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The Ethics of Contributions in Judicial Elections

By Hon. Patricia Cowett (Ret.)

Hon. Patricia Cowett

An important concern for attorneys and judicial candidates is what restrictions, if any, apply to the solicitation of and acceptance of campaign contributions in judicial elections for state court judges in California. Attorneys wanting to support judicial independence or wanting to support specific candidates for whatever good reason worry about what ethical strictures apply and the appearance of impropriety. In particular, an attorney may question whether the contribution gives the impression of an attempt to improperly influence a judge or the outcome of litigation; what limits apply to the amount of the contribution, if any; and what are the applicable Business and Professions Codes or Canons of Judicial Conduct? Judicial candidates must also be fully knowledgeable about the rules that apply to time, place and manner of acceptance of contributions and clearly also the appearance of any activity that compromises the integrity and impartiality of the judge and the judicial system. The following are some of the most important rules to keep in mind.

As stated in the Preamble to the California Code of Judicial Ethics, "Our legal system is based on the principle that an independent, fair, and competent judiciary will interpret and

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Five Tips from a Criminal Defense Lawyer to a Civil Practitioner

By Robert D. Rose

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Just because you practice in civil doesn't excuse you from knowing what lurks in the dark side of the law. Let's face it: isn't everything criminal now? What was regulatory has become criminal; what was local or state has become federal. Two years ago, a law school team added up just the federal crimes on the books: 4,450. In the past decade, Congress has averaged one new crime per week. (That's enactment, not commission.)

So here are five tips from the dark side:

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1. Take Governmental Inquiries Seriously

Investigators don't start with searches and arrests. Detectives and agents are trained to work the periphery -- interview employees at home, drop by the business to ask a few questions, send an informal request for records, issue a records-only subpoena, talk with the tax return preparer, serve the bank with a subpoena that bars notice to the customer with the threat of prosecution for violation.[1] IRS agents particularly adore former bookkeepers and treat them as if they had run the company. Investigative contacts need your immediate follow up—with the people on both sides of the contact.

2. Don't Let Your Clients Be Private Investigators

While it's tempting to secretly press the "record" button while talking with an adversary, your client does so at the risk of committing a crime.[2] In addition to invasion of privacy issues, there are criminal and civil penalties. [3] Similar temptations for clients (and for lawyers who advise them) include videotaping, physical surveillance, computer hacking, and dumpster diving. Each of these has its perils, which you will appreciate if you followed the saga of former celebrity private investigator Anthony Pellicano, now serving a fifteen-year sentence.

Criminal lawyers use licensed reputable private investigators and so should civil practitioners. Private investigators are often retired detectives and agents, with decades of experience in knowing where to look for evidence. They subscribe to on-line services that offer much more than Google. They know how to interview. They are also trained witnesses and pose more of a risk to your adversary than will your amateur detective client.

3. It's Tough Keeping A Secret

"Three may keep a secret if two of them are dead." - Poor Richard's Almanack (1735)

Prosecutors and defense counsel know that humans recall past events at different speeds and some simply remember faster than others. As lawyers, we need to learn what is important *before* it causes more harm. But, once we learn that something harmful has occurred, client and lawyer need to decide whether its transmission should be stopped or postponed.

(see "Tips" on page 6)

Articles of Interest in Current ABTL Reports

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There is a privilege in federal and state Constitutions that doesn't belong exclusively to criminal lawyers. Your client, acting on your advice, has a Fifth Amendment privilege in civil proceedings. The immediate effect of its assertion is to stop the flow of information. In a federal case, assertion will give rise to an adverse inference from the silence, but that is not the case in California state courts. Perhaps obtaining a stay will postpone the decision—to the close of discovery or to one last chance to reconsider before trial. Occasionally, immunity is granted.[4] The point is, once the incriminating words are out, you should expect they will always be out.

We warn deponents that they are testifying under oath and, thus, are subject to the penalties of perjury. But trial lawyers know those penalties stand virtually no chance of ever being enforced. Nevertheless, it is remarkable what true statements are made in depositions, as if no one will ever read the transcripts. Most notable are confessions of tax fraud. Could there be an easier case for a tax collector than to be delivered a transcript of sworn testimony by an errant taxpayer, whose lawyer was focused solely on the problem of that deposition day?

Lest you take too much comfort from having a protective order entered in your civil case, the Ninth Circuit Court of Appeals has ruled that a court-ordered protective order sealing documents in a settled civil case is trumped by a grand jury subpoena.[5]

A final thought, about protecting client secrets in your own files: In pursuit of the nation's gatekeepers for their complicity in financial crimes, prosecutors are regularly challenging assertions of attorney-client privilege via the crime-fraud exception. So, information in your files is not necessarily exempt from being used against your clients.

4. Be Careful What You Put In Your Pleadings

This is a true story. "Smith" consults with a developer on removing asbestos from an old mall. Smith tips off "Jones" to bids, so that Jones' company gets the contract and pays kickbacks to Smith. Payments slow down, so Smith sues Jones to collect kickbacks. Jones sues Smith, alleging extortion, death threats, and that Smith claimed mob connections. Smith counter-sues, claiming his actions were ordinary collection efforts. Developer notices lawsuits. So does District Attorney. Both go after Smith and Jones. District Attorney seizes Smith's brokerage accounts as funds that rightfully belong to developer. The message? Lawsuits are public records. Choose your words—and your causes of action—wisely.

5. Don't Threaten a Criminal Prosecution to Resolve a Civil Case

Two words -- it's unethical. [6] But you can help your victimized clients use the criminal laws to get results—often at much less expense. Overworked agents and prosecutors may welcome the arrival of an evidence package, with witness statements and, perhaps, the suggestion of relevant charges. However, a note of caution: if you opt for criminal treatment, don't expect to have any control over how it proceeds. And, if you have a parallel civil case, expect a stay motion.[7]

Federal law offers rewards for information leading to successful prosecutions, such as defrauding the U.S.[8] and tax cases.[9] Federal and state criminal laws impose mandatory restitution on felons, where the government and probation office enforce payment schedules. The pot has been sweetened again for whistleblowers, with enhanced protections from retaliation. ▲

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1 18 U.S.C. 1510(b).
2 Cal. Penal Code § 630 et seq.
3 (see 18 U.S.C. §§ 2511, 2520)
4 Daly v. Superior Court (1977) 19 Cal. 3d 132.
5 In re Grand Jury Subpoena, 62 F.3d 1222 (1995).
6 DR 7-105.
7 Pacers, Inc. v. Superior Court (1984) 162 Cal.App. 3d 686.
8 (18 U.S.C. 1031).
9 (26 U.S.C. 7623).