." The attorney in question, Gary Green, counsel for the plaintiffs, repeatedly and obtrusively made objections to defense counsel's questions at deposition and instructed his witness not to answer. Counsel for the defense called chambers to address these objections. The court directed Green to make the relevant objection and let the witness answer the question. Upon the conclusion of the call, Green continued to object as he had prior to the call, and denied that the judge had directed him otherwise. In later depositions that he conducted, Green informed the deponent, "When you say something that's dishonest or not true, I will interrupt you."[18] He then interrupted the deponent when the deponent provided answers that did not support Green's theory of the case. In revoking Green's *pro hac vice* admission, the court concluded:

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[15] *See, e.g., In re Graham*, 453 N.W.2d 313 (Minn. 1990) *and Lawyer Disciplinary Board v. Neely*, 528 S.E.2d 468 (W. Va. 1998).

[16] *See, e.g., In re Jaffe*, 585 F.3d 118 (2d Cir. 2009) (issuing public censure and permitting attorney to withdraw as member of the Bar on the grounds that she had, *inter alia*, chronically filed briefs after their due date, made misrepresentations to the court about inability to appear on certain dates, and failed to respond to court inquiries).

[17] 107 F. Supp. 2d 596 (D.N.J. 2000).

[18] *Id.* at 611.

> Mr. Green's behavior is so wanting, so far beyond the pale of the conduct expected of attorneys practicing in this court, that the court must conclude he has forfeited any right to practice here in this case.... The court must attempt to ensure that litigation is not practiced as if it were nuclear war.[19]

Lawyers must also take steps to guarantee that the course of litigation is not delayed by their clients. Counsel must check the impulses of a party offering testimony on its own behalf. A plaintiff testifying at an employment discrimination matter, for example, may view her time on the stand as an opportunity to tell the jury her side of the story – which, to a certain extent, is precisely what her testimony does. However, as officers of the court, attorneys have a duty to ensure that their clients' testimony is responsive, and that it remains within the bounds of admissible evidence and appropriate conduct.

This rule applies to conduct outside the courtroom as well as inside. In *GMAC Bank v. HTFC Corp.*,[20] the court took the extraordinary step of sanctioning a deponent for outrageous and inappropriate conduct at deposition, as well as his counsel for failure to control that conduct. Aaron Wider, the deponent, was the president and Chief Executive Officer of the defendant corporation. In addition to subjecting opposing counsel to a torrent of verbal abuse and insults, Wider was outspoken about his intent to delay the proceedings. After a providing what the judge characterized as an "unnecessarily protracted answer," deposing counsel asked if Wider was finished. He responded, "No I'm not. I'm going to keep going. I'll have you flying in and out of New York City every single month and this will go on for years. And, by the way, along the way GMAC will be bankrupt along the way and I will laugh at you."[21] After another exchange, Wider said, "Stick to the here and now; you'll get out of here quicker because I'll take months. You'll be back and forth. I'll make your life miserable. Trust me. You'll be drinking breakfast, lunch, and dinner every day."[22]

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[19] *Id.* at 615.

[20] Civil Action No. 06-5291 (E.D.Pa. Feb. 9, 2008).

[21] *Id.* at 12.

[22] *Id.* at 12-13.

The court found that, when faced with conduct of this sort, an attorney has a duty to curtail his or her client's behavior. While Joseph Ziccardi, Wider's counsel, argued that his attempts to control Wider took place off the record during breaks, the court found:

> Even if this assertion is to be believed, Wider's continuing misconduct indicates that whatever efforts Ziccardi made were woefully ineffectual. In fact, Ziccardi's meek attempts to intercede and his otherwise silent toleration of Wider's conduct only emboldened Wider to further flout the procedural rules.... It is true that any attorney can be blindsided by a recalcitrant client who engages in unexpected sanctionable conduct at a deposition. An attorney faced with such a client cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down.[23]

The court found that, by not acting, Ziccardi had engaged in sanctionable conduct. It ordered Wider and Ziccardi, jointly and severally, to pay $29,322.61 in fees and expenses that the plaintiff had incurred in connection with the deposition and subsequent motion to compel Wider's testimony.

