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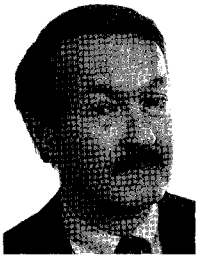
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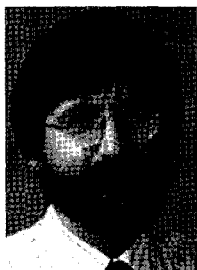
By J. Charles Mokriski and Paul R. Tremblay

Zeal By All Means, But Only Within the Rules



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Lawyers, as we all know, are ethically obligated to serve their clients zealously and to protect client confidences. At the same time, they must act honestly and with candor to the court, deal with their opponents in good faith, and seek to achieve justice in their work. Sometimes, and perhaps frequently, these obligations will clash, so that honoring one will compromise or sacrifice another. A recent opinion by the Supreme Judicial Court offers a vivid example of that kind of conflict, with unfortunate results for the lawyer involved.

In that case, *In the Matter of Robert A. Griffith*, 440 Mass. 500 (Dec. 9, 2003), the SJC, overruling the Board of Bar Overseers, suspended a lawyer from practice for a year after he concealed information that would have disclosed his deceased client's HIV-positive status from defendants who, the lawyer believed, were acting in bad faith after covering up a shocking episode of police brutality. The lawyer's story is a compelling one in many respects, but his desperate actions on his client's behalf violated the rules of pretrial discovery and cost him dearly. His sanctioning offers important lessons for lawyers who find themselves enmeshed in contentious litigation. First, a lawyer's commitment to maintain client confidences must generally give way to the disclosure obligations imposed by civil discovery rules, even when such disclosure would reveal deeply embarrassing or privileged information. Second, the opinion erases any lingering doubt about whether a case's special claim to justice, or a client's vulnerability or disadvantage, might excuse some bending of

the usual rules of litigation. Even if obeying the rules is apt to lead to an unjust result, lawyers depart from them, the BBO observed, "at their professional peril."

THE GRIFFITH FACTS, BRIEFLY TOLD

The provocative facts of the *Griffith* case were downplayed in the SJC opinion, but they were developed in considerable detail in the BBO opinion. The lawyer in question, Robert Griffith, is a Cape Verdean, who practiced in New Bedford, a community with a large Cape Verdean population. In 1990, a Cape Verdean man, Morris Pina, Jr., was beaten to death while in New Bedford police custody. The death certificate falsely indicated that he had died of a cocaine overdose. Pina's mother and sister tried unsuccessfully for months to find a lawyer to investigate the suspicious death. Griffith was the only lawyer willing to take on the New Bedford police and city establishment. His lawsuit against the city and the police encountered "intensely disputatious opposition," according to the BBO. The federal court proceedings included 233 pretrial discovery docket items alone, many of them motions by Griffith to compel the city to comply with its discovery obligations. Griffith saw the actions of the city and police, and the tactics of the city's lawyers, as part of a continuing effort to cover up unconscionable official misconduct.

While preparing the case, Griffith learned that Pina was HIV-positive, and had been treated by a doctor for that illness. Relying in part on a Massachusetts statute, G.L. c. 111 § 70F, which is

designed to protect the confidentiality of all medical information relating to HIV, Griffith submitted incomplete and false discovery responses to the defendants seeking to prevent disclosure of Pina's HIV status. He also failed to apprise his expert witness, engaged to testify about Pina's life expectancy and hedonic damages, of Pina's HIV status. Griffith's efforts to conceal the HIV condition failed when Pina's sister testified in the trial about Pina's having visited a doctor known in the community to treat HIV patients.

After the trial ended, with a jury verdict in favor of the plaintiff (later settled for \$555,000), the United States District Court trial judge sanctioned Griffith for his misconduct, fining him \$15,000 and publishing the sanctions opinion as a form of public reprimand. The judge *refused* to refer the matter to the BBO, both because of the sanctions imposed by the court, and because, the judge wrote, it would be "anomalous" if the respondent were suspended from his profession while the New Bedford police officers were not suspended from theirs.

