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8/21/20

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual Plaintiff, vs. CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL R. WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual Defendants,	Case No. 3:18-cv-00325-BAS-DEB **PLAINTIFF PRO SE DARRYL COTTON'S REPLY TO DEFENDANT MICHAEL WEINSTEIN'S OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR APPOINTMENT OF COUNSEL** Hearing Date: NA Time: NA Judge: Hon. Cynthia Ann Bashant Courtroom: Related Case: 20CV0656-BAS-MDD

ORAL ARGUMENT RESPECTFULLY REQUESTED

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I. INTRODUCTION

Plaintiff pro se Darryl Cotton hereby submits this Reply to Defendant Michael Robert Weinstein's Opposition to Plaintiff's ex parte application (the "Application") for court appointed counsel (the "Opposition").

The Opposition makes false factual statements and legal arguments and completely ignores the merits of Cotton's arguments in the Application proving that *Cotton I*[1] was filed and maintained without probable cause. Thus, the *Cotton I* and *Cotton II* judgments are void for, *inter alia*, being the product of a fraud on the court and judicial bias.

Specifically, the Opposition argues that (i) the record is not sufficiently developed so this Court cannot make a determination of the merits, (ii) that, standing alone, Cotton's inability to afford counsel does constitute exceptional circumstances, and (iii) Cotton is able to represent himself because of his previous submissions to the Court and because he "has the assistance of a paralegal" (Opp. at 3:13). Each of these arguments fail on numerous grounds as explained below.

II. REPLY TO WEINSTEIN'S ARGUMENTS

A. THE RECORD IS SUFFICIENTLY DEVELOPED AND THIS COURT CAN MAKE A DETERMINATION OF THE MERITS OF COTTON'S CAUSES OF ACTION.

(1) *Probable Cause*

Cotton's entire case is predicated on the fact that Weinstein filed and maintained *Cotton I* without probable cause. Thus, Weinstein's argument on this point is completely frivolous for at least two reasons. First, an attorney must have probable cause *before* he files suit. Second, as Weinstein has and continues to bellow at this Court, the *Cotton I* case is over and judgment entered. It is *impossible* to further develop the record in *Cotton I* to determine whether Weinstein had probable cause to file *Cotton I*.

> **<u>The presence or absence of probable cause is a question of law</u>**. Probable cause exists if "any reasonable attorney would have thought the claim tenable." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 886 (*Sheldon Appel*).) "[P]robable cause to bring an action does not depend upon it being meritorious, as such, but upon it being arguably tenable, i.e., not so completely lacking in apparent

[1] Terms not defined herein have the definition set forth in the Application. (ECF No. 36.)

> merit that no reasonable attorney would have thought the claim tenable." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 824.) "[T]he probable cause issue is properly determined by the trial court under an objective standard; it does not include a determination whether the attorney subjectively believed that the prior claim was legally tenable." (*Sheldon Appel*, at p. 881.)

Chavez v. Meneshke Law Firm, H038557, at *9-10 (Cal. Ct. App. July 7, 2014).

Judge Bashant, in *Baker v. Ensign*, granted a motion for summary judgment dismissing a cause of action for malicious prosecution materially stating as follows:

> "[I]n order to establish a cause of action for malicious prosecution[,] a plaintiff must plead and prove that the prior proceeding, commenced by or at the direction of the malicious prosecution defendant, was (1) pursued to a legal termination favorable to the plaintiff; (2) brought without probable cause; and (3) initiated with malice." *Villa v. Cole*, 4 Cal. App. 4th 1327, 1335 (1992) (citing *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 871-72 (1989)). "[M]alice means actuated by a wrongful motive, i.e., the party must have had in mind some ***evil*** or sinister purpose." *Centers v. Dollar Mkts.*, 99 Cal. App. 2d 534, 541 (1950). "It is sufficient if it appear[s] that the former suit was commenced in bad faith to vex, annoy or wrong the adverse party." *Id.*
>
> "[U]nder California tort law, the indictment itself create[s] a prima facie ***presumption*** 'that probable cause existed for the underlying prosecution.'" *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1166 (9th Cir. 2011) (quoting *Conrad v. United States*, 447 F.3d 760, 768 (9th Cir. 2006)). "***Although the presumption may be rebutted if the indictment was based on false evidence***." *Id.* (citing *Williams v. Hartford Ins. Co.*, 147 Cal. App. 3d 893, 900 (1983)).
>
> Once again, there is no evidence before this Court to support Mr. Ensign's cause of action for malicious prosecution. To the contrary, Mr. Baker provides undisputed evidence that he never threatened to file a lawsuit if Mr. Ensign did not plead guilty to criminal charges and pay $40,000 in damages, and that his jaw was injured when Mr. Ensign punched him. There is nothing before the Court that the assertion regarding Mr. Baker's jaw injury resulting from Mr. Ensign's punch was fabricated in any way. Presumably, that act served as the basis for Mr. Baker's state-court action. Consequently, the Court cannot conclude that Mr. Baker initiated his lawsuit without probable cause, or that it was initiated with malice. *See Villa*, 4 Cal. App. 4th at 1335. Therefore, the Court GRANTS Mr. Baker's summary-judgment motion as to the malicious-prosecution cause of action.

Baker v. Ensign, No. 11-cv-2060-BAS(WVG), at *13-14 (S.D. Cal. Aug. 29, 2014) (emphasis added).

Here, as opposed to *Baker*, there is no factual or legal theory to support the proposition upon which *Cotton I* was exclusively predicated: the November Document is a fully integrated sales contract. The evidence before this Court, the declaration of Lawrence Geraci most notably, show that even accepting as true Geraci's last version of events, he fails to state a cause of action premised on the fact that he sent the Confirmation Email by mistake. Or, as he testified, as intending only to sent

a response to Cotton's first sentence of the Request for Confirmation. *Stewart v. Preston Pipeline Inc.*, 134 Cal.App.4th 1565, 1589 (Cal. Ct. App. 2005) ("Plaintiff has cited no California cases (and we are aware of none) that stand for the extreme proposition that a party who fails to read a contract but nonetheless objectively manifests his assent by signing it — absent fraud or knowledge by the other contracting party of the alleged mistake — may later rescind the agreement on the basis that he did not agree to its terms. To the contrary, California authorities demonstrate that a contracting party is not entitled to relief from his or her ***alleged unilateral mistake*** under such circumstances. [Citations.]") (Emphasis added).

The judgments entered against Cotton are the equivalent of indictments, creating a "***presumption***" that there was probable cause, but that presumption can be rebutted if those judgments were obtained through false evidence. Here the "false evidence" includes, *inter alia*, Weinstein's fabrication of the Disavowment Allegation when confronted with *Riverisland* and his representations to Judge Wohlfeil, Judge Curiel, and Judge Bashant that it is legal for Geraci to own a cannabis CUP notwithstanding the Sanctions Issue or the Berry Fraud. All of which ***negate*** any probable cause for the filing of *Cotton I*.

The only legal theory that would have allowed Weinstein to ignore the legal import of the Request for Confirmation and the Confirmation Email is the case law developed under *Pendergrass*; which was overruled specifically by *Riverisland* to prevent scumbag attorneys like Weinstein from using the law to extort innocent people via the judiciary. *Riverisland Cold Storage, Inc. v. Fresno–Madera Prod. Credit Ass'n*, 55 Cal.4th 1169, 1182 (Cal. 2013) ("[W]e overrule *Pendergrass* and its progeny, and reaffirm the venerable maxim stated in *Ferguson v. Koch* [204 Cal. 342, 347 (Cal. 1928)]: '***[I]t was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.***'") (Emphasis added).

All Weinstein has to do is articulate his probable cause for filing Cotton I. But he can't. Weinstein is not stupid. He is a calculating, evil Machiavellian legal genius. That the Kjar Law Firm is complicit in seeking to defile Judge Bashant in this action is indisputably established by their argument in Weinstein's motion to dismiss pending before this Court:

> The underlying state court action was decided in [Weinstein's] client's favor and against Plaintiff by a jury trial, ***definitively showing*** that Defendant had probable cause to bring

the action and is thus therefore not a "sham".

(ECF No. 32 (Weinstein motion to dismiss) at 7:17-20 (emphasis added).)

I am not an attorney and I know that the question of **probable cause is a question of law for the court to decide, not a jury**. The law recognizes that attorneys do commit a fraud on the court and falsify evidence and make false representations. (*See* attached Exhibit 1 (Moore's Federal Practice, Civil § 811.04 (Attorneys Have Duty Not to Present False or Perjurious Testimony or Make False or Misleading Statements)). Weinstein did it to Judge Wohlfeil and the Kjar Law Firm is now doing it to Judge Bashant.

(2) ***Judicial Bias***

"[A]n attack on the authority of a state court to adjudicate a case because a state court judge should have been disqualified is not subject to dismissal under the *Rooker-Feldman* doctrine." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 903 (9th Cir. 2003) (emphasis added).

There are so many things that Wohlfeil did wrong, each of which constitute an "egregious miscarriage of justice" warranting the judgments issued by him be voided, that it is impossible to state them all.[2] But, one of the most succinct issues that this Court can readily adjudicate is that Wohlfeil should have disqualified himself pursuant to the DQ Motion. *Geraci v. Cotton*, 37-2017-00010073-CU-BC-CTL, ROA No. 297 (dated September 17, 2018). The judgments entered against Cotton are void for judicial bias and cannot be used a shield by Weinstein to cover up his criminal actions and betraying the personal trust that Wohlfeil placed in him.

(3) ***Void Judgments***

"The judgment, if void when rendered, will always remain void…" *Pennoyer v. Neff*, 95 U.S. 714, 728 (1877). Thus, a "void judgment is a nullity from the beginning, and is attended by none of

[2] "'The phrase 'miscarriage of justice' has a settled meaning in our law, having been explained in the seminal case of *People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243] (*Watson*). Thus, a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*Id.* at p. 836.) 'We have made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital Inc. v.Superior Court* (1994) 8 Cal.4th 704, 715 [34 Cal.Rptr.2d 898, 882 P.2d 894].)." *Cassim v. Allstate Ins. Co.*, 33 Cal.4th 780, 800 (Cal. 2004).

the consequences of a valid judgment. ***It is entitled to no respect whatsoever*** because it does not affect, impair, or create legal rights." *Tipton v. Thaler*, 354 F. App'x 138, 142 (5th Cir. 2009); *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985) ("A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.").

All of the judgments issued against Cotton are "***entitled to no respect whatsoever***" because they are void on numerous grounds, not the least of which that they were procured through multiple criminal acts that constitute a fraud on the court and judicial bias. That Cotton in *Cotton I* and attorney Andrew Flores in *Cotton V* have made multiple appeals to the state and appellate courts are no bar to Cotton vindicating his rights. Cotton just needs to stay strong and continue pressing forward: "***It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity; and especially if such affirmance is put upon grounds not touching its validity***." *Redlands Etc. Sch. Dist. v. Superior Court*, 20 Cal.2d 348, 362 (Cal. 1942) (quoting *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 642).

Cotton will NEVER STOP. The law, facts, and justice are on his side. No matter how many judges may hate me for focusing and wanting to expose Wohlfeil for ruining my life and the lives of many of my supporters, judicial animosity does not change that my battle against Weinstein and the Enterprise is one of good vs. evil. Geraci is a drug dealer. Austin and Weinstein are officers of the court that help effectuate a drug dealer's criminal schemes through the judiciaries: my cause is righteous!

The only thing standing between me and justice is the institutional judicial bias by judges against exposing other judges for their criminal and unethical actions. The truth is that Wohlfeil lacks the intellect, morals and integrity required of a judge. Eventually, that truth will be exposed by a judge that holds sacrosanct their judicial oath more than their personal desire to not expose that over twelve trial and federal judges have ratified the unlawful actions against me for years and deprived me of the value of a cannabis CUP at the Property. *Harriman v. Northern Securities Co.*, 197 U.S. 244, 263 (1905) ("When property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder must return the property on demand. [Citations.] To deny a remedy to reclaim it, is to give effect to the illegal contract. [Citations.]").

Wohlfeil uses the Constitution of the United States of America to wipe his robed ass with and operates his courtroom like a high school popularity and wealth contest to my great and irreparable damage. That no judge wants to state what the record makes clear – Wohlfeil lacks the intellect, morals and integrity to be a judge – CANNOT stop me from having my rights vindicated. Weinstein and the Kjar Law Firm ***will*** eventually be forced to admit the truth and then they will turn on a dime and, in an Oscar, winning performances talk about "zealous advocacy" to mitigate their punitive damages.

Litigation is neither a game, a competition of wealth nor a popularity contest with judges. Unlike Flores, I WILL NEVER SETTLE WITH WEINSTEIN. And there will come a day when he is going to be on the stand and answer questions to attempt to reconcile his years of knowing and making false representations which prove he fabricated evidence, procured multiple judgments through criminal acts, and in so doing serves to expose Wohlfeil as a disgracefully, horrible judge that must be removed from the bench immediately!

Having said that, I'm open to being crazy. All of my attorneys and paralegals who have helped me over the years did not do so out of the goodness of their hearts. At every point, they have taken their pound of flesh from me. As it currently stands, I'm alone because no one else wants to make allegations of judicial bias and I have no money. But I want the Court to realize something. I'm not going to be a victim and lie back and be violated by Geraci just because he has the money to manipulate the judiciary into violating me. If the law does not protect me, I will protect myself against Weinstein, Geraci and anyone else who wants to take what is lawfully mine.

The recent protests by Black Lives Matter have made it abundantly clear to me that any group that has been the victim of government oppression and tyranny cannot remain quiet and allow themselves to be continuously violated. It's people like Weinstein, who as an Officer of the Court, represent what is wrong in the judicial system when they no longer serve justice, but they exist to assist their clients in illegal business advantages. And although I will never take violent action against Weinstein, because I am going to win, there are other investors who Weinstein has subjected to knowing and willful harm and who hate him.

Weinstein knows that by his actions he has screwed over the friends and families that have

financially supported me for years throughout this litigation. As a result there has been severe strife and even children having gone hungry because with what little they did have they donated to me and my cause because they believed in me and were relying on my assurances that, based strictly on the merits, I would prevail in this action. When I made those assurances, no one could have ever contemplated that Weinstein would drag out the litigation for years with false evidence and ratification of violence that kept third party witnesses away from providing their testimony. Whatever horrific things happen to Weinstein and his family in the future are of his own making. *U.S. v. Pendergraft*, 297 F.3d 1198, 1206 (11th Cir. 2002) ("History has taught us that, if people take the law into their own hands, an endless cycle of violence can erupt, and we therefore encourage people to take their problems to court."). Weinstein has taken the law into his own hands and used it to viciously attack people, he will wail in the future when he faces the consequences of his actions. Weinstein has malicious damaged families. The rage and loathing that Weinstein has sowed, he will reap. I cannot control those who have assisted me and believe in their heart of hearts that the courts have conspired against me in these proceedings. If blood is ever spilled, that blood will ultimately be on the enormously inept hands of The Emperor - Judge Joel R. Wohlfeil.

B. COTTON'S INABILITY TO AFFORD COUNSEL IS NOT STANDING ALONE

That Weinstein, *inter alia*, perpetuated a fraud on the Court and presented suborned perjury from private and government witnesses to the effect that it is lawful for Geraci to own a cannabis CUP is indisputable. And, as described below, Gina Austin's judicial admissions prove that she has ALREADY created an illegal monopoly in the City of San Diego in the cannabis market.

Thus, Cotton's financial inability to afford counsel is not "standing alone" and this factor weighs in favor of this Court granting Cotton counsel.

