

## PROFESSIONAL LIABILITY UPDATE

### ETHICS

By Jennifer A. Becker

***Martinez v State of California Department of Transportation (2015) 238 Cal.App.4<sup>th</sup> 559***

*The Fourth District orders a new trial based on attorney misconduct.*

Donn Martinez filed a personal injury suit against the State of California, represented by Karen Bilotti. Prior to trial, the court granted a motion *in limine* limiting references to Martinez's affiliation with ministry catering to potential motorcycle gang members, and his termination of employment from a school district years before. The court also prohibited evidence of CalTrans's allegedly strapped financial condition.

Bilotti violated the court's *in limine* orders numerous times throughout the trial. Martinez requested a mistrial after Bilotti suggested his ministry's logo utilized a Nazi symbol. Although Bilotti admitted she had made the reference to attack Martinez's character, the trial judge denied the mistrial motion, and took no action to control Bilotti. In closing, Bilotti repeated arguments about Caltrans's financial condition, and suggested Martinez was a Nazi himself.

It is improper for an attorney to pander to the prejudice, passion or sympathy of the jury. Attorneys cannot make appeals based on irrelevant financial aspects of the case such as defendant's financial hardship if a verdict occurs. Although it is proper to impeach an opposing party's credibility, irrelevant *ad*

*hominem* attacks are prohibited.

To obtain a reversal for attorney misconduct, a party must show prejudice. The criteria are: (1) the nature and seriousness of the misconduct; (2) the general atmosphere, including the judge's control of the trial; (3) the likelihood of actual prejudice on the jury; and (4) the efficacy of objections or admonitions under all the circumstances. The Court of Appeal makes an independent determination of prejudice.

Bilotti's repeated use of prohibited questions was disrespectful of the judge and exploited qualities usually associated with good judging -- a good nature. When Bilotti ignored the judge it encouraged the jury to ignore the judge. The judge's failure to take corrective action diminished his authority.

Although the likelihood of actual prejudice is a difficult question, the balance tipped in favor of Martinez due to Bilotti's character attacks. The jury may have adopted the defense expert's liability opinion believing Martinez was just a low-life biker with an affinity for "Nazi" paraphernalia.

The efficacy of objections or admonitions favored reversal. There was no penalty when

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Bilotti ignored the trial court's rulings.

Although a client should not pay for its counsel's sins, the cumulative effect of Bilotti's misconduct that required reversal. The Court was so incensed over Bilotti's conduct, it referred the matter to the State Bar to consider discipline.

*Comment:* As the court noted, there are many more instances of attorney misconduct than there are reversals due to attorney misconduct. This attorney crossed the line of zealous advocacy, and did her client a disservice.