The BBO did receive a referral, though, most likely from the defendants. The BBO Hearing Committee found that Griffith had violated the Code of Professional Responsibility and recommended a public reprimand, but no suspension, and the full BBO agreed for reasons similar to those expressed by the trial court judge. On Bar Counsel's appeal, the SJC imposed a one-year suspension.

THE DUTY OF CONFIDENTIALITY AND PRETRIAL DISCOVERY DISCLOSURES

Nowhere in its opinion did the SJC address a lawyer's ethical obligation not to disclose the secrets and confidential information of his client. Few, if any, would argue that the ethics confidentiality rules by themselves override the mandate to respond completely and honestly to discovery requests, since such a policy would eviscerate the discovery process. However, the fact that the confidential information that Griffith was attempting to hide in this case was Pina's HIV status, a condition that is covered by the strong policy of confidentiality

contained in M.G.L. c. 111 § 70F, changed the equation significantly. While the Code of Professional Responsibility (in effect when this case was pending), as well as the present Rules of Professional Conduct, create an exception permitting disclosure of otherwise confidential information "when required by law or court order," here there was a state statute arguably at odds with that exception. It is unfortunate that the SJC failed to address at all the colorable conflict between the Code's confidentiality obligation, buttressed by c. 111 § 70F's HIV confidentiality protection, and the dictates of court rules requiring full and truthful discovery.

The SJC simply said, without elaboration, that Griffith "should have objected to the discovery requests." The court brushed aside the concern that the mere lodging of an objection based on c. 111 § 70F would reveal the very information that the statute was designed to keep confidential. Indeed, it assumed that an objection by Griffith based on that statute would have had that result, declaring that "the respondent's actions threatened the integrity of the trial because they prevented the judge from fashioning complete and appropriate preliminary instructions to the jury and may also have affected the judge's evidentiary rulings on the issue of damages." The ramifications of this language—that the trial court would have informed its jury instructions with Pina's HIV condition—appears inconsistent with the statutorily mandated protection of the confidentiality of HIV status, a protection that the SJC had earlier suggested, in *Commonwealth v. Ortiz*, No. SJC-2001-0055, is "absolute."

The BBO's opinion contained some advice helpful to future litigators caught in similar conflicts, recommending a variety of measures that Griffith might have undertaken: *in camera* review, a motion for a protective order, or advice from ethics counsel, a bar association ethics committee, or Bar Counsel's ethics hotline. These are helpful suggestions, but in the end, the idea of *in camera* review seems the only one offering Griffith some practical way out of his felt dilemma.

A LAWYER'S RESPONSE TO INJUSTICE

The message from *Griffith* is a simple one. Even when confronted by deep injustice and obstructionist opposing counsel, a lawyer must nevertheless comply with all of the rules of litigation. Although the trial court judge appeared moved by Griffith's having fought a good fight on behalf of a disadvantaged man who had been treated shamefully by the authorities, the SJC rejected the notion that considerations of justice should enter the equation at all. Describing Griffith as "obsessed" while litigating a "contentious" case, the SJC dismissed Griffith's c. 111 § 70F arguments as "irrelevant," and refused to consider the context of the case as providing any basis for mitigation of discipline.

The BBO was less harsh. While it, like the SJC, refused to recognize the justice of Griffith's cause as a mitigating factor, it tempered its sanctions with mercy, imposing a public reprimand rather than suspension, recognizing that Griffith's misconduct was overlaid with "novel issues respecting the nature and scope of the statutory protection accorded those diagnosed with HIV" and considering the "corrosive effect of the widespread publicity" that attended the sanctions and fine imposed by the District Court. But at the same time the BBO made it clear that it regarded Griffith's violation of the rules a serious matter and one not to be countenanced. The BBO addressed the issue of justice this way: "One of the reasons we reject the suggestion that the perceived justness of a cause should mitigate misconduct is that lawyers tend to think that their cases fall into such a category."

In hindsight a lawyer might be able dispassionately to assess which cases are just and which are not, but for a litigator in the smoke of battle, such judgments are hazardous. And regardless of how noble a lawyer's cause, how sympathetic his client, or how evil the other side appears, the lawyer must follow the rules. ■