C. PLAINTIFFS CANNOT REPRESENT HIMSELF AND HE DOES NOT HAVE A CONTRACT PARALEGAL

(1) ***Paralegal***

Weinstein has argued that because I have been assisted by a paralegal I do not need an attorney. I would find this argument to be hilarious if not for all the surrounding violence. What Weinstein knows, even if this Court and his own attorneys do not, is that I have copied and pasted the vast

majority of all my writings from previous submissions in the various related litigation matters or legal study guides. Frankly, the most original language that I have is what no else willing has been willing to write or help with: the sheer stupidity of Wohlfeil and the implication of over twelve state and federal trial and appellate judges refusing to find that Wohlfeil is an imbecile and how such represents constitutional violations by judges to the great and irreparable prejudice I and no doubt others have suffered. Which just gets continually buried through disingenuous legal opinions that ignore or mispresent the truth to cover up same.

That being said, the contract paralegal that has assisted me is owed approximately $300,000 and only assisted me because a third-party paid for the 4.5 hours of research she did for me in support of this request. *See Declaration of Zoe Villaroman* at ¶¶ 6-9 (attached hereto as Exhibit 2).

The Court should be familiar with a significant portion of the Application as it was copied near verbatim from attorney Andrew Flores' petition to the Ninth Circuit from this Court's denial of his ex parte application for a Temporary Restraining Order.[3] Additionally, the Court can compare the language from the attached study guides that I have copied from near verbatim. Attached hereto as Exhibit 3 and Exhibit 4 respectively is Moore's federal practice guide § 13.11 (Section 1986 – Neglecting to Prevent Conspiratorial Wrongs) and § 12E.05 (Zoning) regarding Civil Rights violations arising from "zoning" decisions.

(2) ***Gina Austin's testimony and judicial admissions prove she has already created an illegal monopoly in the cannabis market in the City of San Diego.***

Cotton seeks to vindicate his rights under state law in state court. Had Weinstein and Cotton's formers attorneys not conspired with Weinstein to sabotage his case, they would have brought forth causes of action for Cotton for violations of California's Cartwright Act. "[T]he analysis under the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700–16770, is identical to that under the Sherman Act, *see Cnty. of Tuolumne v. Sonora Cmty.* Hosp., 236 F.3d 1148, 1160 (9th Cir.2001)[.]" *Name.Space,*

[3] Attorney Flores is currently preparing a submission to the United States Supreme Court from the Ninth Circuit's denial of his petition from this Court's denial of his ex parte application for a TRO. Frankly, if this Court denies this Application, I will copy and paste and appeal to the Ninth Circuit and if they deny my motion (like they did Flores' petition, with no factual or legal basis therefore; they are enforcing an illegal contract), then I will copy and paste the Flores' petition to the Unites States Supreme Court as well.

Inc. v. Internet Corp., 795 F.3d 1124, 1131 n.5 (9th Cir. 2015).

"To prove a conspiracy to monopolize in violation of § 2 [of the Sherman Act], [a plaintiff] must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003) (citing *United States v. Yellow Cab Co.*,332 U.S. 218, 224-225, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947)).

Here, all elements are already met.

Here, attorney Gina Austin was forced to go with a "big lie" at the trial of *Cotton I* - ***forced*** to testify that she had submitted the Berry Application without disclosing Geraci as the true and sole owner, she had to state that such was lawful and was her "common practice." Neither Weinstein, Austin or any state or federal court in over three years across five actions have ever provided any legal authority that such is lawful in contradiction of all the applicable State and City disclosure laws seeking to prevent drug dealers from acquiring prohibited interests in cannabis businesses. Because there is none. Such is prima facie evidence of the knowing unlawful attempt to acquire cannabis CUPs in the City of San Diego without disclosing the identity of the true owners. There are a very limited number of cannabis CUPs available in the City of San Diego. *Union of Med. Marijuana Patients, Inc. v. City of San Diego*, 7 Cal.5th 1171, 1180 (Cal. 2019) ("In 2014, the City of San Diego (City) adopted an ordinance [(the "Ordinance")] authorizing the establishment of medical marijuana dispensaries and regulating their location and operation."); *id.* at 1181 ("The Ordinance placed an upper limit of four dispensaries in any single city council district and required a dispensary to be located more than 1,000 feet from certain sensitive uses, such as parks and schools, and more than 100 feet from a residential zone. (*Id* ., § 8.) Regardless of location, the Ordinance required the grant of a conditional use permit for a dispensary's operation.").

Gina admits that she has acquired most of the cannabis CUPs in the City of San Diego. See: Geraci's Opposition Motion for Motion for New Trial. Exhibit 5. Further, she also admits that it is her "common practice" to acquire said cannabis CUPs in the name of proxies who do not disclose the actual true and sole owners, such as the drug dealing Geraci! *I.d.* at 8:1-3 (Indeed, as set forth herein, several witnesses testified that it is common practice foe an applicant on a CUP application for a

medical marijuana dispensary to utilize an agent in that process").

The Ninth Circuit has expressly acknowledged that "the [Cartwright] Act reaches beyond the Sherman Act to threats to competition in their incipiency…" *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1110 (9th Cir. 2013) (citing *Cianci v. Superior Court*, 40 Cal.3d 903 (1985)); *accord In re Cipro Cases I & II*, 61 Cal.4th 116, 160–61 (2015). The day after Cotton terminated the agreement with Geraci, Weinstein filed *Cotton I* without probable cause to record the F&B Lis Pendens, slander title to the Property, and prevent Cotton from selling the Property to Martin - a "threat to competition in [its] incipiency…". *Id.*

Lastly, although Cotton does not have it, attorney Flores has direct evidence of the Enterprise's Antitrust Conspiracy. A recording of a conspirator stating that attorney Gina Austin and her client, Ninus Malan, specifically discussing their intent to create a "monopoly" in the City of San Diego. *Flores v Austin* 3:20-cv-00656-BAS-DEB, docket No. 17 ¶ 72.

III. CONCLUSION

By this point, the Kjar Law Firm knows they are perpetrating a fraud on this court. Zealous advocacy can be no defense for their actions which at this point have crossed the point over into evil. They would rather seek to deceive this court, ratify the violence against innocent individuals by a RICO criminal organization, than do what is required by their judicial oath as officers of the court – admit their wrongs and seek to LAWFULLY mitigate their damages. *See* 18 U.S.C.A. § 1961(1) (defining "racketeering activity" as including "bribery," "obstruction of justice," and "tampering with a witness"). But they don't. They, and all other defendants, are PRAYING AND HOPING that this Court's desire to not denounce Wohlfeil as an imbecile will prevent it from giving justice to Cotton.

There is no factual or legal basis for the Opposition and as such it violates FRCP 11 and Weinstein and his attorneys should be severely sanctioned. *Quidel Corp. v. Siemens Med. Sols. U.S.*, No. 16-cv-3059-BAS-AGS, at *2 (S.D. Cal. Oct. 21, 2019) ("Under Rule 11, any 'pleading, written motion, or other paper' presented 'to the court' must contain 'factual contentions' with 'evidentiary support' or must 'likely have evidentiary support after a reasonable opportunity for further' discovery. Fed. R. Civ. P. 11(b).").

Lastly, Cotton submits that the Court should at the very least, no matter its feelings towards Cotton, realize that it is possible that these attorneys are criminals. Austin's testimony already shows that she has already established an illegal monopoly in the City of San Diego. "Common practice" does not make her actions legal, and that means that my attorney must be able to take on antagonistic discovery to find out which criminals own cannabis businesses through proxies. Criminals who have been aided and abetted by the City of San Diego and which provides an incentive for the City to also bury what has taken place her to also minimize its own liability for allowing, at the very least negligently, drug dealers like Geraci to create a monopoly. The facts I've presented here and that are now before this court are extraordinary and warrant court appointed counsel so that the full criminal scheme can be exposed.

Dated: August 21, 2020

Darryl Cotton

EXHIBIT 1

§ 811.04 Attorneys Have Duty Not to Present False or Perjurious Testimony or Make False or Misleading Statements*

[1] Limiting Lawyer's Knowing Presentation or Use of False Evidence Facilitates Truth-Seeking Functions of Courts

Both the Model Rules and Model Code impose an affirmative duty to avoid participation in wrongdoing, including knowingly presenting false or perjurious testimony, or facilitating a crime or fraud by the client.[1] In many instances this is captured in the concept that the duty of zealous representation only applies when acting "within the bounds of the law." The adversary system is grounded in the fundamental belief that adversarial presentation will increase the likelihood that the truth will emerge. The conventional wisdom holds that the while the system of confidentiality and adversarial presentation may have a short-term negative effect on truth seeking, this cost is tolerated because the system ultimately increases the probability that the neutral decision-maker will have all points of view available.[2] Knowing participation in the presentation of false or perjurious testimony or facilitation of client crime or fraud typically does not provide either short or long-term support for the truth-seeking function and consequently is condemned.[3]

[2] Use of False or Perjurious Testimony Poses Strategic and Legal Risks to Both Client and Attorney

Even if the use of false or perjurious testimony were not prohibited by ethical rules, other strategic and legal factors would recommend against the use of such testimony. For instance, the testimony will be subject to vigorous cross-examination, and a witness' inconsistent or unbelievable testimony may be interpreted by the fact-finder as evidence of guilt.[4]

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*We are grateful to Thomas O'Shea, Boston College Law School '00; Solveig Hanson McShea, BCLS '02; Craig F. Kowalski, BCLS '02; and Jackie A. Gardina, BCLS '99 for their invaluable research assistance in preparing this chapter.

[1] Model Rule of Prof'l Conduct 3.3(a); Model Code of Prof'l Responsibility DR 7-102.

[2] *But cf.* Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339, 354–357 (1994) (allowing untruthful testimony facilitates search for truth by exposing the testimony to cross examination and provides factfinding with truthful information that accompanies the false).

[3] *See generally* Nathan M. Crystal, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 229–232 (1998) (describing the truth-maximizing function of the adversary system).

[4] **Falsity may be exposed.** *E.g.*, Rock v. Arkansas, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ("Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies"); *see generally* Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339, 355 (1994) ("A defendant's confused, conflicting, fantastic, or incomplete testimony or suspicious demeanor frequently represents, in the minds of jurors, the clearest proof that the defendant's version of the case is untruthful").

The suspicion or outright exposure of perjury can cause not only cause serious harm to the merits of the client's case, but may also lead to personal and professional censure for the lawyer. Both perjury and subornation of perjury are criminal offenses.[5] Punishment of a criminal defendant may be enhanced based on perjury.[6] A lawyer who knowingly presents false testimony is subject to fines and other sanctions, including attorney fees, disqualification and disbarment.[7] Even if the perjury is not immediately exposed and the client wins the case, the subsequent exposure of the perjury may be grounds for relief from the judgment for fraud on the court under Fed. R. Civ. P. 60(b)(3) (*see generally* § 60.21[4]).[8] All these variables are likely to be part of the client counseling discussed in [e][i], *below*.

[3] Courts Condemn Knowing Use of False or Perjurious Evidence, but Actual Implementation of Duty Is Extremely Fact Sensitive

The "perjury problem"—i.e., how the lawyer should act in response to knowledge that a client or witness intends to present false or perjurious testimony—has received extensive treatment by scholars because it provides a dramatic conflict between the lawyer's duty to maintain the confidences and secrets of clients, and the lawyer's duty as an officer of the court.[9] Client perjury, particularly in the criminal defense context, has been explored in detail, with no firm consensus among scholars on the best method to resolve the tensions.[10] More recently, legal literature has explored issues of police perjury, touching on the concomitant obligation of prosecutors.[11]

In the rare circumstances in which the issue is presented in reported decisions, the federal courts have stated that knowing presentation of perjurious and fraudulent evidence threatens the integrity of the judicial process

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[5] 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1622 (suborning perjury).

[6] **Sentence enhancement for perjury.** United States v. Dunnigan, 507 U.S. 87, 88–89, 113 S. Ct. 111, 122 L. Ed. 2d 445 (1993).

[7] **Sanctions for subornation of perjury.**

2d Circuit *See* Tedesco v. Mishkin, 629 F. Supp. 1474, 1487 (S.D.N.Y. 1986) ($10,000 fine, plus attorneys fees and costs, imposed for suborning perjury and other offenses).

11th Circuit *See* Knox v. Hayes, 933 F. Supp. 1573, 1582, 1586 (S.D. Ga. 1995) (attorneys fees imposed and defense counsel disqualified for incorporating false and misleading statements in an affidavit, and allowing those statements to be relied on by fact witnesses).

[8] **Perjury as fraud on court.** *See* Johnson v. VeriSign, Inc., No. 01-765-A, 2002 U.S. Dist. LEXIS 13229 (E.D. Va. July 17, 2002) (while perjury not sufficient to constitute fraud on the court under Rule 60, involvement of attorney in scheme to suborn perjury should be considered fraud on court; falsity of evidence not sufficient to show conspiracy to present false testimony between counsel and witness); Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 987 (4th Cir. 1982) (involvement of attorney in perjury of party or witness constitutes fraud on court).

[9] *See* Wilkinson, *"That's A Damn Lie!": Ethical Obligations of Counsel When a Witness Offers False Testimony in a Criminal Trial*, 31 St. Mary's L.J. 407 (2000); Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339 (1994); Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939 (1988).

[10] *See* Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand. L. Rev. 339 (1994); Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939 (1988); Wolfram, *Client Perjury*, 50 S. Cal. L. Rev. 809 (1977).

[11] *See* Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 Am. J. Crim. L. 455 (1999); Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037 (1996).

and is prohibited.[12] As discussed below, the more challenging question is the proper actions to take in the face of proposed perjury. The duty of confidentiality usually plays a smaller role when the lie is by a third person, not the client, and not surprisingly courts have imposed sanctions for knowing presentation of false evidence by third persons.[13] The actual implementation of the duty not to present false or perjurious testimony is extremely fact sensitive. Some of the most important factual variables are discussed below.

[4] Problem in Determining Whether Counsel "Knows" Evidence Is False

[a] Actual Knowledge (or Its Equivalent) Is Required

Both the Model Rules and the Model Code clearly prohibit the use of any evidence that the lawyer actually knows to be false.[14] The first challenge is ascertaining whether the lawyer knows the evidence is false. This does not require an examination of the state of mind of counsel, as actual knowledge may be inferred from the circumstances. The 2000 revisions to the Model Rules also state that "[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."[15]

Relatively few federal cases have probed the nuances of actual knowledge, though clearly a mere belief or even a firm conviction that the client or witness is lying does not constitute actual knowledge.[16] A major purpose of the trial process is to resolve issues of credibility and truthfulness, leaving the courtroom as the forum for resolving doubts.[17] For this reason, lawyers typically should only conclude that the client intends to commit perjury based on strong evidence. Anything less than actual knowledge based on a firm factual basis runs the risk of placing the lawyer as the final arbiter of credibility. The federal courts have held that a lawyer must have a "firm factual basis" for the conclusion that the client's testimony is false, so that "mere suspicion or inconsistent statements" are not sufficient.[18] If the lawyer merely has a reasonable belief that

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[12] **Use of false evidence prohibited.** *Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 246, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)* (use of false evidence to support patent and infringement claim justifies equitable relief of setting aside prior decree).

[13] **Perjury by other than client.** *See, e.g., Knox v. Hayes, 933 F. Supp. 1573, 1582, 1586 (S.D. Ga. 1995)* (imposing sanctions for submission of known false statements in witness affidavit).

[14] Model Rule of Prof'l Conduct 3.3(a)(4); *see also* Model Code of Prof'l Responsibility DR 7-102 (analogous provision of Model Code).

[15] Model Rule of Prof'l Conduct 3.3(c).

[16] *See generally* Windham, Note, *Candor Toward the Court: How Much Evidence Must an Attorney Have That the Client has Done a Wrongful or Illegal Act?, 21 J. Legal Prof. 307 (1996).*

[17] **Attorney not to make credibility determinations.** *United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977)* ("it is the role of the judge or jury to determine the facts, not that of the attorney").

