CANDOR WITH THE COURT - DEALING WITH THE MISLEADING OPPONENT

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Have you ever been in a hearing or a trial in which the opposing counsel was making arguments and alleged statements of fact filled with half-truths and out-and-out misrepresentations? Have you ever been faced with responding to pleadings where opposing counsel makes statements that cannot reasonably be interpreted as anything but blatant misrepresentations intended to mislead the court? In a recent hearing, an attorney started his response to Plaintiff's argument by stating "I think that Your Honor should demand that counsel appearing before you not make false statements." Unfortunately, from time to time, we all have to deal with the untruthful opponent. Codes of ethics prohibit such conduct and there are state and federal statutes that provide possible remedies for misrepresentations, but those remedies are not always feasible or practical. Sometimes a court may act on its own if it is aware of the misrepresentations. Set forth in this article are some cases and considerations that may help you in determining how to deal with the untruthful opponent.

Ethical Rules Regarding Candor

Although the ABA and all state Codes of Ethics or Professional Conduct require attorneys to zealously represent their clients, attorneys may not knowingly make a false statement of law or fact to a court. Rule 3.3 of the ABA's Model Rules of Professional Conduct specifically provides that as an advocate:

> **Rule 3.3 Candor Toward The Tribunal**
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> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
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> (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
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> (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

See also ABA Model Rules 8.4(c) (an attorney shall not engage in conduct involving dishonestly, fraud, deceit or misrepresentation).

Considerations in Deciding How to Respond (or Not) to Representations by Opposing Counsel

Improper attorney behavior can take many forms and arises in a variety of different circumstances throughout litigation, from failure to truthfully present facts in pleadings and motions, unethical discovery tactics, and blatant unsupported statements or half-truths made in oral arguments. Deciding whether and how to respond in these circumstances is more challenging than one would think. Below are some considerations when deciding whether and how to address opposing counsel's failure to be candid or truthful with the court.

1. *Is it a Misrepresentation or a Difference in Opinion?*

   As attorneys, we like to think we are always right. But not every statement or difference in opinion is a misrepresentation. If it is a difference in position (even a stretch of one), consider using your talent of persuasive legal argument as opposed to attacking the credibility of opposing counsel.

2. *How important is the misrepresentation?*

   You know the phrases "pick your battles" and "never cry wolf." Is the statement from opposing counsel serious enough to point it out to the court? Judges hate finger-pointing, name calling, and personal attacks. If you were a judge and constantly had your time filled with this behavior, you would probably be sick of hearing these things as well. Consider whether the misrepresentation is important enough to make a big deal out of it or just let it go. And, consider how pointing

out this misrepresentation may affect the judge's perception for any future attempts by you to point out important misrepresentations.

3. *Is the Misrepresentation Intentional? Is the deceitful conduct repeated?*

   Not every misrepresentation is intentional. Sometimes, even good attorneys say things they probably should not have, and it does not always mean they are trying to deceive you or the court. Consider whether the misrepresentation might be a one-off comment or one of these "missteps," as opposed to a pattern of conduct you are faced with handling each time you the parties file pleadings or argue to the judge.

4. *Learn from It.*

   You can learn from other attorneys -- even those who you do *not* want to emulate. How so? Watch the court's reaction to counsel's behavior, and listen to peer commentary about these attorneys and their reputations. Sometimes, the best lesson to learn is what *not* to do.

5. *Sanctions are Serious.*

   Some lawyers move for sanctions regularly, as part of their practice. (See No. 4 above -- this may not reflect well on the attorney's reputation or credibility – with other attorneys or the court.) But moving for sanctions against opposing counsel should not be taken lightly. It should be used as a remedy sparingly sought, and only when there is a strong, good faith basis to do so. This will preserve your credibility with the court when you actually do seek sanctions. Below are three cases where the court has either imposed sanctions or indicated that sanctions may be appropriate.

Sanctions for Misrepresentations

An attorney's misrepresentations may result in a variety of sanctions to the attorney, which range from a reprimand to suspension to the payment of a civil fine or attorney's fees. *See In re Grodner*, --- F. App'x. ---, 2014 WL 5510994 (5th Cir. Nov. 3, 2014). Also, harsh sanctions may be imposed that are harmful to the client, such as the dismissal of the lawsuit. *See, e.g., Tesco Corp. v. Weatherford Int'l, Inc.*, No. H-08-2531, 2014 WL 4244215 (S.D. Tex. Aug. 25, 2014).

In *Grodner*, a disciplinary action arose from misrepresentations made in filings by an experienced litigator and long-time member of the bar of the Middle District of Louisiana. The misrepresentations were made in connection with the attorney's legal representation of a prison

inmate in a civil rights action against the State of Louisiana. Grodner, the attorney, filed five motions requesting that the district court subpoena certain inmates to testify in court and represented that the motions were "unopposed," although she admittedly never contacted opposing counsel to confer about the motions. At the hearing, after learning that the motions were in fact opposed, the court confronted Grodner and she admitted that she never contacted the State's attorneys because she thought it was not necessary based on a prior ruling by the court. The court issued a show cause order as to why Grodner should not be sanctioned, basing the order on Louisiana Rules of Professional Conduct 3.3 (candor toward the tribunal), 3.4 (fairness to opposing party and counsel), 4.1 (truthfulness in statements to others), and 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation), and the court's inherent powers. The court also notified Grodner that the possible sanctions could include "reprimand, ethics training, suspension, disbarment, and the payment of a civil fine."