Unfairness to Opposing Party and Counsel

Rule 3.4 governs an attorney's conduct toward opposing counsel and his or her client. Under this Rule, an attorney shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]"[24] Perhaps more than any other Rule, this mandate has gained in significance with the advent of electronic discovery.

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[23] *Id.* at 32.

[24] Rule 3.4(a).

In *Qualcomm Inc. v. Broadcom Corp.*,[25] a suit alleging patent infringement, the court granted defense counsel's motion for sanctions against Qualcomm's counsel due to the failure to identify and produce more than 46,000 responsive electronic documents. At issue in Broadcom's defense to Qualcomm's charge of patent infringement was whether Qualcomm had waived enforcement of the patent by participation in a team development project called the Joint Video Team, or JVT. From the inception of the litigation in October 2005 until the eve of trial in January 2007, Qualcomm counsel had identified no documents responsive to their client's participation in the JVT. However, during trial preparation, counsel discovered a number of e-mail messages to Qualcomm employees from members of the JVT group. Qualcomm counsel claimed that they were not responsive and did not produce them. Under cross-examination, of one of the Qualcomm employees admitted to having received the e-mails in question. The e-mails were then produced by order of the court over Qualcomm's objections that they were not responsive. At the close of trial, the court found "by clear and convincing evidence that Qualcomm, its employees, and its witnesses actively organized and/or participated in a plan to profit heavily by .... [a]ctively hiding this concealment from the Court, the jury, and opposing counsel during the present litigation."[26] Consequently, the court granted Broadcom an award of attorney's fees in the amount of $9,259,985.09.

In April 2007, Qualcomm's General Counsel informed the court that it had thousands of responsive documents that it had not produced, which "revealed facts that appear to be inconsistent with certain arguments that [counsel] made on Qualcomm's behalf at trial[.]" General Counsel apologized for "asserting positions that [it] would not have taken had [it] known of the existence of these documents."[27]

In January 2008, Magistrate Judge Barbara L. Major issued a 48-page order sanctioning six attorneys by name. Magistrate Judge Major found that Qualcomm had intentionally concealed thousands of responsive documents – and that it did not matter whether Qualcomm's counsel was knowingly complicit in that concealment. "Given the impressive education and extensive experience of Qualcomm's retained lawyers," the court rejected the possibilities that either Qualcomm's attorneys were misled by their client or that they failed to discover the responsive documents

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[25] Case No. 3:05-cv-1958 (S.D. Cal. Jan. 7, 2008).

[26] *Id.* at 11.

[27] *Id.* at 12.

due to their own ineptitude.[28] Instead, the court found it more likely that the lawyers either were complicit in the concealment or suspected that responsive documents existed and chose not to ask Qualcomm to search for them. "Given the volume and importance of the withheld documents, the number of involved Qualcomm employees, and the numerous warning flags, the Court finds it unbelievable that the retained attorneys did not know or suspect that Qualcomm had not conducted an adequate search for documents."[29] Judge Major found that counsel's willful disregard of their professional responsibility to instruct their client on its responsibilities to identify and produce responsive documents warranted sanctions. The sanctioned attorneys were referred to the State Bar and ordered to undergo an intensive review of their firms' electronic discovery protocols with Qualcomm.

Conclusion

To be sure, not all instances of attorney misconduct provoke a judge to issue sanctions. However, as these examples illustrate, counsel are well advised to remain vigilant about performing their professional responsibilities. Inadvertent breaches of the rules of professional conduct may nonetheless result in public sanctions if they deviate sufficiently from the conduct of a reasonable lawyer – and reckless or intentional breaches can lead to significant monetary sanctions.

[28] *Id.* at 24.

[29] *Id.* at 25.