[18] **Client perjury in criminal action.** *E.g., United States v. Long, 857 F.2d 436, 445–446 (8th Cir. 1988); cf. Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* (accepting state court finding in habeas proceeding that lawyer had knowledge of intended perjury).

3d Circuit *See United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977)* (defense counsel's refusal to allow client to testify based on belief, not documented on record, that client intended to commit perjury violated right to testify and *Sixth Amendment* right to counsel).

4th Circuit *United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003)* ("Defense counsel's mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse Midgett's need for assistance in presenting his own testimony").

8th Circuit *E.g., United States v. Long, 857 F.2d 436, 445–446 (8th Cir. 1988).*

the evidence is false, the lawyer may choose to present or not present the evidence. Although the duty of zealous advocacy may counsel in favor of offering the evidence, strategic concerns may counsel against proceeding with questionable evidence. This is particularly true in the criminal defense context, where lawyers also have a very practical reason to have a firm factual basis. In criminal cases a lawyer who dissuades a client from testifying, or who discloses perjury, may be required to describe in detail the factual basis for that conclusion in an hearing on an ineffective assistance of counsel claim.[19]

At least in the context of a prosecutor's presentation of evidence to the grand jury, the Supreme Court has indicated that doubts about accuracy of testimony do not rise to the level of knowledge of falsity.[20] While doubt might not justify a formal remedy, courts have been willing to urge self-restraint, or "soul searching in the prosecutor's office" before offering questionable evidence.[21] Professional responsibility obligations are primarily self-executing, and the fact that a court may allow a particular practice does not answer the question of whether the practice is proper. For a more complete discussion of the professional regulation of prosecutors, see *Ch. 813, Special Issues in Criminal Cases*.

In a civil context, a lawyer "cannot counsel others to make statements in the face of obvious indications of which he is aware that those assertions are not true."[22] In criminal matters, however, absent such obvious indications of fraud or perjury, "the lawyer is not obligated to undertake an independent determination before advancing his client's position."[23]

Similarly, in a civil context the Second Circuit reversed the six month suspension of an attorney for allegedly allowing the introduction of perjurious testimony, concluding that the duty to rectify a fraud upon the court through perjury is triggered only if the lawyer has actual knowledge that would "clearly establish" that a fraud was being committed. This was not, the court hastened to add, a requirement of moral certainty, but strong personal suspicion is not sufficient.[24] Merely being "surprised" at a witness' response does not constitute actual knowledge that the response is perjurious.[25] Certainly the client's or witness' admission of the falsity of testimony would be sufficient to provide actual knowledge.[26]

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[19] **Hearing on issue.** *See, e.g.,* *United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977)* (failure of record to document factual basis for lawyer's belief one factor in reversal of criminal conviction).

[20] **Doubt not equivalent to knowledge.** *Bank of Nova Scotia v. United States, 487 U.S. 250, 261, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988)* ("Although the Government may have had doubts about the accuracy of certain aspects of the summaries, this is quite different from having knowledge of falsity").

[21] **Restrain encouraged.** *E.g.,* *Veney v. United States, 344 F.2d 542, 542–43 (D.C. Cir. 1965)* (Wright, J. concurring).

[22] **May not advise perjury.** *United States v. Sarantos, 455 F.2d 877, 881 (2d Cir. 1972)* (when lawyer is part of scheme to arrange sham marriages in return for finder's fee, lawyer may not advise false testimony as to validity of marriages).

[23] **No duty of independent investigation.** *In re Grand Jury Subpoena (Legal Services Center), 615 F. Supp. 958, 969 (D. Mass. 1985)* (motion to quash subpoenas granted pursuant to *Fed. R. Crim. P. 17(c)* on basis of attorney-client privilege, work product doctrine and as unduly burdensome and oppressive, relying on state provision similar to Model Code).

[24] **No actual knowledge.** *In re Grievance Committee of the U.S. District Court, District of Connecticut, 847 F.2d 57, 63 (2d Cir. 1988)*; *see also* Quodrozzi v. City of New York, 123 F.R.D. 63, 82 (S.D.N.Y. 1989) (attorney must clearly know, rather than suspect, fraud on the court, citing *Grievance Committee*).

[25] **Surprise not equivalent to knowledge.** *Sigma-Tau Industrie Farmaceutiche Riunite, S.P.A. v. Lonza, Ltd., 48 F. Supp. 2d 16, 20 (D.D.C. 1999)* (surprise does not, in and of itself, constitute actual knowledge that the testimony is false).

[26] **Admission is actual knowledge.** *See* *United States v. Shaffer Equip., 11 F.3d 450, 459 (4th Cir. 1993)* (government expert admitted to falsifying credentials, so that government's "claim to have held only a suspicion rings hollow").

The lawyer also has an obligation not to induce a witness to lie under oath.[27] At least one court has found that it is not sanctionable conduct, however, for an attorney, in an arms length interview with a witness, to attempt to persuade the witness, even aggressively, that an alternate version of the facts is more accurate.[28] Pressure tactics, however, such as agreeing to withdraw a broad request for production of documents to induce a third party witness to recant testimony, may be the basis of discipline.[29]

In practice, the level of certitude about the potential perjury is merely one factor that shapes the complex decision of how to proceed. The interaction between certitude, prejudice and client counseling is discussed in [6], *below*.

[b] Dangers of Proceeding With Deliberate Ignorance

The duty to avoid presenting false or misleading evidence requires actual knowledge. The actual knowledge requirement, coupled with a duty to serve as an advocate, indicates that lawyers should give sympathetic ear to the client's version of events. This conceptually makes good sense, because the veracity and accuracy of the information will ultimately be tested in litigation. Some conscious avoidance is inevitable and, according to some commentators, even required for effective advocacy, at least in criminal matters.[30]

A lawyer should not, however, rely merely on information provided by the client, particularly when investigation into those assertions would be relatively easy and quick. Accordingly, courts turn a disdainful eye to what they perceive as strategic ignorance, particularly in civil matters.[31]

While it appears that federal courts have not widely used the notion of deliberate ignorance in assessing a lawyer's conduct in federal court proceedings, the development of this jurisprudence in criminal contexts

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[27] **No inducement to lie.**

3d Circuit *See* United States v. Friedland, 502 F. Supp. 611, 619 (D.N.J. 1980) (inducing a witness to lie under oath in a judicial proceeding is an action involving moral turpitude).

5th Circuit *See* In re Thalheim, 853 F.2d 383, 390 (5th Cir. 1988).

[28] **May attempt to persuade witness.** Resolution Trust Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993) (attorney may inquire of witness whether factual assertions in draft affidavit are more accurate than witness' recollection, as activity does not induce witness to testify falsely under oath).

[29] **Improper attempt to persuade.** Addamax Corp. v. Open Software Found. Inc., 151 F.R.D. 504, 511–512 (D. Mass. 1993) (declined to disqualify counsel based on conduct that "tread perilously close to or even crossed the line of propriety," but referred matter to state disciplinary body).

[30] *See generally* Green, The Criminal Regulation of Lawyers, 67 Ford. L. Rev. 327, 356 (1998)

[31] **Strategic ignorance unacceptable.**

6th Circuit *Cf.* United States v. Wuliger, 981 F.2d 1497, 1505 (6th Cir. 1992) (overturning wiretapping conviction of lawyer who used audiotapes made by client after assurances that tapes were legally obtained, noting that knowledge of legality was element that had to be proved beyond reasonable doubt, and that although "an attorney must not turn a blind eye to the obvious, he should be able to give his clients the benefit of the doubt").

7th Circuit *See* Romano Bros. Beverage Co. v. D'Agostino-Yerow Assocs., 1996 U.S. Dist. LEXIS 10730, at *24 (N.D. Ill. 1996) (looking to Model Rules, local rules of court, and state professional responsibility rules, and holding that reckless and cavalier disregard for the truth merited sanctions when counsel was deliberately ignorant of facts).

11th Circuit *See* Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254–1255 (11th Cir. 1996) (counsel's good faith reliance on statements of client insufficient to protect attorney from sanctions under Fed. R. Civ. P. 11 when cursory investigation would have shown claim could not be supported).

sets the stage for incorporating ideas of deliberate ignorance into professional responsibility standards in federal court practice.[32] Deliberate ignorance is present when the circumstances indicate "(1) subjective awareness of a high probability of the existence of illegal conduct, and (2) purposeful contrivance to avoid learning of the illegal conduct."[33] Deliberate ignorance is sometimes referred to "ostrich" tactics and has been used to impose either criminal liability on attorneys,[34] or significant civil liability for continued facilitation of client fraud.[35] Federal courts have been willing to chastise counsel who select this option and have used their inherent power to impose additional sanctions for engaging in deliberate ignorance.[36] Imposition of liability in both these contexts suggests that the substantive law, rather than professional ethics, is more responsible for defining the limits of a lawyer's obligation to believe the client.[37]

[5] Constitutional Implications of Perjury in Criminal Cases

[a] Duty of Defense Counsel Not to Present False or Perjurious Testimony Is Typically Addressed as Ineffective Assistance of Counsel

The Model Rules and Model Code generally do not distinguish in the text of the rules between civil and criminal proceedings in the context of knowingly offering false statements and perjury. The comment to the Models Rules, however, sets out the "intensely debated" issue of how defense counsel should respond when confronted by a client's desire to present false testimony.[38] In criminal cases the defense counsel's

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[32] **Deliberate ignorance in criminal cases.** *See generally* Charlow, *Willful Ignorance and Criminal Culpability,* 70 Tex. L. Rev. 1351 (1992) (describes and analyzes rapid expansion of use of deliberate ignorance and similar concepts to impose criminal sanctions).

2d Circuit *See* United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) (attorney and accountant convicted of Securities Act violations; Congress "could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess").

5th Circuit *See* United States v. Cihak, 137 F.3d 252, 260 (5th Cir. 1998) (upholding conspiracy conviction of attorney, finding that deliberate ignorance is sufficient to establish knowing participation in conspiracy).

6th Circuit *See* Nix v. O'Malley, 1998 U.S. App. LEXIS 37797, at *17, *18 (6th Cir. 1998) (summary judgment for violation of Ohio wiretap laws reversed where circumstantial evidence could allow jury to find that defendant attorney had "reason to know" of illegality sufficient to satisfy state statute).

[33] **Defining deliberate ignorance.** United States v. Cavin, 39 F.3d 1299, 1310 (5th Cir. 1994)

[34] **Criminal liability.** United States v. Cavin, 39 F.3d 1299, 1310–1311 (5th Cir. 1994) (instruction proper as to one defendant; improper if there is no evidence of purposeful contrivance to avoid learning the truth).

[35] **Civil liability.** In re First Merchants Acceptance Corp. Sec. Litig., 1998 U.S. Dist. LEXIS 17760, at *32, *33 (N.D. Ill. 1998) (because of law firm's deliberate ignorance, court denied firm's motion to dismiss claims that impose civil liability on persons preparing and signing materially misleading registration statements).

[36] **Inherent power to sanction.** Wyle v. R.J. Reynolds Indus., Inc., 709 F. 2d 585, 590 (9th Cir. 1983) (dismissal of complaint as sanction for false denials and failure to comply with discovery; "law firm's deliberate ignorance constituted the equivalent of knowledge of the truth"); Xanadu Maritime Trust v. Meyer, 21 F. Supp. 2d 1104, 1105 (N.D. Cal. 1998) (noting unprofessional conduct by plaintiff's counsel for admitting evidence in civil case despite suspicions that evidence was false and misleading; attorney admitted he did not ask witness about potentially false or misleading testimony before offering witness in rebuttal).

[37] *See generally* Luban, *Contrived Ignorance,* 87 Geo. L. Rev. 957, 976 (1999) ("in legal ethics, unlike criminal law, there is not a willful blindness doctrine").

[38] See Model Rule of Prof'l Conduct 3.3, Comment Advisory Committee; Perjury by a Criminal Defendant.

decision to offer, or not offer, false or perjurious testimony is typically framed as a question of whether defendant received ineffective assistance of counsel under the Sixth Amendment (*see generally* Ch. 644, *Right to and* ***Appointment*** *of* ***Counsel***). The question that must be asked is whether the lawyer's conduct was required or permitted by the rules of ethics, and if so, may that conduct nevertheless constitute ineffective assistance of counsel.

The Supreme Court essentially answered both questions in *Nix v. Whiteside,* holding that the defendant was not denied the Sixth Amendment right to assistance of counsel when defense counsel obeyed his perceived ethical obligation and refused to cooperate in presenting perjurious testimony.[39] The Nix Court concluded that although ethical rules may have some bearing on the ineffective assistance of counsel issues, the two are analytically distinct, so that a conclusion on one does not compel any conclusion on the other.

In *Nix,* defense counsel threatened to inform the court if the defendant client testified in a manner that the lawyer believed was a lie. In response, the client withheld testimony that could have bolstered his claim of self-defense. The jury rejected the self-defense argument and convicted the defendant of second-degree murder. The *Nix* majority applied the traditional test for ineffective assistance of counsel, asking whether counsel's performance fell below the base line of "reasonably effective assistance" and whether the defendant suffered prejudice, which required a showing that the results would have been different but for counsel's performance.[40]

The *Nix* Court framed the issue by seeking to define "reasonably effective" counsel in a manner that would not intrude on the state's proper authority to define and apply standards of professional conduct for attorneys.[41] The Court stated that "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."[42] Ethical standards, however, were relevant to determine whether the defense counsel's conduct "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment."[43] The *Nix* Court stated, somewhat inaccurately, that "virtually all of the sources," such as recognized canons of ethics, state statutes or professional codes, and the Sixth Amendment "speak with one voice" on the proper response to client perjury.[44] The *Nix* holding, however, merely stated that when confronted with perjury in a state court criminal prosecution, defense counsel's decision to dissuade the client from the false testimony on threat of withdrawal and disclosure was not ineffective assistance of counsel. The concurring opinions noted that this decision does not constitutionalize a single proper response to perjury.[44.1]

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[39] *Nix v. Whiteside, 475 U.S. 157, 175–176, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* (habeas proceeding).

[40] *475 U.S. 157, 161–62*, applying *Strickland v. Washington, 466 U.S. 668, 687–694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

[41] *475 U.S. at 165*.

[42] *475 U.S. at 165*.

[43] *475 U.S. at 166*.

[44] *475 U.S. at 166*.

[44.1] ***Nix* concurrence.** *475 U.S. at 176–191*.

2d Circuit *See also* *De Pallo v. Burge, 296 F. Supp. 2d 282, 287 (E.D.N.Y. 2003)*

4th Circuit *See also* *United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003)*.

[b] Duty of Prosecutors Not to Present False or Misleading Evidence (Including Duty Under *Brady* to Present Exculpatory Evidence) Is Typically Addressed as Due Process Violation

The Supreme Court has held that the Due Process Clause is violated when the prosecutor knowingly uses perjurious testimony or deliberately suppresses evidence favorable to the accused.[45] The prosecutor's constitutional (and ethical) duty was further clarified by the Court's seminal *Brady* decision, which requires the prosecution to disclose all exculpatory evidence.[46]

In a decision concerning suppression of exculpatory evidence, the Supreme Court concluded that if a prosecutor "asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."[47]

Due Process is also violated if the prosecutor fails to correct evidence known to be false.[48] As discussed in detail in Ch. 813, Special Issues in Criminal Cases, this constitutional framing of the issue frequently may limit the inherent power of the court to provide a remedy for use of perjurious testimony that does not rise to the level of a due process violation. The use of perjurious testimony is one area in which the Supreme Court has suggested that defendants have a lower burden of proof to demonstrate a violation of constitutional standards.

When a prosecutor fails to comply with a request for exculpatory evidence under *Brady*, the subsequent conviction is reversed only if the information is "material," which is defined as entailing a reasonable probability that the outcome of the trial would have been different had the information been disclosed.[49] The standard of materiality is lower when the prosecutor knowingly uses perjurious testimony or false evidence, and the conviction should be overturned "if there is any reasonably likelihood that the false testimony could have affected the jury's verdict."[50] For a more detailed discussion of the prosecutor's duty see Ch. 813, Special Issues in Criminal Cases.