The *en banc* district court conducted the show cause hearing, and after hearing all of the evidence, suspended Grodner from admission to the district court for 60 days. Grodner appealed to the Fifth Circuit, which upheld the en banc court's suspension of Grodner. In doing so, the Fifth Circuit stated that "[c]ourts enjoy broad discretion to determine who may practice before them and to regulate the conduct of those who do." The court found that there was clear and convincing evidence of Grodner's misconduct and that Grodner's sixty-day suspension was "anything but excessive." *Grodner*, 2014 WL 5510994, at *2-4 (*quoting United States v. Nolan*, 472 F.3d 362, 371 (5th Cir. 2006)).

Courts have gone as far as to use their inherent authority to dismiss a lawsuit where plaintiff's attorney has made misrepresentations to the court. In *Tesco*, the district court dismissed Tesco's patent infringement case after its attorney misrepresented to the court during trial that he had a witness that would unequivocally testify that a marketing brochure prepared prior to the filing of the patent application did not display the invention in question, thus meaning that the invention was not in the public domain prior to the filing of the application and not invalid as argued by defendants. 2014 WL 4244215. Defendants claimed that it never received a copy of the brochure prior to trial, which Tesco's counsel disputed. After the trial, because there were inconsistent findings by the jury and defendants claimed that Tesco failed to produce all requested discovery, the court allowed limited post-trial discovery, including the deposition of the witness mentioned by Tesco's attorney as having knowledge regarding the brochure.

At the deposition of Tesco's witness, he testified, contrary to counsel's representations to the court, that he was not involved in the creation of the brochure and that he told Tesco's attorney that he had nothing to do with the brochure. The witness also testified that he could not tell whether the image in the brochure was the invention in question or not.

The district court found that the invention was obvious and granted defendants' motion for summary judgment. The court also considered a defense motion on whether the conduct of Tesco's counsel warranted a judgment of exceptional case for unequitable conduct under 35 U.S.C. § 285 (which allows the award of attorney's fees to a prevailing party in a patent infringement case if the opposing party has committed material misconduct). The district court found that the misrepresentations by Tesco's attorney during the trial "irrevocably poisoned these proceedings, and could not have been calculated to assist the Court in the administration of justice, but only to win an advantage." Accordingly, the district court found that the misrepresentations were "an abuse of the judicial system" and "acts which degrade the judicial system." Finding that lesser sanctions, such as attorney's fees under section 285 would not suffice, the court, using its inherent authority, dismissed Tesco's lawsuit with prejudice.

Another possible form of sanction was discussed in *Barlow v. Colgate Palmolive Co.*, --- F.3d ---, 2014 WL 6661086 (4th Cir. Nov. 25, 2014). In *Barlow*, consumers brought two state-court actions against a number of manufacturers alleging injuries for asbestos exposure. Despite plaintiffs' joinder of in-state defendants, Colgate removed the cases to federal court based on diversity, asserting fraudulent joinder of the in-state defendants and that plaintiffs' discovery responses demonstrated that plaintiffs did not intend to pursue their claims against any defendant other than Colgate, the diverse defendant. Plaintiffs moved to remand with their counsel representing that they had been exposed to the products while working at their employers' places of business. Based on these representations that plaintiffs could have been exposed to asbestos at their employers' businesses, the district court found that plaintiffs could possibly pursue successful claims against the non-diverse defendants.

After returning to state court, plaintiffs filed a motion to consolidate their cases with other asbestos cases. Colgate opposed the motion, arguing that it could not receive a fair trial in a consolidated case because the alleged sources of asbestos exposure were too different between the cases. In their reply brief, plaintiffs made the following statements, which contradict their representations to the federal district court judges in their motions to remand:

> Colgate attempts to highlight alleged differences in Plaintiffs' worksites and occupations as well as their alleged exposures to [other] asbestos-containing products. However, neither of Plaintiffs' worksites nor their occupations are relevant to this consolidation review because each of the Plaintiffs were exposed, *in their homes* . . . . The occupations or worksites of the Plaintiffs should not affect the consolidation of these cases for trial because not one of the Plaintiffs testified that they were exposed to asbestos as a result of their employment.

Based on this filing by plaintiffs, Colgate filed a motion in the federal district court for relief from plaintiffs' misrepresentations under Rule 11 of the Federal Rules of Civil Procedure

asking that plaintiffs' attorneys be sanctioned by imposing monetary penalties, referring them to the state bar, and awarding any other relief that the court deemed appropriate. Colgate also filed a motion under Rule 60(b)(3) seeking vacatur of the remand orders. The district court denied the motions concluding that it no longer had jurisdiction. Colgate appealed to the Fourth Circuit.

The Fourth Circuit concluded that while the federal removal statute prohibits review of orders remanding removed cases, the types of relief requested by Colgate under Rules 11 and 60(b)(3) do not involve "review" as prohibited by the statute. Relying on two United States Supreme Court cases, the Fourth Circuit concluded that district courts have jurisdiction to decide Rule 11 sanctions motions, even when filed after the underlying action is remanded to state court. The court further found that the federal removal statute "does not limit a court's authority to provide relief – in this case, through vacatur – from a fraudulently obtained remand order under Rule 60(b)(3)." Thus, the Fourth Circuit reversed the district court's ruling and remanded Colgate's Rule 11 and Rule 60(b)(3) motions to the district court for determination on their merits.

Conclusion

It is a challenge to deal with counsel who makes misrepresentations to the court. The considerations above should help guide you in your decision on how to handle it. But, whether you ultimately decide to seek legal recourse or not, you should know the ethics rules and applicable statutes and rules in your jurisdiction, consider the proof necessary for sanctions, have all proceedings before the court on the record, and keep a paper trail.