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Top Plaintiff Lawyers May Face Discipline In Banana Case
Banana Farmers May Be Casualty of Trial Lawyers' Misconduct Proceedings
By John Roemer

Daily Journal Staff Writer

SAN FRANCISCO - Signals from a hearing Friday before a federal appeals court indicated plaintiffs' lawyers Thomas V. Girardi and Walter J. Lack may face disciplinary action for allegedly submitting a falsified document in a toxic tort case. But some questioned whether the proceedings were a sideshow because no matter what happens to the lawyers, their clients appear to be out of luck.

"With any competent lawyer if you're omitting part of a document, that is not accidental. That is intentional," said an obviously displeased Judge William A. Fletcher of the 9th U.S. Circuit Court of Appeals.

The panel, which also included circuit judges Marsha S. Berzon and N. Randy Smith, which is charged with probing the alleged misdeeds of Girardi, of Los Angeles' Girardi & Keese, and Lack plus two subordinate attorneys at Los Angeles' Engstrom Lipscomb & Lack, questioned the proposed disposition of the case. The agreement is under seal, but appears to involve a public admonition for Girardi and a stayed suspension of practice before the circuit and probationary conditions for Lack.

It was worked out by the lawyers in negotiations with the court-appointed independent prosecutor, Rory K. Little of UC Hastings College of the Law. In re Girardi, 08-80090.

The panel will rule on whether to accept Little's proposed disposition or to mete out a different set of punishments.

"The thing I find most irksome in reading the papers in this case," said Berzon, "is that neither Mr. Girardi or his co-respondent has ever acknowledged that the document on its face had a problem. There is still a complete refusal on behalf of all the respondents to deal with that fact."

But one labor-law expert questioned the panel's focus on attorney misdeeds, rather than the real impact on the real victims in the case: banana farmers allegedly harmed by exposure to pesticides.

The 466 Central American banana plantation workers at the heart of the case, who were allegedly injured by pesticides, won a \$489 million judgment in a Nicaraguan court against their employer, Dole Food Co., and the maker of the harmful chemical that was used on the fields. The plaintiffs reported ailments ranging from skin lesions to infertility.

But because the plaintiffs' lawyers were forced to move for dismissal of their effort to enforce the judgment after a false document they filed in the case came to light, none will

see a dime of the award. "Corporate America uses things like this attorney misconduct to divert attention from the farmers," said Victor Narro, who teaches labor law at UCLA and is a director at UCLA's Center for Labor Research and Education. He is not involved in the litigation.

The document, a translation of a Nicaraguan court order, seemed to hold Dole Food Co. and Shell Chemical Co. responsible for the \$489 million judgment.

Girardi and Lack in 2003 filed an enforcement action in Los Angeles County Superior Court to collect on the Nicaraguan judgment.

Defense lawyers removed the case to federal court and protested that Dole and Shell had been wrongly named in the Nicaraguan lawsuit as "Dole Food Corporation" and "Shell Oil Company" and that the document given the Los Angeles court was a mistranslation that substituted in the correct company names in an effort to fraudulently enforce the order.

Girardi retained Thomas J. Nolan, chair of Skadden Arps Slate Meagher & Flom's West Coast litigation practice. Representing Lack was Robert C. Baker of Baker Keener & Nahra.

"No clients were harmed in this case," Baker said.

On Monday, he elaborated in a phone interview. "To the American Bar Association, the biggest possible breach of loyalty is to the client," Baker said. "We didn't harm the client. The judgment was flawed when it came to us from Nicaragua, so we didn't do them any harm."

But to Narro of UCLA, arguments about the documents merely obscure the plight of the plaintiffs, many of whom he said suffer real chemical harms from working with pesticides. "There were similar problems with harsh chemicals used in the fields in California decades ago," he said. "You can't sweep injustice under the rug forever."

For the plaintiffs' lawyers, the question of what discipline the courts will impose is the most pressing issue at hand.

"Suspension is really ineffective," Little said, noting that Girardi and Lack's firms could continue litigating cases even if the two lawyers were excluded from the courtroom.

"I set out to draft some sanctions that would have some effect," Little told the panel. Among them: an audited restructuring of Lack's firm to better control documents and an ethics speech Lack must deliver to his law school alma mater, Loyola Law School in Los Angeles.

The "elephant in the room" is the State Bar, Fletcher noted, because the lawyers for Girardi and Lack both sought to keep the circuit discipline light so that subsequent discipline by bar authorities won't do worse damage.

Said Little: "Mr. Nolan wants to be able to argue to the State Bar that there was no formal discipline. The word 'suspension' is not in [my report], so they can argue there was no suspension.

"And there are mitigating factors. Mr. Girardi has a very substantial record of very valuable service to the community."

john_roemer@dailyjournal.com