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[45] **Prosecutorial misconduct as Due Process violation.** *See* United States v. Bagley, 473 U.S. 667, 679 n.9, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); Giglio v. United States, 405 U.S. 150, 153–154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (failure to disclose Government agreement with witness violates due process); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ("Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Napue v. Illinois, 360 U.S. 264, 269–270, 79 S. Ct. 1173 3 L. Ed. 2d 1217 (1959) (failure of State to correct testimony known to be false violates due process); *but cf.* United States v. Williams, 504 U.S. 36, 52–53, 112 S. Ct. 1735, 118 L. Ed. 2d 352, (1992) (prosecutor need not present exculpatory evidence in his possession to the grand jury).

[46] ***Brady* decision.** Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[47] **Open file policy.** Strickler v. Greene, 527 U.S 263, 283 n.23, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (although not deliberate, prosecutor withheld exculpatory evidence because defense counsel had the right to assume that prosecutor would alert him to exculpatory evidence in the open-file); *see also* Youngblood v. West Virginia, 547 U.S. 867, 126 S. Ct. 2188, 165 L. Ed. 2d 269, 272–273 (2006) (*Brady* duty extends to impeachment evidence; suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to prosecutor).

[48] **Failure to correct false evidence.** Napue v. Illinois, 360 U.S. 264, 269–270, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (failure of State to correct testimony known to be false violates due process).

[49] **Evidence must be material for *Brady* violation.** Strickler v. Greene, 527 U.S 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (not every violation of the duty to provide exculpatory evidence necessarily establishes that the outcome was unjust; *Brady* is violated only when nondisclosure was so serious that there is reasonable probability that the suppressed evidence would have produced a different verdict).

[50] **Lesser standard for prosecutor's use of perjury.** United States v. Bagley, 473 U.S. 667, 679 n. 9, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[6] Attorney's Response to False or Perjurious Testimony

[a] Duty to Discourage Witness From Engaging in Perjury

When confronted with an intent by the client or third person to commit perjury, the attorney's first obligation is to attempt to persuade the individual not to present the false testimony, or to correct the testimony if it has already been presented.[51]

An attorney has an array of arguments to attempt to dissuade the client or witness from perjury. Clients face both criminal sanctions and significant strategic risks for presenting perjury (*see* [2], *above*). False testimony exposes the witness to prosecution for perjury.[52] If the jury sees through the perjurious testimony, the lack of candor may affect the entire proceeding. Juries may give enhanced damages in civil cases, or the judge may consider perjury to enhance a sentence in criminal cases.[53]

If these consequences do not dissuade the client or witness, the attorney may attempt to show how easy it will be to see through the testimony. A sample cross examination may give the client or witness a better understanding of how the opposing counsel or prosecutor may expose holes or inconsistencies in the testimony to increase the chance that the testimony will not be believed. In many cases, extrinsic evidence that disproves the perjury will be available to the prosecutor to use in cross examination.[54]

The issue of good ethics and good strategy coincide in most cases in which the lawyer knows or believes that the client or a witness intends to commit perjury. Lawyers walk a delicate line, however. The mere fact that evidence is not believed does not make the witness a perjurer, and there is danger of confusing the strategic concerns with the duty to not testify falsely: if the client or witness appears to sincerely believe that the testimony is true, even though not believable, the lawyer cannot pressure the witness to change the testimony to make it more believable if the effect is to make it false in the eyes of the client or witness.

Sometimes extraneous factors provide the most powerful disincentive to perjury. One court has noted:[55]

> even a statement of an intention to lie on the stand does not necessarily mean the client will indeed lie once on the stand. Once a client hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross-examination by opposing counsel, she may well change her mind and decide to testify truthfully.

The duty to persuade the client to tell the truth applies in civil proceedings, including depositions. It does not matter that the deposition is being taken by opposing counsel. At least in a civil context, the lawyer's

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[51] **First duty to dissuade.** Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjured testimony is to attempt to dissuade the client from the unlawful course of conduct."); *see generally* Wilkinson, *"That's a Damn Lie!": Obligations of Counsel when Witness Offers False Testimony in a Criminal Trial*, 51 St. Mary's L. J. 407 (2000).

[52] **Perjury prosecution.** *See, e.g.*, Bronston v. United States, 409 U.S. 352, 360–361, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973); *see generally* Aycot, *Nothing But the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes*, 28 Val. U.L. Rev. 247 (1993).

[53] United States v. Dunnigan, 507 U.S. 87, 113 S. Ct. 111, 122 L. Ed. 2d 445 (1993) (sentence enhanced for perjury); *but see* United States v. Booker, 543 U.S. 220, 244, 122 S. Ct. 738, 160 L. Ed. 2d 621 (2005) (under Sixth Amendment, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by a defendant or proved to a jury beyond a reasonable doubt").

[54] Nix v. Whiteside, 475 U.S. 157, 191, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (Stevens, J. concurring); *see also* United States v. Curtis, 742 F.2d 1070, 1074 (7th Cir. 1984) (decision not to present witnesses and documentation for alibi defense was "a virtually unassailable strategic choice based upon counsel's assessments that the alibi witnesses lacked credibility").

[55] United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988).

"inaction and silence" in the face of false testimony in a deposition may be seen as "tantamount to acquiescence."[56]

If persuasion is unsuccessful, the harder question is whether the lawyer can threaten to withdraw or threaten to disclose the perjury if the client proceeds to testify.

[b] Withdrawal

The Model Rules envision that a lawyer must withdraw if "the representation will result in violation of the rules of professional conduct or other law"[57] Withdrawal, particularly in the course of litigation, is no panacea. Courts are often understandably resistant to allowing lawyers to withdraw in the midst of litigation. This is particularly true when the problem will likely persist for substitute counsel.[58] Withdrawal also may have double jeopardy implications in criminal cases.[59]

In addition, withdrawal is likely to occur at the eve or during trial, after vigorous client counseling, and after giving the client an opportunity to reflect on the concededly limited options available. Yet "an attorney's motion to withdraw at such a tell-tale junction," such as just prior to testifying, may inform the court and potentially the jury that the defendant intends to commit perjury.[60] Judges are faced with inadequate guidance on how to proceed. If the judge seeks specific information about the reason for withdrawal, the judge's own impartiality may be compromised.[61] But if the judge fails to develop a precise record of the factual basis for the lawyer's belief that the client will commit perjury, the judge may force the client into an impermissible choice between the right to testify or the right to proceed with counsel.[62] In-house counsel may feel particular pressure, particularly if withdrawal means not only withdrawing from one part of the litigation but from the entire employment relationship.

In many cases the motion to withdraw is the first indication to the court that the client intends to testify falsely. Most courts appreciate the delicate situation presented by client perjury. At a minimum, the lawyer must not disclose any more information than necessary.[63]

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[56] **False testimony in deposition.** *Romano Bros. Beverage Co. v. D'Agostino-Yerow Assoc., 1996 U.S. Dist. LEXIS 10730, at *19 (N.D. Ill. 1996).*

[57] Model Rule of Prof'l Conduct 1.16(a)(1); *see also* Model Code of Prof'l Responsibility DR 2-110(B)(2), (C)(1) (analogous provision of Model Code).

[58] **Problem will persist.** *E.g., United States v. Omene, 143 F.3d 1167, 1168 (9th Cir. 1998).*

[59] **Double jeopardy implications.** *Nix v. Whiteside, 475 U.S. 157, 170 n.6, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)* ("Withdrawal of counsel when this situation arises at trial gives rise to many different questions including possible mistrial and claims of double jeopardy").

[60] **Timing is problematic.** *E.g., United States v. Henkel, 799 F.2d 369, 370 (7th Cir. 1986)* (conviction on direct appeal affirmed because defendant "had no right to commit perjury") *Cf. Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978)* (due process violation when defense counsel cut short defendant's testimony, moved to withdraw which was denied, then failed to argue defendant's testimony in closing).

[61] **Judge may appear impartial.** *Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978).*

[62] **Client dilemma.** *United States v. Scott, 909 F.2d 488, 492 (11th Cir. 1990)* (to advise defendant that he could proceed pro se, or could keep attorney and be precluded from testifying impermissibly forced him to choose between two constitutionally protected rights).

[63] **Lawyer must be discrete.** *Cf. United States v. Bruce, 89 F.3d 886, 893 (D.C. Cir. 1996)* (attorney exercised poor judgment and possibly violated rules of professional conduct in disclosing client urging that the lawyer lie on the client's behalf, but no conflict of interest present).

[c] Refusal to Submit False or Perjurious Testimony

Submission of testimony requires the active participation of the lawyer in calling and questioning the witness. Assuming that the lawyer knows that the testimony is false, and is unable to convince the witness to avoid perjury, the lawyer must refuse to offer false evidence of non-parties.[64]

The issue is much more challenging in criminal cases because a defendant has a constitutional right to testify.[65] In addition, the decision whether to testify belongs ultimately to the client.[66] A defendant's right to testify, however, "does not extend to testifying falsely."[67]

Keeping the defendant off the stand entirely is no solution to the perjury issue, because it deprives the fact-finder of truthful testimony as well as the perjury. This concern was reflected in one case in which the state court judge ruled that if the defendant chose to testify, counsel would be allowed to withdraw, and the defendant would proceed pro se. The defendant elected to retain counsel and not testify, and was subsequently convicted. The Third Circuit found that the state court action impermissibly forced the defendant to choose between the right to testify and the right to counsel.[68] In contrast, another court found that defendant was not deprived of his constitutional right to testify when defense counsel refused to put the defendant on the stand despite defendant's wishes, though the court expressly reserved the issue of whether counsel's conduct conformed to professional standards.[69]

[d] Testifying in Narrative Form

Testifying in narrative form has been proposed by several commentators as a potential solution to the perjury conundrum.[70] While narrative testimony has been approved in some states, the practice has not been given significant attention in reported federal decisions. The Ninth Circuit implicitly approved of the practice in 1998 when it upheld the conviction of a defendant who had testified in narrative form after defense counsel's motion to withdraw was denied. The court of appeals found that this procedure did not

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[64] **May not offer perjury from witness.** *Knox v. Hayes, 933 F. Supp. 1573, 1586 (S.D. Ga. 1995)* (sanctions imposed on attorney for allowing witness to sign false affidavit). *See* Model Rule of Prof'l Conduct 1.6, comment [4] ("When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes").

[65] **Right to testify.** *Alicea v. Gagnon, 675 F.2d 913, 923 (7th Cir. 1982)*.

[66] **Decision is client's.** *Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004)* (attorney must both consult with defendant and obtain consent to recommended course of action for important decisions involving overarching defense strategy, including whether to testify in his or her own behalf); *Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)* (accused has ultimate authority "to make certain fundamental decisions regarding the case" such as whether to "testify in his or her own behalf"); *United States v. Scott, 909 F.2d 488, 490 (11th Cir. 1990)* ("the right to testify is personal and cannot be waived by counsel").

[67] **No right to commit perjury.** *Nix v. Whiteside, 475 U.S. 157, 171–172, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)*.

[68] **Right to testify and right to counsel.**

2d Circuit *De Pallo v. Burge, 296 F. Supp. 2d 282, 287 (E.D.N.Y. 2003)*.

3d Circuit *United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977)*.

4th Circuit *United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003)*.

[69] **Right to testify not infringed.** *United States v. Curtis, 742 F.2d 1070, 1076 n.4 (7th Cir. 1984)*.

[70] *See* Wilkinson, *"That's a Damn Lie!": Ethical Obligations of Counsel When a Witness Offers False Testimony in a Criminal Trial*, *31 St. Mary's L. J. 407 (2000)*; Thompson, *The Attorney's Ethical Obligations When Faced With Client Perjury*, 42 S.C. L. Rev. 973 (1991).

constitute ineffective assistance of counsel, particularly when defendant had the assistance of counsel as to all matters other than the narrative testimony, and in light of the finding of the trial judge at sentencing that the testimony was, in fact, false.[71]

[e] Disclosure to Court

No lawyer wishes to disclose, and no judge wishes to hear, that a client or witness intends to commit perjury. Disclosure should be absolutely a last resort, and should disclose only the information necessary to constrain the perjury. Because of the possibility that the witness will change his or her mind, presumably disclosure would be most likely immediately prior to the witness' intent to testify.[72] As noted earlier, a motion to withdraw or to permit the client to testify in narrative form is, in essence, a disclosure to the court that the client intends to commit perjury.

[7] Lawyer Must Take "Reasonable Remedial Measures" Upon Learning of Prior Submission of Perjury

Relying on false or perjurious testimony is a continuing offense. Lawyers may attempt to minimize the impact of false testimony by avoiding express reliance on the false testimony. However, under the ethical rules, such action generally is insufficient. The Model Rules require that the lawyer who learns that earlier submitted evidence is false or perjurious must take "reasonable remedial measures," including, if necessary, disclosure to the tribunal.[73] Thus, if the false or perjurious testimony cannot be withdrawn or otherwise remedied, the lawyer should disclose the falsity to the court.[73.1] This is required because once the false testimony is on the record, it can influence settlement negotiations or summary judgment even if not directly relied upon at trial.[74] Accordingly, submitting a corrected affidavit or otherwise withdrawing false or perjurious testimony may be insufficient under the circumstances, and full disclosure may be required on pain of sanction.[75]

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[71] **Implicit approval of narrative testimony.** *United States v. Omene, 143 F.3d 1167, 1168–1171 (9th Cir. 1998)*.

[72] **Timing of disclosure.** *United States v. Del Carpio-Cotrina, 733 F. Supp. 95, 100 (S.D. Fla. 1990)* ("a lawyer who knows that his client intends to commit perjury need not advise the court until the client takes the witness stand").

[73] Model Rule of Prof'l Conduct 3.3(a).

[73.1] **Disclosure to court.** *Interstate Narrow Fabrics, Inc. v. Century United States, Inc., No. 1:02CV00146, 2006 U.S. Dist. LEXIS 9039 (M.D.N.C. Feb. 22, 2006)* (court criticized attorney who when apprised of the incorrectness of his statements to the Court, chose to withdraw rather than cure mistake by taking affirmative action to inform the Court).

[74] **Perjury taints entire process.**

2d Circuit *Romano Bros. Beverage Co. v. D'Agostino-Yerow Assoc., 1996 U.S. Dist. LEXIS 10730, at *47 (N.D. Ill. 1996)* (perjury in pretrial discovery "is more destructive to the judicial system and the search for truth than lying on the stand during trial").

11th Circuit *Knox v. Hayes, 933 F. Supp. 1573, 1584 (S.D. Ga. 1995)*.

[75] **Sanctions for failure to disclose.**

2d Circuit *Tedesco v. Mishkin, 629 F. Supp. 1474, 1485 (S.D.N.Y. 1986)* (misconduct included aiding and abetting witness to commit perjury and corrupt endeavor to influence and impede testimony; attorney also restrained from contacting class members, enjoined from interfering with the due administration and determination of class action by the court, and ordered to pay $64,792.35 in costs and attorneys fees, plus $10,000 sanction payable to court).

11th Circuit *Knox v. Hayes, 933 F. Supp. 1573, 1586 (S.D. Ga. 1995)* (counsel should have informed opposing counsel of true nature and admitted indiscretion to court; attorney fees ordered and counsel disqualified from further representation of defendant).

The comments to Model Rule 3.3 state that except in criminal defense, "if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party."[76] The duty to counsel one's client and to minimize the harmful impact of the disclosure suggests that this subject must be discussed with the client before the lawyer's disclosure.[77] Presumably in most cases the client will agree to facilitate the correction of the record in a way that minimizes negative impact rather than having the lawyer proceed independently to inform the court. If the decision-making process leads to a rupture of the attorney-client relationship, the lawyer may make a motion to withdraw, although such a motion is likely to be met with resistance if it occurs at or near trial.

