Can a Lawyer Speak Out Against the Project of a Former Client?

By Jeffrey P. Lewis

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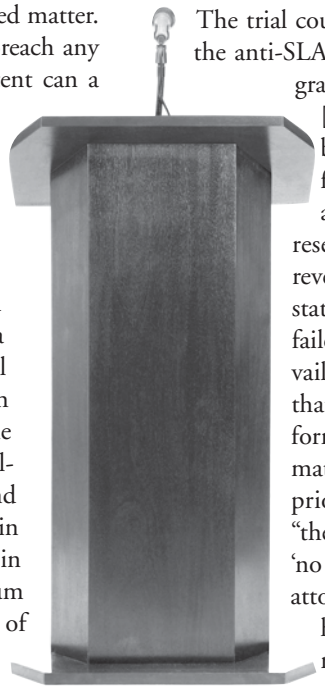
On occasion, a lawyer may be called upon to represent a client engaged in a project, which, although perfectly legal, may be one the lawyer does not consider sound public policy. An example would be a real estate development project where the lawyer may not feel that the proposed project would be good for the neighborhood but would be breaching no professional ethical code in taking on the representation. There is no question that the lawyer could not then take on the representation of another client, such as a citizen's opposition group, in the same or in a substantially related matter. There is also no question that a lawyer cannot breach any confidences of a former client. But to what extent can a lawyer, once he or she ceases representing the developer, act as a private citizen in opposition to a development project without it being actionable conduct? The Supreme Court of California recently considered such a case.



In *Oasis West Realty, LLC v. Goldman,* 250 P.3d 1115 (Cal. 2011), a developer had retained a lawyer in an effort to procure city council approval of a redevelopment project, which approval was granted. After about two years, the lawyer terminated his representation of the developer. Two years after that, as a private citizen and not as a lawyer, he and his wife became involved in a campaign to oppose the project. By letter and in person they solicited signatures on a referendum petition to overturn the city council's approval of the project. He was successful in getting a referendum vote, but, by a narrow vote, the voters upheld city council's approval. The lawyer maintained that during the course of his active opposition to the project he did not disclose "confidential information acquired during his representation of [the developer]" and he did not disclose his previous representation of the developer.

In a letter to the lawyer, the developer contended that the lawyer's conduct was a "manifest violation" of both his and his "firm's fiduciary obligations as ... prior counsel" and demanded that the lawyer and his firm cease and desist from "any and all activities that may in any manner be construed as adverse to the Project, its approval or [the developer's] interests." In response to a letter from the lawyer's firm, the developer later demanded that the lawyer and his wife (in their capacities as "mutual agents of each other") "retract the letter and their support for the petition and referendum." Thereafter, the developer brought suit against the lawyer and the lawyer's firm for breach of fiduciary duty, professional negligence and breach of contract.

Whether the complaint states any cause of action was tested in the context of a special motion based upon a statute designed to provide for the early dismissal of lawsuits that have been brought in an effort to curb a citizen's "exercise of the right of petition or speech in connection with a public issue." Such actions are referred to as "SLAPP" lawsuits — SLAPP being an acronym for "strategic lawsuit against public participation." In this context the test is not whether the complaint states a cause of action but whether "plaintiff has demonstrated a probability of prevailing on the claim."

The trial court denied the motion on the basis that the anti-SLAPP statute does not apply because "the gravamen of the causes of action was not [the lawyer's] petitioning activity but his breach of the duties of loyalty and confidentiality as well as his duty to disclose adverse interests at the outset of the representation. …" The court of appeals reversed, finding both that the anti-SLAPP statute does apply and that the developer failed to "demonstrate a probability of prevailing on the claim." The parties agreed that the lawyer "had acted adversely to his former client with respect to an ongoing matter that was the precise subject of the prior representation." Notwithstanding, "the [court of appeals] declared that there is 'no authority for a rule which would bar an attorney from doing what [the lawyer] did here.' " The California Supreme Court reversed the court of appeals.

The defendants had argued, and the court of appeals had agreed, that liability should lie only "(1) where the attorney has undertaken a concurrent or successive representation that is substantially related to the prior representation and is adverse to the former client, or (2) where the attorney has disclosed confidential information." The supreme court found this view too limiting, instead finding liability, for example, "where the attorney has used the former client's confidential information to actively oppose the former client with respect to an ongoing matter that was the precise subject of the prior representation." But the court did not limit liability to instances where the lawyer has used confidential information from one client to advise another client. It also recognized liability where the lawyer has taken confidential information from a client " 'significantly into account in framing a course of action' such as 'deciding whether to make a personal investment' — even though … no second client exists and no confidences are actually disclosed." As a result, the supreme court held that the attorney is barred from disclosing or using a former client's confidential information against the former client, even though the attorney has not disclosed it to anyone.

Here the supreme court found that the allegation that the lawyer had used his former client's confidential information "in active and overt support of a referendum to overturn the city council's approval of the … project, where the council's approval of the project was the explicit objective of the prior representation" states a claim, at least at the pleading stage.

What lesson does this case teach? As a practical matter, the burden will be on a lawyer to demonstrate that he or she did not use a former client's confidential information against that client. Therefore, the prudent course would be either to decline the representation in the first place or refuse to get involved in the opposing activity subsequent to the termination of the representation. Foregoing representation of a client under certain circumstances is part of the cost of doing business, and declining representation may be one of the better malpractice avoidance tools available to the practitioner.