[8] Duty Not to Provide False or Misleading Statements

The duty not to knowingly make a false statement of material fact has been a part of legal ethics since codification began (*see generally* § 801.02 (discussing history of federal regulation of attorney conduct)). The false statement of fact might come through the lawyer's knowing facilitation of client perjury, or the lawyer's own false statements to a court. A lawyer may not make false or misleading statements to a court, either in oral presentations or in documents.[78] Failure to make a factual disclosure, or giving only partial information, has been found to be the equivalent of an affirmative misrepresentation.[78.1] Knowing presentation of false evidence can be the basis for disbarment or denial of pro hac vice status.[79]

Federal courts have been quite emphatic that the duty of confidentiality does not justify making false or misleading statements to a court.[80] Claims that misleading statements were not technically lies, and similar

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[76] Model Rule of Prof'l Conduct 3.3, comment [6].

[77] *See* Model Rule of Prof'l Conduct 1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information").

[78] **Lawyer may not lie to court.**

1st Circuit *See* *Gonsalves v. City of New Bedford, 168 F.R.D. 102, 112–118 (D. Mass 1996)* (attorney's false and misleading statements to court constituted serious misconduct which "threatened the integrity of the trial" and were thus sanctionable).

2d Circuit *United States v. Gotti, 322 F. Supp. 2d 230, 237 (E.D.N.Y. 2004)* (criticizes AUSA for misleading court).

5th Circuit *See* *Smith v. Our Lady of the Lake Hospital, Inc., 135 F.R.D. 139, 144 (M.D. La. 1991)* ("impermissible, misleading and half-truth pleadings, briefs, and oral arguments made by the plaintiff and his counsel cannot be tolerated").

[78.1] **Affirmative misrepresentation.** *Schmude v. Sheahan, 312 F. Supp. 2d 1047, 1088, 1092 (N.D. Ill. 2004)* ("Making a passing reference to the issue is not the same as being forthright and fairly presenting the matter to the court").

[79] **Disbarment for lying.**

5th Circuit *In re Sealed Appellant, 194 F.3d 666, 670 (5th Cir. 1999)* (backdating endorsement of stock certificate and lying or misleading in subsequent deposition basis for disbarment).

10th Circuit *United States v. Howell, 936 F. Supp. 767, 774 (D. Kan. 1996)* (omissions and misstatements in pro hac vice affidavit and materially misleading responses to the magistrate judge justify denial of pro hac vice admission)

[80] **Confidentiality does not justify lying to court.**

4th Circuit *See* *United States v. Shaffer Equip. Co. 11 F.3d 450, 458 (4th Cir. 1993)* (as officers of the court, "the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit").

7th Circuit *See* *Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1066 (7th Cir. 2000)*.

"hairsplitting," have not been generously received.[81] Failing to correct a false statement, reliance upon it, or efforts to cover-up the wrongdoing, can impact the sanction.[82] When courts catch a lawyer making misleading or false statements the court appears likely to seek disciplinary action against counsel[83] or impose other significant sanctions on the lawyer.[84]

In refusing to make false statements to the court, however, the lawyer must be careful not to divulge more information than necessary to honor the lawyer's ethical obligations of both candor and confidentiality.[85]

Counsel also has a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation," such as facts that might render the case moot.[86]

A lawyer must also avoid making false or misleading statements about the law to a court. For example, lawyers have been sanctioned for selective quotation or direct misquotation of precedent (*see* § 811.02).[87]

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[81] **"Hairsplitting" not tolerated.**

7th Circuit *See* Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1066 (7th Cir. 2000).

8th Circuit *See* Jones v. Clinton, 36 F. Supp. 2d 1118, 1130 (E.D. Ark. 1999) (misleading statements in deposition "undermined the integrity of the judicial system" and were sanctionable because they were "intentionally false, notwithstanding tortured definitions and interpretations" of certain terms).

[82] **Exacerbating behavior.**

1st Circuit Romero-Barcelo v. Acevedo-Vila, 275 F. Supp. 2d 177, 191 (D.P.R. 2003) ("The dishonesty rule has also been applied in instances where an attorney fails to correct innocently created misunderstandings of which a lawyer subsequently becomes aware and neglects to correct her own statements that were initially believed to be true but later revealed to be false.").

7th Circuit *See* Cleveland Hair Clinic, Inc. v. Puig, 200 F.3d 1063, 1064 (7th Cir. 2000) ("People often get in hot water not so much for the original misdeed, but for the cover-up").

11th Circuit *See* Knox v. Hayes, 933 F. Supp. 1573, 1586 (S.D. Ga. 1995) (continued use and reliance on false affidavit; award of costs and attorneys fees, and counsel disqualified from further representation).

[83] **Disciplinary action sought.**

8th Circuit *See* Jones v. Clinton, 36 F. Supp. 2d 1118, 1130 (E.D. Ark. 1999) (member of bar who lied in deposition found in civil contempt, ordered to pay reasonable expenses, including attorney fees to opposing counsel and reimbursement to court; matter also referred to state disciplinary body).

9th Circuit *See* Erickson v. Newmar Corp., 87 F.3d 298, 303–304 (9th Cir. 1996) (remand to impose "appropriate sanctions and disciplinary action" upon defense counsel for witness tampering and false statements to appellate court).

[84] **Awarding sanctions.** *E.g.*, In re General Motors Corp., 110 F.3d 1003, 1008 (4th Cir. 1997) (counsel cited language previously stricken by Fourth Circuit and ordered not cited; these acts misled later courts into thinking that certain findings had been made; total of $190,541.37 in attorney fees awarded).

[85] **Disclosure only when necessary.** United States v. Bruce, 89 F.3d 886, 894–895 (D.C. Cir. 1996) (lawyer correctly advised client that he would not honor request to lie, but conduct was problematic when lawyer went on to disclose client's request to court).

[86] **Continuing duty to inform.** Arizonans for Official English v. Ariz., 520 U.S. 43, 68 n.23 (U.S. 1997) ("It is the duty of counsel to bring to the federal tribunal's attention, 'without delay,' facts that may raise a question of mootness."); Tiverton Bd. of License Comm'rs v. Pastore, 469 U.S. 238, 240, 105 S. Ct. 685, 83 L. Ed. 2d 618 (1985) (per curium) (dismissing case as moot, adding admonishment, citing Fusari v. Steinberg, 419 U.S. 379, 391, 95 S. Ct. 533, 42 L. Ed. 2d 521 (1975) (Burger, C. J., concurring); Schreiber Foods, Inc. v. Beatrice Cheese, Inc., 402 F.3d 1198, 1205 (Fed. Cir. 2005).

The duty not to make false or misleading statements extends to misrepresenting a lawyer's status to third persons.[88] Similarly, a prosecutor may not make a false statement of fact to induce a plea bargain.[89]

End of Document

[87] **Selective quotations.** *Federal Circuit Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1355 (Fed. Cir. 2003)* (Rule 11 and inherent powers supports reprimand of attorney for selective quotations that gave false and misleading impression about existing law). [Weinstein changing position regarding applicability of the BPC to the Berry Application governed by SDMC process.]

[88] **Misrepresenting status to third persons.** *Chimko v. Lucas (In re Lucas), 317 B.R. 195, 201 (D. Mass. 2004)*.

[89] **False statement to induce plea bargain.** *Morgan v. Perry, 142 F.3d 670, 684 (3d Cir. 1998)* (Marine prosecutor's fabrications about during plea negotiations "constituted a gross ethical violation of his duty and responsibility as a lawyer as well as government prosecutor").

EXHIBIT 2

DARRYL COTTON
6176 Federal Boulevard
San Diego, CA 92104
Telephone: (619) 954-4447
Facsimile: (619) 229-9387

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON,

Plaintiff,

v.

LARRY GERACI, an individual, REBECCA BERRY, an individual; GINA AUSTIN, an individual; AUSTIN LEGAL GROUP, a Professional Corporation; MICHAEL WEINSTEIN, an individual; SCOTT H. TOOTACRE, an individual; FERRIS & BRITTON, a Professional Corporation; CITY OF SAN DIEGO, a public entity, and DOES 1 through 10, Inclusive,

Defendants.

Case No. 18-cv-3325-BAS (MDD)

DECLARATION OF ZOË GAYLE VILLAROMAN RE PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL

Hearing Date: August 31, 2020
Time: Unknown
Judge: Hon. Cynthia A. Bashant
Courtroom: 4B

I, Zoë Gayle Villaroman, declare:

1. I am over the age of eighteen years, not a party to this action and submit this declaration in connection with a certain factual allegation contained in the Opposition to

/ / /

Motion for Appointment of Counsel filed by Defendant Michael Weinstein ("Weinstein") on August 17, 2020 (Doc 39) ("Weinstein Opp").

2. The facts stated herein are of my own personal knowledge, except those facts which are stated upon information and belief; and, as to those facts, I believe them to be true.

3. Earlier this morning, I was advised of yesterday's filing of the Weinstein Opp and that certain content contained therein related to me.

4. At Plaintiff's request, I downloaded and reviewed the Weinstein Opp, and submit this declaration for the express purpose of clarifying my role in this litigation.

5. The Weinstein Opp states that "... Plaintiff has drafted the present motion, ***has the assistance of a paralegal***, and has responded to multiple motions to dismiss [citations omitted; emphasis added]." *See* Doc 39 at 3:12-14.

6. As set forth in my declaration in support of Plaintiff's *Ex Parte* Application for Appointment of Counsel filed on August 3, 2020 (Doc 36), Plaintiff contacted me on July 21, 2020 advising me that he had borrowed some money from a friend to pay me to perform some research for him (Doc 36 at 3:3-6).

7. I performed 4.5 hours of research for Plaintiff and was paid $675.00 (Doc 36 3:6-10).

8. As also set forth in my declaration, I spent nearly three years providing paralegal assistance to Plaintiff as a pro se litigant and to his former attorneys in the related state court action and, my fees were approximately $400,000 (Doc 36 at 2:22-280); however, over $300,000 of those fees remain unpaid – some of which are well over two years old.

9. Given the significant amount of receivables I've been carrying for Plaintiff, it is logistically impossible for me as an independent contractor to continue to assist him, as doing so would dig an even larger hole in my finances.

/ / /

/ / /

10. Conversely, having become well-acquainted with Plaintiff after working with him and his counsel for three years, I am also well-aware on a first-hand basis that his financial hole is much larger and deeper than my own.

11. When Plaintiff contacted me in July saying he had borrowed money to pay me to do some research, I welcomed the opportunity to work and pay some bills, given that the COVID-19 shut-down did not prove instrumental in improving my financial situation.

12. Simply stated, since the conclusion of post-trial motions in the state court case, I have not assisted Plaintiff or his former counsel by performing ***any work*** in or related to this case or any other litigation with exception of the research described in my previous declaration.

13. It also is important to note that I did not charge Plaintiff to draft this declaration; rather, I did so at no charge as a professional courtesy to a long-time client.

14. In light of the foregoing, I respectfully submit to this Court that the statement in the Weinstein Opp that, "... Plaintiff ... has the assistance of a paralegal" is wholly inaccurate and contrary to the true facts.

I declare under penalty of perjury according to the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 18, 2020 at San Diego, California.

ZOE GAYLE VILLAROMAN

Darryl Cotton
6176 Federal Blvd.
San Diego, CA 92114
Telephone: (619) 954-4447

Plaintiff *Pro Se*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual Plaintiff, vs. CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL R. WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual Defendants,	Case No. 3:18-cv-00325-BAS-DEB **CERTIFICATE OF SERVICE** Hearing Date: NA Time: NA Judge: Hon. Cynthia A. Bashant Courtroom: 4B **Date: August 20, 2020** **Time: NA** Related Case: 20CV0656-BAS-MDD

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

1. PLAINTIFF DARRYL COTTON'S REPLY TO DEFENDANT MICHAEL WEINSTEIN'S OPPOSTION TO COTTON'S EX PARTE APPLICATION FOR APPOINTMENT OF COUNSEL: MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO 28 U.S.C. § 1915 (e)(1).

2. DECLARATION OF ZOE VILLAROMAN.

Were served on this date to party/counsel of record:

[X] BY E-MAIL DELIVERY

[X] BY PERSONAL DELIVERY: TO JUDGE WOHLFIEL AT THE HALL OF JUSTICE, 330 WEST BROADWAY SAN DIEGO, CA 92101

Executed on August 20, 2020 at San Diego, California.

Darryl Cotton

Plaintiff - Pro Se Litigant

EXHIBIT 3

¶ 13.11 Section 1986—Neglecting To Prevent Conspiratorial Wrongs.

Section 1986 creates a cause of action against the knowing failure to prevent the perpetration of any of the wrongs described in section 1985, by anyone having the power to do so.[1] Such an individual is liable "for all damages caused by such wrongful acts, which such person by reasonable diligence could have prevented."[2] No claim for relief will lie under section 1986 unless a cause of action can be established under section 1985.[3] By its terms, the section is not limited to actions under color of law.[4] Knowledge of the conspiracy is an essential element.[5] While it is essential for an action under section 1985(3) to prove a class-based invidiously discriminatory animus,[6] it does not follow that a defendant charged under section 1986 with neglecting to intervene in a section 1985(3) conspiracy must personally share the class-based animus.[7] An action will not lie under section 1986 against a federal agency.[8]

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[1] *See supra* ¶ 13.01 for the language of 42 U.S.C. § 1986.

The most comprehensive examination of this section—its history, interpretation and potential use—is by Professor Linda E. Fisher: *Anatomy of an Affirmative Duty to Protect:* 42 U.S.C. Section 1986, 56 Wash. & Lee L. Rev. 461 (1999).

[2] Aliens are protected. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (D. Tex. 1981).

[3] Dowsey v. Wilkins, 467 F.2d 1022 (5th Cir. 1972); Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975); Halu v. Sargent, 523 F.2d 461 (1st Cir. 1975); Taylor v. Nichols, 558 F.2d 561 (10th Cir. 1977); Creative Environments v. Estabrook, 680 F.2d 822 (1st Cir. 1982); Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984); Martinez v. Winner, 771 F.2d 424 (10th Cir.), *modified*, 778 F.2d 553 (10th Cir. 1985); Morast v. Lance, 807 F.2d 926 (11th Cir. 1987); Jews for Jesus v. Jewish Comm. Relat. Council, 968 F.2d 286 (2d Cir. 1992); Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994); Doyle v. Unicare Health Serv., Inc., 399 F. Supp. 69 (N.D. Ill. 1975), *aff'd*, **541 F.2d 283 (7th Cir. 1976)**; Schoonfield v. Mayor & City Council, 399 F. Supp. 1068 (D. Md. 1975), *aff'd*, 544 F.2d 515 (4th Cir. 1976); McIntosh v. White, 582 F. Supp. 1244 (E.D. Ark. 1984), *aff'd in part, rev'd in part*, 766 F.2d 337 (8th Cir. 1985); White v. Williams, 179 F. Supp. 2d 405 (D. N.J. 2002).

[4] *See supra* ¶ 13.09[C]. Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981).

[5] Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, **415 U.S. 917 (1974)**; Buck v. Board of Elections, 536 F.2d 522 (2d Cir. 1976); Veres v. County of Monroe, 364 F. Supp. 1327 (E.D. Mich. 1973), *aff'd*, **542 F.2d 1177 (6th Cir. 1976)**, *cert. denied*, **431 U.S. 969 (1977)**; Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981); Wesley v. Don Stein Buick, Inc., 996 F. Supp. 1299 (D. Kan. 1998).

[6] *See supra* ¶¶ 13.09[A] & [B].

[7] Clark v. Clabaugh, 20 F.3d 1290 (3d Cir. 1994) (citing this work); Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (citing *Clark*, citing this work). Barrett v. United Hosp., 376 F. Supp. 791, 806 (S.D.N.Y.), *aff'd*, 506 F.2d 1395 (2d Cir. 1974), need not be read to the contrary.

Typical of the circumstances giving rise to a claim under section 1986 is *Symkowski v. Miller*[9] in which the plaintiff contended that two police officers had witnessed a beating inflicted upon the plaintiff by a third police officer and had done nothing to prevent it.[10] A cause of action was stated under this section in *Peck v. United States*[11] in which the plaintiff alleged that the police agreed not to respond to calls for assistance for fifteen minutes, thereby allowing vigilantes time to physically assault individuals participating in a "Freedom Ride."[12]

In *Bell v. City of Milwaukee*,[13] the Court of Appeals for the Seventh Circuit held that an action would lie under this section where police officers had conspired to make false representations in an effort to cover up the facts surrounding the fatal shooting of an arrestee. A colorable claim under section 1986 was found to be stated in *White v. Williams*[14] in which the claimant alleged that a state attorney general and members of his staff had conspired to conceal the practice of racial profiling in law enforcement.

End of Document

[8] Hill v. McMartin, 432 F. Supp. 99 (E.D. Mich. 1977); Community Bhd. of Lynn v. Lynn Redev. Auth., 523 F. Supp. 779 (D. Mass. 1981).

[9] 294 F. Supp. 1214 (E.D. Wis. 1969).

[10] The difficulty with this decision is that courts have consistently held that a conspiracy under § 1985 must first be proven before an action under § 1986 will lie. There is no allegation that the officer committing the assault conspired with anyone, unless it was the two defendant officers. But if this is the case, all three are chargeable under § 1985, not § 1986.

[11] 470 F. Supp. 1003 (S.D.N.Y. 1979).

[12] Id. at 1012–13.

See also Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997); Bergman v. United States, 579 F. Supp. 911 (W.D. Mich. 1984).

[13] 746 F.2d 1205 (7th Cir. 1984).

[14] 179 F. Supp. 2d 405 (D. N.J. 2002).

EXHIBIT 4

3 Civil Rights Actions P 12E.05

Civil Rights Actions > I Civil Rights Actions Treatise > CHAPTER 12E Deprivation of Rights Under Color of State Law—Due Process in State Proceedings and State Created Rights (Civil Rights Act of 1871, 42 U.S.C. § 1983)

¶ 12E.05 Zoning

Because zoning decisions fall largely within the discretionary power of governments, they rarely give rise to an action under section 1983, but a litigable issue may arise when first amendment interests are implicated. For example, in *Young v. American Mini Theaters, Inc.*,[1] the Supreme Court sustained a zoning ordinance which prohibited the location of an adult motion picture theater within 1,000 feet of any two other "regulated uses"[2] or within 500 feet of a residential area.[3] *Young* was applied in *CLR Corporation v. Henline*[4] and its permissible limits were found to be exceeded. The effect of the zoning ordinance in *Henline* was to require all the affected stores to be located on a half-mile portion of a particular road and to permit only four adult book stores in a community of 62,000 people and 25 square miles.

Young was a plurality opinion, the decision depending upon the separate concurrence of Justice Powell. Justice Powell considered it important that the city had not embarked upon an effort to suppress free expression: "The ordinance was already in existence, and its purposes clearly set out, for a full decade before adult establishments were brought under it."[5] In *Avalon Cinema Corp. v. Thompson*,[6] the Court of Appeals for the Eighth Circuit concluded that for an ordinance to survive, it must satisfy both the criteria set forth in *Young* by the plurality and that set forth by Justice Powell. Consequently, the zoning ordinance at issue in *Avalon Cinema Corp.*, which was against sexually explicit films, failed because "[t]he City Council enacted the ordinance only after being informed of the impending opening of the Avalon Cinema adult theater."[7]

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[1] 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

[2] In addition to adult motion picture theaters and "mini" theaters, which contain less than 50 seats, the regulated uses include adult book stores, cabarets (group "D"), establishments for the sale of beer or intoxicating liquor for consumption on the premises; hotels or motels, pawnshops, pool or billiard halls; public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Id. at 52 n.3.

[3] "[W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating these ordinances." 427 U.S. at 62.

[4] 520 F. Supp. 760 (W.D. Mich. 1981), aff'd, 702 F.2d 637 (6th Cir. 1983).

[5] Young v. American Mini Theaters, Inc., 427 U.S. at 80–81.

[6] 667 F.2d 659 (8th Cir. 1981).

[7] Id. at 662.

The denial of a requested property use in retaliation for the exercise of free expression protected by the *first amendment* is actionable.[8]

Another litigated issue involves zoning ordinances applied to abortion clinics. The denial of an application to open an abortion clinic in an area zoned for business was reversed in *Deerfield Medical Center v. City of Deerfield Beach.*[9] Because the right to an abortion was a fundamental right[10] which could be raised by the plaintiff,[11] the government action was subject to close scrutiny. The court found that the denial of the license placed a significant burden on the abortion decision because there were no abortion facilities presently within the city, and the denial of the license would discourage efforts to establish one in the foreseeable future. Furthermore, the exercise of the right to an abortion "would be adversely affected if abortion facilities were restricted to the most unattractive, inaccessible and inconvenient areas of the city."[12] Nor were the justifications offered by the city compelling. First, the city argued that the facility would have proximity to single family residences, but other medical facilities within the same district bordered multi-family residences and the court saw no basis for a distinction. Second, the city relied upon proximity to a Catholic Church which espoused religious objections to abortions.[13] The court responded that there was no legitimate state interest "in protecting a church from suffering intra-zoning district neighbors whose activities it opposes on religious grounds."[14] The court found no evidence that the clinic "would promote the physical deterioration of the district,"[15] thus distinguishing the *Young* decision. Finally, the concern of the city that the facility would pose a threat to the "health and welfare" of the citizens of the area was too vague to justify the burdening of a constitutional right.[16]

Invidiously discriminatory practices in zoning may also give rise to an action under this section,[17] but the fact that a zoning ordinance discriminates against low income groups does not necessarily lead to the conclusion that racial or

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[8] ***Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32 (1st Cir. 1992).***

[9] *661 F.2d 328 (5th Cir. 1981).*

[10] *Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).*

[11] *Carey v. Population Servs. Int'l, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).*

[12] *Deerfield, 661 F.2d at 336.*

[13] Indeed, the Archbishop of the Archdiocese of Miami had filed a brief as defendant-intervenor contending that "the furnishing of abortion services within less than one thousand feet (1,000') of a Catholic Church whose members are opposed to abortion on *religious* and *philosophical* grounds would deeply offend the spiritual values of the clergy and parishioners of the church." *Id. at 337* (emphasis in original).

[14] *661 F.2d at 337.*

[15] *Id.*

[16] *Id.*

See also *Bodony v. Incorporated Vill. of Sands Point, 681 F. Supp. 1009 (E.D.N.Y. 1987)* (zoning ordinance limiting the permissible height for radio antenna not shown to relate to health, safety and welfare, and was violative of amateur radio station operator's *first amendment* rights).

But see *Duplantis v. Bonvillain, 675 F. Supp. 331 (E.D. La. 1987)* (building code providing for condemnation of unsafe structures substantially related to public health, safety and welfare, and no *fourteenth amendment* violation occurred).

[17] *Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970)* (denying building permit for private low income housing); *Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971)* (failure to enforce zoning laws); *Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2d Cir. 1970), cert. denied,* ***401 U.S. 1010 (1971)*** (zoning ordinance against low income housing).

ethnic groups have been victimized.[18] In *Village of Belle Terre v. Boraas*,[19] the Supreme Court found nothing unconstitutional in a zoning ordinance which limited the occupancy of one-family dwellings to "persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit," or no more than two persons not so related.[20] Racial discrimination is impermissible in state aided housing projects.[21]

Zoning of property which freezes the land in order to preserve it for future public improvements or condemnation may constitute a deprivation of property without due process if imposed for an unreasonable length of time.[22]

An arbitrary and capricious zoning decision may result in a deprivation of property without due process.[23] Rezoning which targets a single property owner and significantly alters the value of the property may be more closely scrutinized. In *Harris v. County of Riverside*,[24] the plaintiff, who had purchased property for an ATV rental facility, was persistently harassed by public officials in respect to his use of the property. Ultimately, he learned that his property had been rezoned residential (a use to which it was unsuited) and that an application to change the zoning would cost a non-refundable $2,400 to $3,000. The Court of Appeals for the Ninth Circuit held that the immediate deprivation of the use of the land and the required fee for reconsideration itself was cognizable as a potential due process violation. Second, the court held the decision to alter the general zoning scheme specifically to rezone the plaintiff's property gave rise to concerns distinct from those presented in the typical rezoning case. Finally, the failure to provide the plaintiff with prior notice of the intention to rezone his property was a denial of due process. In a similar situation, a city's adoption of an ordinance which rezoned property was held tantamount to an unconstitutional taking.[25] And in *Burkhart Advertising, Inc. v. City of Auburn*,[26] the court found a zoning ordinance

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See also Mikeska v. City of Galveston, 451 F.3d 376 (5th Cir. 2006); ***Nestor Colon Medina & Sucesores Inc. v. Custodio, 758 F. Supp. 784 (D.P.R. 1991)***.

[18] Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974), *aff'd in part, vacated in part*, 964 F.2d 32 (1st Cir. 1992).

[19] 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

[20] "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." Id. at 9.

And see Bannum, Inc. v. City of St. Charles, 2 F.3d 267 (8th Cir. 1993) (requirement of conditional use permit to operate halfway house reasonable).

[21] Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968); Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969); Gautreaux v. Chicago Hous. Auth., 342 F. Supp. 827 (N.D. Ill. 1982), ***aff'd***, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, ***414 U.S. 1144 (1974)***.

[22] Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (14-year freeze was unreasonable).

[23] *See* Natale v. Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999); Bowlby v. City of Aberdeen, Miss., 681 F.3d 215 (5th Cir. 2012); Mays-Ott Co., Inc., v. Town of Nags Head, 751 F. Supp. 82 (E.D.N.C. 1990).

[24] 904 F.2d 497 (9th Cir. 1990).

See also Koncelik v. Town of East Hampton, 781 F. Supp. 152 (E.D.N.Y. 1991) (property owners had protectible property interest in their application for conforming subdivision, based on prior court finding of compliance with all statutory requirements, the general policy of the Town Code and the criteria for lot line modification).

[25] A.A. Profiles, Inc. v. City of Fort Lauderdale, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, ***490 U.S. 1020 (1989)*** (city had previously approved development of land and owner had expended time and money pursuing that development).

[26] 786 F. Supp. 721 (N.D. Ind. 1992).

which imposed a total ban on off-premises billboards was an unconstitutional limitation on commercial speech under the *first amendment* and that the municipality was liable to the plaintiffs under section 1983.

A plaintiff alleging a substantive due process violation in the denial of a permit must first show that he has a "federally protected property right in the permit."[27] To make this showing, the complainant must clearly demonstrate that he has met the relevant state law criteria.[28]

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[27] *Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999).*

[28] *Id.*

EXHIBIT 5

20 Pages

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

LARRY GERACI, an individual, Plaintiff, v. DARRYL COTTON, an individual; and DOES 1 through 10, inclusive, Defendants. AND RELATED CROSS-ACTION	Case No. 37-2017-00010073-CU-BC-CTL Judge: Hon. Joel R. Wohlfeil **PLAINTIFF/CROSS-DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT/CROSS-COMPLAINANT'S MOTION FOR NEW TRIAL** **[IMAGED FILE]** **DATE:** **October 25, 2019** **TIME:** **9:00 a.m.** **DEPT:** **C-73** Filed: March 21, 2017 Trial Date: June 28, 2019 Notice of Entry of Judgment: August 20, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff/Cross-Defendants submit this Memorandum of Points and Authorities in Opposition to Defendant/Cross-Complainant's Motion for New Trial.

I. INTRODUCTION/SUMMARY OF ARGUMENT

This case came to jury trial on July 1, 2019 and took place over the ensuing three-week period, consisting of 9 trial days. Mr. Cotton received a fair trial. The jury unanimously found in favor of Mr. Geraci and against Mr. Cotton on his causes of action for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing and awarded damages to Mr. Geraci. (See Special Verdict Form, ROA #635.)[1] Cotton now requests this Court to set aside the verdict.[2]

As a threshold matter, Mr. Cotton's supporting documents were not timely filed and served. CCP § 569(a) provides that "Within 10 days of filing the notice, the moving party ***shall serve upon all other parties*** and file any brief ***and accompanying documents***, including affidavits in support of the motion. ...". Here, Mr. Cotton's Notice of Intent to Move for New Trial was served and filed on September 3, 2019. The ten-day period to file his brief and accompanying documents expired on September 13th. While Mr. Cotton timely filed his ***unsigned*** Memorandum of Points and Authorities just before midnight on September 13th, that filing did not include any accompanying documents. Instead, on Monday, September 16th, (3-days late) Mr. Cotton filed two documents entitled "Errata"

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[1] The jury also unanimously found in favor of Mr. Geraci and against Mr. Cotton on all of Mr. Cotton's claims set forth in his cross-complaint. (See Special Verdict Form, ROA# 636.) Mr. Cotton does not challenge the jury verdict nor seek a new trial in connection with his cross-claims; his memorandum of points and authorities in support of his new trial motion does not argue any grounds for a new trial on his cross-claims. Even if for the sake of argument Mr. Cotton intended to move for a new trial on those claims, that motion would fail for the same reason as his new trial motion fails as to the verdict against him on Mr. Geraci's claims.

[2] Mr. Cotton's counsel, Jacob Austin, did not raise an objection to the admission of any exhibits or the examination with regard to any exhibits. Attorney Austin only made two objections throughout the trial, neither of which have any impact on the pending motion. "In an appeal ... from a judgment after denial of a motion for new trial, the failure of ... counsel to object or except may be treated as a waiver of the error." (5 Witkin, Cal. Procedure (1983 pocket sup.) Attack on Judgment in Trial Court, § 119, p. 307; *Malkasian v. Irwin* (1964) 61 Cal. 2d at p. 747; see *Horn v. Atchison, T. & S.F.Ry. Co.* (1964) 61 Cal.2d 602, 610, cert. den. Sub nom.Atchison, *Topeka & Santa Fe Railway Co. v. Horn*, 380 U.S. 909 [13 L. Ed. 2d 796, 85 S. Ct. 892] ["'In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.'" (*Sabella* v. Sothern Pac. Co. (1969) 70 Cal.2d at p. 319.)

which contained the accompanying documents in support of his motion.[3] Affidavits or declarations filed too late may be disregarded. (See *Morris v. Purity Sausage Co.* (1934) 1 Cal.App.2d 120; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Peterson v. Peterson* (1953) 121 Cal.App.2d 1, 9.)

As to the merits of his motion for new trial, Mr. Cotton's asserts three grounds:

First Mr. Cotton contends the November 2, 2016 agreement was illegal and void because Mr. Geraci failed to disclose his interest in both the Property and the Conditional Use Permit ("CUP"). Mr. Cotton erroneously contends the agreement violates local law and policies, as well as state law. The statutes upon which Mr. Cotton relies were not even in effect at the time the November 2, 2016 contract was entered.[4] Even if that is disregarded, the contract was otherwise legal as discussed *infra*.

Additionally, Mr. Cotton has waived the "illegality" argument for two reasons: (1) he never raised illegality as an affirmative defense; and (2) with regard to the "illegality" argument, Attorney Austin represented to the Court at the conclusion of evidence and in response to the Court's inquiries if there were any other exhibits Mr. Austin wished to admit into evidence: "I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (Reporter's Transcript herein after referred to as "RT") (Plaintiff/Cross-Defendants Notice of Lodgment in Opposition to Motion for New Trial ("Plaintiff NOL") (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL)

Even assuming the illegality argument has not been waived, the argument that the November 2, 2016 contract is illegal fails. Mr. Geraci's stipulated judgments with the City of San Diego, and the

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[3] Mr. Cotton's Errata claims that "[d]ue to a clerical error, an incomplete draft of the Memorandum of Points and Authorities in Support of the Motion for New Trial was uploaded for electronic filing and service instead of the true final copy and, as such, the table of Authorities in the draft was incomplete, the document was not executed and the exhibits referenced therein were not attached." The signature page for the Memorandum of Points & Authorities attached to the Errata is dated, ***September 15, 2019***, (2 days after the papers were filed and served) which belies Mr. Cotton's claim that the motion was complete, filed and served in a timely manner and that the failure to transmit the signature page and accompanying documents was a "clerical error. Indeed, it suggests Mr. Cotton's filing was untimely.

[4] In making his illegality argument, Mr. Cotton cites to B&P Code §§ 26000 (Effective June 27, 2017); 26055 (Effective July 2019); and 26057(a) (Effective January 1, 2019). The contract in question was entered November 2, 2016. The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. In *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, the California Supreme Court observed: "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79, 103 S.Ct. 407, 413, 74 L.Ed.2d 235.) The statutes cited by Mr. Cotton in support of his "illegality" argument were not in effect until after, sometimes years after, entering the contract in question.

use of an agent in application process for the CUP, do not render the contract illegal. Indeed, as set forth herein, several witnesses testified that it is common practice for an applicant on a CUP application for a medical marijuana dispensary to utilize an agent in that process.

Second, Mr. Cotton argues the verdict is against law because the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

Third, Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prohibited Mr. Cotton from receiving a fair and impartial trial.[5] Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial. In spite of asserting the attorney-client privilege with regard to the documents drafted by Gina Austin's office, and contrary to Cotton's arguments herein, those documents were produced to Mr. Cotton during discovery. (Cross-Defendant Rebecca Berry's Responses to Request, For Production of Documents, Set One, Ex. 1 to Plaintiff NOL; and Plaintiff/Cross-Defendant Larry Geraci's Amended Responses to Special Interrogatories, Set Two, Ex. 2 to Plaintiff NOL) The documents were also listed on the Joint TRC Exhibit List and admitted into evidence at trial without objection. (Trial Exhibits 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 3 to NOL; Joint Exhibit List, Ex. 10 to Plaintiff NOL) Mr. Cotton's counsel did not raise any evidentiary objections to the waiver of attorney-client privilege either with regard to the documentary evidence or the testimonial evidence. As such, Mr. Cotton's claim that he was unable to cross-examine either Mr. Geraci or Ms. Austin with the relevant documents (Cotton's P's & A's, p. 5:1-3) is without merit.

[5] This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in the Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Indeed, armed with those documents during discovery, Mr. Cotton never took the depositions of Mr. Geraci nor Attorney Gina Austin. And he in fact questioned the witnesses about those documents during trial. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Finally, as a matter of law, a new trial may only be granted when the verdict constitutes a miscarriage of justice. (Calif. Const., Art. VI, §13.) "If it clearly appears that the error could not have affected the result of the trial, the court is bound to deny the motion." [*Bristow v. Ferguson* (1981) 121 Cal.App.3d 823, 826; *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 866-867, (disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272.)] Mr. Cotton has not demonstrated the claimed errors likely affected the result of the trial.

II. STANDARDS FOR NEW TRIAL MOTION BASED ON C.C.P. § 657(6)

A. Cotton's New Trial Motion is Limited to the Statutory Ground that the Verdict was "Against Law" under C.C.P. § 657(6)

In his Notice of Intent to Move for New Trial dated September 13, 2019, Mr. Cotton gave notice that he was bring the motion pursuant to C.C.P. § 657(6) on the ground that "the verdict is against the law." (ROA#656.) Yet in his brief, he asserts that his motion for new trial is made on the grounds of "irregularity of proceedings" under C.C.P. § 657(1) and "against the law" under (C.C.P. § 657(7), *neither of which grounds were set forth in his Notice of Intention to Move for New Trial.* (Cotton P's&A's, p. 5:10-21) A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated in the notice.* (C.C.P. §659.) It is well-established that a new trial order "can be granted only on a ground specified in the motion." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745; *De Felice v. Tabor* (1957) 149 Cal.App.2d 273, 274.)

Mr. Cotton also asserts that "the Court sits as the 13th juror and is "vested with the plenary power – and burdened with a correlative duty – to independently evaluate the evidence," (incorrectly citing to *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784, which concerned C.C.P. § 657(5), not § 657(6). Rather, the "against law" ground differs from the "insufficiency of the evidence" ground in that there is no weighing of evidence or determining credibility. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient as a matter of law to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229.)

B. The Correct Standard for a New Trial Motion Based on the Statutory Ground that the Verdict is "Against Law"

The statutory ground under C.C.P. §657(6) that the verdict is "against law" is of very limited application. (*Tagney v. Hoy* (1968) 260 Cal.App.2d 372, citing *Kralyevich v.Magrini* (1959) 172 Cal.App.2d 784 ["A decision can be said to be 'against law' only: (1) where there is a failure to find on a material issue; (2) where the findings are irreconcilable; and (3) where the evidence is insufficient in law and without conflict in any material point.[6] C.C.P. § 657(6) is not a ground to have the court reconsider its rulings. The "against law" ground applies only when the evidence is without conflict in any material point and insufficient *as a matter of law* to support the verdict. (*McCown v. Spencer* (1970) 8 Cal.App.3d 216, 229; see *Fergus v. Songer* (2007) 150 Cal.App.4th 552, 567-569 [finding verdict was not "against law" because it was supported by substantial evidence]; *Marriage of Beilock* (1978) 81 Cal.App.3d 713, 728.) C.C.P. § 657(6) does not cover errors that fall within the other sections of C.C.P. § 657, such as § 657(7). (*O'Malley v. Carrick* (1922) 60 Cal.App. 48, 51)

III. ARGUMENT

A. MR. COTTON'S ILLEGALITY ARGUMENTS FAIL

1. Mr. Cotton Has Waived and Abandoned the "Illegality" Argument

Mr. Cotton failed to raise "illegality" as an affirmative defense in his Answer to Plaintiff's Complaint (ROA#17). Normally, affirmative defenses not raised in the answer to complaint or cross-complaint are waived. (E.g., *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.) As stated above, Mr. Cotton did not plead "illegality" as an affirmative defense; therefore, Mr. Cotton cites *Lewis Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 146-148), for the proposition that illegality can be raised "at any time." That is a correct statement of the law, however, that rule is not unqualified. Two California Supreme Court cases decided after *Lewis & Queen – Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, and *Apra v. Aureguy* (1961) 55 Cal.2d 827 – both rejected post-

[6] Mr. Cotton did not set forth any failure by the court as to a finding on some material issue. Mr. Cotton also did not establish findings that are irreconcilable. Mr. Cotton further did not establish that the evidence is insufficient in law and without conflict on any material point. Other challenges as to the application of law in this case would be governed by C.C.P. § 657(7) not cited in Mr. Cotton's Notice of Intention to Move for New Trial and, therefore, are not reviewable herein. For these reasons alone, Mr. Cotton's arguments for a new trial should be rejected by this Court.

trial defenses of illegal contract because the illegality defense had not been raised in the trial court. (See *Fomco, supra,* 55 Cal.2d at p. 166; 55 Cal.2d at p. 831.) In fact, language in *Fomco* suggests that the high court actually rejected *Lewis & Queen's* dicta that the issue of illegal contract could be raised for the first time on appeal. (See *Chodosh v. Palm Beach Park Association* 2018 WL 6599824)

At trial the "illegality" issue appears to have first come up in response to questions being posed by Attorney Austin in his examination of witnesses. Attorney Weinstein argued Attorney Austin was asking questions of witnesses which implied it was illegal for Mr. Geraci to operate a legally permitted dispensary. Attorney Weinstein pointed out, and the Court agreed, that the two civil judgments on their face did not bar Mr. Geraci from operating a legally permitted dispensary. (RT, July 9, 2019, p. 120:20-121:24, Ex. 5 to Plaintiff NOL) Attorney Weinstein went on to argue that Business & Professions Code Section 26057 was *permissive* and not mandatory and that it dealt with state licenses, not a City CUP. The Court was troubled by the fact that Attorney Austin had not filed a trial brief addressing this issue, nor had Attorney Austin filed any memorandum of points and authorities on the issue. The Court concluded: "So for the time being, I'm tending to agree with the plaintiff's side without the defense having given me something I can look at and absorb." (RT, July 9, 2019, p. 120:20-123:6, Ex. 5 to Plaintiff NOL)

Later that day, Attorney Austin called Joe Hurtado to the stand. Joe Hurtado had a vested interest in the case as he was financing Mr. Cotton's litigation expenses and attorneys' fees. (RT July 9, 2019, p. 150:13-18, Ex. 5 to Plaintiff NOL) Attorney Austin improperly attempted to elicit expert testimony from Joe Hurtado, that it was his opinion that Mr. Geraci did not qualify for a CUP under the Business & Professions Code. (RT, July 9, 2019, 151:22-28, Ex. 5 to Plaintiff NOL) During Attorney Austin's examination of Mr. Hurtado, the Court initiated a side-bar at which Mr. Hurtado's proposed testimony was discussed. The Court permitted Mr. Hurtado to testify to hearsay conversations with Gina Austin and hearsay conversations with anyone else on Mr. Geraci's team. At the conclusion of Mr. Hurtado's testimony, and after excusing the jury, the Court permitted the parties to make a record of that side bar. (RT, July 9, 2019, p. 155:8-158:18, Ex. 5 to Plaintiff NOL) The Court expressed to Attorney Austin that to the extent Mr. Hurtado wanted to express legal opinions, he was not going to permit such testimony. In response, Attorney Austin admitted that "perhaps Mr.

Hurtado should have been designated as an expert...". (RT, July 9, 2019, p. 157:13-15, Ex. 5 to Plaintiff NOL) Mr. Hurtado was not designated as an expert witness and his opinion testimony was properly excluded.

The "illegality" issue was again raised on July 10, 2019, when Attorney Austin offered Trial Exhibit 281 into evidence, which was a copy of Business & Professions Code § 26051; and requested the Court take judicial notice of the two lawsuits in which Mr. Geraci was a named party. The Court sustained Attorney Weinstein's objections to Business & Professions Code § 26051 being admitted into evidence. As to the request for judicial notice of the two prior cases against Mr. Geraci, Attorney Weinstein raised an Evidence Code § 352 objection.

The Court stated:

> Putting aside whether the probative value is substantially outweighed by undue prejudice or any other of the 352 factors including but not limited to cumulativeness, as I read these judgments, Mr. Geraci is not barred from trying to obtain whatever permission he would need or anybody would need from operating a marijuana dispensary. And I thought that was your theory at one point.
>
> And if that were your theory, I'm not seeing anything, well, inside the four corners of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton.

Attorney Austin replied to the Court: "I think there was a change in the law, which would – would change that. ***But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it.***" The Court then sustained the objections and declined to take judicial notice of Mr. Geraci's two prior judgments. (RT, July 10, 2019, p. 69:15-72:26, Ex. 6 to Plaintiff NOL) [trial court could properly deny a motion for new trial based on a waiver of the issue during trial. (*Miller v. National American Life Ins. Co.* (1976) 54 Cal.App.3d 331, 346; *Horn v. Atchison, T. & S.F.Ry. Co.*, (1964) 61 Cal.2d 602; *Sepulveda v. Ishimaru*, (1957) 149 Cal.App.2d 543, 547]

It is clear in the instant case, that Attorney Austin abandoned his "illegality" argument; i.e., Mr. Austin's statement to the Court: "I think there was a change in the law, which would – would change that. But I'm willing to not argue the matter if your Honor is inclined not to include it. We can just – forget about it." (RT, July 10, 2019, p. 72:10-13, Ex. 6 to Plaintiff NOL) Having waived this issue during the trial, Mr. Cotton is precluded from urging it as a ground for granting a new trial.

2. The Contract at Issue in This Case is Not Illegal.

Even if the statutes Mr. Cotton relies upon were in effect on November 2, 2016 when the contract was entered (which they were not) and there were no waiver of the "illegality" issue (which there was), the November 2, 2016 agreement remains a legal contract.

The stipulated judgments on their face permit Mr. Geraci to apply for a CUP. In Case Number 37-2014-00020897-CU-MC-CTL, paragraph 8a enjoins Mr. Geraci from "Keeping, maintaining, operating, or allowing the operation of an ***unpermitted marijuana dispensary*** ...". (Italics, Bold Added.) Paragraph 8(b) specifically sates "***Defendants shall not be barred in the future from any legal and permitted use of the PROPERTY.***" (Italics, Bold Added.)

In Case Number 37-2015-00004430-CU-MC-CTL, Paragraph 7 prevents Defendant from "Keeping, maintaining, operating or allowing any commercial, retail, collective, cooperative or group establishment for the growth, storage, sale or distribution of marijuana, including, but not limited to, any marijuana dispensary, collective or cooperative organized anywhere in the City of San Diego ***without first obtaining a Conditional Use Permit pursuant to the San Diego Municipal Code.***" (Italics, bold added)

It was this language in the two stipulated judgments that led this Court to state: "I'm not seeing anything, well, inside the four corners of these judgments that prohibit Mr. Geraci from, for example, doing the deal that he had proposed to do with Mr. Cotton." To which, Attorney Austin stated "***We can just – forget about it.***" (RT, July 10, 2019, p. 69:8-15, Ex. 6 to Plaintiff NOL)

3. The B&P Code Does Not Bar Mr. Geraci From Applying for a CUP

Setting aside waiver and the fact that the two stipulated judgments, on their face, permit Mr. Geraci to obtain a CUP, there is no mandatory provision in the Business & Professions Code which would bar Mr. Geraci from lawfully obtaining a CUP.

Section 26057(b)(7) of the California Business & Professions Code provides that "[t]he licensing authority ***may*** deny the application for licensure or renewal of a **state license** if ... [t]he applicant, or any of its officers, directors or owners, has been sanctioned by a licensing authority or a city, county, or city and county for unauthorized commercial cannabis activities, has had a license suspended or revoked under this division in the three years immediately preceding the date the

application is filed with the licensing authority." (Cal. Bus. & Prof. Code § 26057(b)(7) [*emphasis added*].) Section 26057 is part of a larger division known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act, which has the purpose and intent to "control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale" of commercial medicinal and adult-use cannabis. (Cal. Bus. & Prof. Code § 26000.) Under this division, a "license" refers to a "state license issued under this division, and includes both an A-license and an M-license, as well as a laboratory testing license." (Cal. Bus. & Prof. Code § 26001(y).)

In this case, the CUP is <u>not</u> a state license. Even if this statute were to apply to a CUP, the permissive nature of the authority would not *require* the denial of a CUP license because it is up to the discretion of the licensing authority to make such a decision based on the conditions provided in section 26057(b). (Cal. Bus. & Prof. Code § 26057(b).) In addition, attorney Gina Austin testified at trial the statute would not prevent Mr. Geraci from obtaining a CUP. (RT, July 8, 2019, p. 55:12-57:21, Ex. 4 to Plaintiff NOL)

4. It Is Common Practice For CUP Applicants To Use Agents During The Application Process.

Mr. Cotton argues that Mr. Geraci did not disclose his interest on the Ownership Disclosure Statement and that therefore Mr. Geraci is asking this Court to assist him in violating local laws, which the Court is prohibited from doing. (Cotton P's & A's, p. 12:16-23)

Rebecca Berry, the CUP applicant, signed the CUP forms as Mr. Geraci's agent. This was disclosed to Mr. Cotton from the outset. Prior to Mr. Cotton signing the Ownership Disclosure Statement he knew that Ms. Berry was going to be acting as Mr. Geraci's agent for purposes of the CUP. (RT, July 8, 2019, p. 99:15-19, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL) In fact it was Mr. Cotton's belief that Ms. Berry had to sign the Ownership Disclosure Statement as a Tenant Lessee. (RT, July 8, 2019, pp. 101:26-102:7, Ex. 4 to Plaintiff NOL; and Trial Exhibit 30, Ex. 8 to Plaintiff NOL)

Abhay Schweitzer testified that there is no problem with that (Ms. Berry signing as an agent for Mr. Geraci) because, from the City's perspective, the City is only interested in having someone make the representation that they are the responsible party for paying for the permitting process. (RT,

July 8, 2019, p. 31:22-33:13, Ex. 4 to Plaintiff NOL) And as to the Ownership Disclosure statement, the City's Form is limited, only permitting three choices, none of which fit the circumstances in this case; thus attorney Gina Austin testified that there was no problem from her perspective with Ms. Berry checking tenant/lessee. (RT, July 8, 2019, p. 33:14-35:11, Ex. 4 to Plaintiff NOL) Mr. Schweitzer testified that it is not unusual for an agent to be listed as the owner on the form. (RT, July 9, 2019, p. 60:20-27, Ex. 5 to Plaintiff NOL)

During Mr. Austin's cross-examination of Firouzeh Tirandazi, a City Project Manager III (the highest classification of Project Managers at the City of San Diego), he tried to get her to testify that "anyone with an ownership or financial interest in a marijuana outlet is supposed to be disclosed to the City." Ms. Tirandazi testified that they (the City) are only looking for the property owner and the tenant/lessee. (RT, July 9, 2019, p. 112:23-28; Ex. 5 to Plaintiff NOL) Ms. Tirandazi was unfamiliar with the California Business & Professions Code vis-à-vis the CUP application process. (RT, July 9, 2019, p. 113:1-5, Ex. 5 to Plaintiff NOL)

B. MR. COTTON'S ARGUMENT THAT THE VERDICT IS AGAINST THE LAW BECAUSE THE JURY DISREGARDED THE JURY INSTRUCTIONS FAILS.

Mr. Cotton contends the verdict is contrary to law because, he argues, the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton's conduct and a subjective standard to Mr. Geraci's conduct as related to the November 2, 2016 Agreement, the "confirmation email" and the "disavowment" allegation. To the contrary, there is no legal basis to conclude that the jury disregarded the jury instructions and applied an objective standard to Mr. Cotton and a subjective standard to Mr. Geraci's conduct. That is simply Mr. Cotton's interpretation of the facts and evidence which he would like to substitute for the jury's unanimous verdict.

If the jury has been instructed correctly and returns a verdict contrary to those instructions, the verdict is "against law." (See *Manufacturers' Finance Corp. v. Pacific Wholesale Radio* (1933) 130 Cal.App.239, 243.(A new trial motion based on the "against law" ground permits the moving party to raise new legal theories for the first time; i.e., the trial judge gets a second chance to reexamine the judgment for errors of law. (*Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 15.)

Mr. Cotton asks this Court to accept *his* interpretation of the evidence; disregard the jury's

evaluation and interpretation of the evidence; and grant him a new trial based upon *his* theory of what the evidence shows. Specifically, Mr. Cotton urges that there was no disputed evidence relating to the parties' objective manifestations regarding the contract formation. (Cotton P's&A's, p. 13:16-17.) This is yet another iteration of Mr. Cotton's mantra in numerous motions throughout the litigation that the "disavowment allegation" was case dispositive.

The unanimous verdict of a sophisticated jury militates strict adherence to the principle that courts "credit jurors with intelligence and common sense and presume they generally understand and follow instructions." (*People v. McKeinnon* (2011) 52 Cal.4th 610, 670 ["defendant manifestly fails to show a reasonable likelihood the jury misinterpreted and misapplied the limiting instruction"].) The Court's instructions to the jury, which, "absent some contrary indications in the record," must be presumed heeded by the jury. (*Cassim v. Allstate Ins. Co.* (2004)33 Cal.4th 780 at 803.)

The Court gave CACI Nos. 302 – Contract Formation Essential Factual Elements; 303 – Breach of Contract – Essential Factual Elements; and a host of other instructions regarding contract formation, interpretation and breach. Those instructions were correct statements of the applicable law. Mr. Cotton's counsel did not object to any of those instructions. Mr. Cotton has not overcome the presumption that the jury heeded the Court's instructions. He fails to show a reasonable likelihood the jury misinterpreted and misapplied the jury instructions related to contract formation.

In support of his argument, Mr. Cotton argues that Mr. Geraci had draft "final" agreements prepared and circulated by Attorney Gina Austin, and therefore, the argument goes, the November 2, 2016 Agreement could not have been the final agreement between the parties. This argument simply ignores the testimony of Larry Geraci that he felt he was being extorted by Mr. Cotton and did not want to lose all of the money he had invested in the project and therefore he instructed his attorney, Gina Austin to draft some agreements, attempting to negotiate some terms that Mr. Cotton might be happy with. Those draft agreements were prepared by Gina Austin's office and forwarded to Mr. Cotton. (Trial Exhibit 59, 62, Ex. 7 to Plaintiff NOL; RT July 3, 2019, 129:22-133:27, Ex. 4 to NOL) Mr. Cotton refused to accept those terms and no new agreement was reached. Mr. Geraci became fed-up and filed the instant lawsuit to protect his investment based on the November 2, 2016 written agreement the parties had entered into.

Mr. Cotton sets forth a number of factors which he claims support his interpretation of the evidence that the November 2, 2016 agreement was not the final agreement of the parties. (Cotton Ps &As, p. 13:16-25.) However, Mr. Cotton fails to acknowledge that each of the alleged factors he claims support his argument, are equally supportive of Mr. Geraci's and Attorney Gina Austin's testimony that Mr. Geraci felt he was being extorted by Mr. Cotton and requested Gina Austin to please draft new contracts so he would not lose his investment. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL.) Consistent with their testimony, the November 2, 2016, written agreement was neither amended nor superseded by a new agreement.

C. MR. COTTON'S ARGUMENT THAT HE WAS DENIED A FAIR TRIAL AS THE RESULT OF ERRORS RELATING TO THE USE OF THE ATTORNEY-CLIENT PRIVILEGE DURING DISCOVERY AND AT TRIAL ALSO FAILS.

Mr. Cotton contends that Mr. Geraci used the attorney-client privilege as a shield during discovery and as a sword during trial, which prevented Mr. Cotton from receiving a fair and impartial trial. This is a C.C.P. § 657(7) issue regarding evidentiary rulings, a ground *not* set forth in Mr. Cotton's Notice of Intent to Move for New Trial. (See *Treber v. Sup. Ct* (1968) 68 Ca.2d 128, 131; *Hernandez v. County of Los Angeles* (2014) 226 Cal.App.4th 1599, 1601-1605.) (Practice Guide: Civil Trials and Evidence, Post Trial Motions, (The Rutter Group 2010) ¶ 18:201.)]

Preliminarily, under C.C.P. § 657(1), evidentiary rulings by which relevant evidence was erroneously excluded (or conversely, irrelevant evidence erroneously admitted) may be grounds for a new trial if prejudicial to the moving party's right to a fair trial. [Civil Trials and Evidence, Post Trial Motions, The Rutter Group 18:134.1] A motion for new trial on this ground *must* be made on affidavits. Mr. Cotton has failed to file any affidavits in support of his motion for new trial

Alternatively, erroneous evidentiary rulings (admitting or excluding evidence may be challenged under C.C.P. §657(7) as an "Error in law, occurring at the trial and excepted to by the party making the application." Mr. Cotton has *not* moved for a new trial based on either C.C.P. § 657(1) or C.C.P. §657(7). Instead, in his Notice of Intent to Move for New Trial (p. 2:8-11), Mr. Cotton has sought a new trial on the sole ground that the verdict is "against law" pursuant to C.C.P. § 657(6). A notice of intention to move for a new trial is deemed to be a motion for new trial *on the grounds stated*

in the notice. (C.C.P. §659.) Mr. Cotton cannot assert grounds for new trial not stated in the Notice.

As to the merits of the argument, Mr. Cotton has misrepresented the facts, circumstances and the Minute Order issued by the Court in connection with the attorney-client privilege issues during discovery and the waiver of those issues at trial.

Mr. Cotton claims there was a Court order prohibiting testimony on matters that Plaintiff asserted attorney-client privilege. (Mr. Cotton's P's & A's, p. 14:26-28) In support of this contention, Mr. Cotton Cites to the Court's Minute Order dated February 8, 2019 (ROA#455 at p. 3.) This misrepresents what that Court Order states. It actually states:

> Plaintiff's objections on the basis of privilege to REQUEST FOR PRODUCTION NO. 29 are SUSTAINED; however, the scope of the request appears to seek relevant documents. Given Plaintiff's election to assert the privilege and/or doctrine in discovery, the Court will ***HEAR*** on the scope of the testimony Plaintiff will be not be permitted to provide at trial on the subject of the DISAVOWMANET ALLEGATION."

Cleary, the Court said it would hear and determine the scope of the testimony allowed; it did not prohibit testimony as alleged by Mr. Cotton. Thereafter, Mr. Cotton's attorney drafted the Notice of Ruling which only prevents Rebecca Berry from testifying on the matter of the disavowment allegation. It does not bar any other witness from so testifying. (ROA# 455, p. 2.)

In addition, Mr. Cotton asserts that Mr. Geraci used the attorney-client privilege as a shield and a sword, thereby violating Mr. Cotton's right to a fair and impartial trial. This argument fails on many levels, and has otherwise been waived by Mr. Cotton's failure to object to either the documentary evidence or the testimonial evidence.[7] In fact, Mr. Cotton's attorney conducted substantial examination of witnesses on these very topics.

Mr. Cotton has waived this argument for the following reasons:

1. He never took the depositions of Mr. Geraci or Gina Austin for ascertain this information from them;

2. In response to Mr. Cotton's requests for the production of all documents relating to the purchase of the property drafted or revised by Gina Austin [RFPs Nos. 18, 19], Mr. Geraci objected on the grounds of attorney-client privilege; however, in response to RFP 19, he added that ***"Responding***

[7] "Failure to object to the reception of a matter into evidence constitutes an admission that it is competent evidence." (*People v. Close* (1957) 154 Cal.App.2d 545, 552; *People v. Wheeler* (1992) Cal.4th 284, 300.)

Party has produced previously all responsive documents drafted by Ms. Austin or persons employed in her law firm."

3. Indeed, all such responsive documents had been produced and were marked as Trial Exhibits 59 and 62 which were admitted at trial with Mr. Cotton's Attorney's representations that he had no objections to the admission of the documents. (RT July, 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL.) Mr. Cotton testified that he received Exhibit 59 on February 27, 2017, and Exhibit 62 on March 2, 2017. (RT July 8, 2019, pp. 137:1-138:6, Ex. 4 to Plaintiff NOL.) In fact Mr. Cotton responded to Mr. Geraci regarding those documents. (RT July 8, 2019, pp. 138:2-141:4, Ex. 4 to Plaintiff NOL; and Trial Exhibits 63 and 70, Ex. 9 to Plaintiff NOL)

4. Larry Geraci testified regarding these exhibits and the surrounding circumstances. Mr. Cotton's attorney noted he had no objection to the admission of those exhibits (RT July 3, 2019, pp. 130:18-26; 132:2-7, Ex. 3 to Plaintiff NOL) and he did not object to the testimony.

5. Attorney Gina Austin testified regarding these exhibits and the surrounding circumstances and Mr. Cotton's attorney made no objections. (RT July 8, 2019, p. 41:10-26, Ex. 4 to Plaintiff NOL)

6. Mr. Cotton's attorney cross-examined Gina Austin regarding the draft agreements drafted by Ms. Austin's office. (RT July 8, 2019, p. 58:3-60:10, Ex. 4 to Plaintiff NOL)

Having failed to make any objections whatsoever to any of the documentary and testimonial evidence of which he now complains, Mr. Cotton has waived any argument that the material should not have been admitted.

Mr. Cotton cites *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 556 for the proposition that a litigant cannot claim privilege during discovery and then testify at trial. The *A&M Records* case is clearly distinguishable from the case at bar. In that case, a defendant accused of distributing pirated records failed to produce at his deposition documents requested by the plaintiff "and also refused to answer any questions of substance on the constitutional ground (5th Amendment) that his answers might tend to incriminate him." (*A&M Records, supra*, 75 Cal.App.3d at p. 654.) The trial court ordered the defendant to turn over the requested documents by a specified date before trial, or the defendant would be barred from introducing them at trial, and the court also precluded the

defendant "from testifying at trial respecting matters [and] questions ... he refused to answer at his deposition[.]" (*Id.* at p. 655.) The order limit[ed] the scope of [the defendant]'s testimony only, and not that of any other witness" at his company. (*Ibid.*)

First and foremost, this case does not involve a situation where a party claims the 5th Amendment privilege against self-incrimination and then waives it at trial, so the *A & M Records* case has no application to the case at bar. The Court held that a litigant cannot assert his constitutional privilege against self-incrimination in discovery and then waive the privilege and testify at trial. (*Ibid.*) By analogy, and without citation, Mr. Cotton seeks to extend this reasoning to the attorney-client privilege being asserted during discovery and then waived at trial. This argument is inapplicable to this case where the attorney-client documents were produced to Mr. Cotton; were responded to by Mr. Cotton; were offered and admitted at trial with no objection by Mr. Cotton; the witnesses (Larry Geraci and Gina Austin) testified without any objection being made; and where Mr. Cotton's own attorney conducted extensive examination of that witness with regard to the relevant communications between Ms. Austin and her client, Mr. Geraci. And Mr. Cotton himself was examined regarding these exhibits.

IV. CONCLUSION

This Court ensured that Mr. Cotton received a fair trial from a fair and impartial jury. The jury paid careful attention, sifted through the evidence, and carefully came to an appropriate verdict. For the above-stated reasons, the Court should deny Mr. Cotton's motion for a new trial. "There must be some point where litigation in the lower courts terminates" because otherwise "the proceedings after judgment would be interminable". (*Coombs v. Hibberd* (1872) 43 Cal. 452, 453.) It is time to end this litigation in the trial court and respect the jury's judgment.

FERRIS & BRITTON
A Professional Corporation

Dated: September 23, 2019

By: Michael R. Weinstein
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARRYL COTTON, an individual Plaintiff, vs. CYNTHIA BASHANT, an individual; JOEL WOHLFEIL, an individual; LARRY GERACI, an individual; REBECCA BERRY, an individual; GINA AUSTIN, an individual; MICHAEL R. WEINSTEIN, an individual; JESSICA MCELFRESH, an individual; and DAVID DEMIAN, an individual Defendants,	Case No. 3:18-cv-00325-BAS-DEB **CERTIFICATE OF SERVICE** Hearing Date: NA Time: NA Judge: Hon. Cynthia A. Bashant Courtroom: 4B **Date: August 21, 2020** **Time:** NA Related Case: 20CV0656-BAS-MDD

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document(s):

1. PLAINTIFF DARRYL COTTON'S REPLY TO DEFENDANT MICHAEL WEINSTEIN'S OPPOSTION TO COTTON'S EX PARTE APPLICATION FOR APPOINTMENT OF COUNSEL: MEMORANDUM OF POINTS AND AUTHORITIES PURSUANT TO 28 U.S.C. § 1915 (e)(1) AND ATTACHED EXHIBITS.

Were served on this date to party/counsel of record:

[X] BY E-MAIL DELIVERY:

[X] BY PERSONAL DELIVERY: TO JUDGE WOHLFIEL AT THE HALL OF JUSTICE, 330 WEST BROADWAY SAN DIEGO, CA 92101

Executed on August 21, 2020 at San Diego, California.

Darryl Cotton

Plaintiff - Pro Se Litigant