PARENTING, THE POPE, AND PROFESSIONALISM: *CILA V. DOJ* AND THE ETHICS OF ATTORNEY APOLOGIES

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October 16, 2015

I. INTRODUCTION TO APOLOGIES

A. Parenting

1. Teaching the art of apology helps younger children realize what it's like to stand in someone else's shoes—empathy, in other words.

2. Some easy ways to go about this: (a) set a good example; (b) put their feelings into words: and (c) ask for specifics.

B. The Pope

1. Papal apology in Bolivia (July 9, 2015) – "Some may rightly say, 'When the Pope speaks of colonialism, he overlooks certain actions of the Church.' I say this to you with regret: many grave sins were committed against the native peoples of America in the name of God. My predecessors acknowledged this, CELAM, the Council of Latin American Bishops, has said it, and I too wish to say it. . . . I humbly ask forgiveness, not only for the offenses of the Church herself, but also for crimes committed against the native peoples during the so-called conquest of America. Together with this request for forgiveness and in order to be just, I also would like us to remember the thousands of priests and bishops who strongly opposed the logic of the sword with the power of the Cross. There was sin, a great deal of it, for which we did not ask pardon. So for this, we ask forgiveness, I ask forgiveness. But here also, where there was sin, great sin, grace abounded through the men and women who defended the rights of indigenous peoples."

2. Junípero Serra (1713-1784) – born in Petra, Majorca (Spain), buried in Carmel

   a. founded nine of 21 CA missions - San Diego, Carmel, Padua, San Gabriel, San Juan Capistrano, San Francisco, Santa Clara, San Buenaventura.

   b. 1780 writing - "that spiritual fathers should punish their sons, the Indians, with blows appears to be as old as the conquest of the Americas; so general in fact that the saints do not seem to be any exception to the rule."

   c. On the other hand - Serra pushed for laws to protect natives from some abuses by Spanish soldiers.

3. Canonization as a Saint (Sept. 23, 2015) –

   a. "Junípero sought to defend the dignity of the native community, to protect it from those who had mistreated and abused it. Mistreatment and wrongs which today still trouble us, especially because of the hurt which they cause in the lives of many people."

   b. July 1 feast day – patron saint of California, Hispanic Americans, and religious vocations.

   c. Note statute in hometown as a thank you from the people of California.

C. Dispute Resolution

1. Values - help resolve disputes, reach agreements, and restore relationships

2. Manner – accept responsibility, express genuine regret, offer reparation/ restitution, make it timely.

3. Examples – employment, divorce, criminal matters, attorney-client disputes.

4. Procedural/Evidentiary issues –

   a. Apology may be protected under Federal Rule of Evidence (FRE) 408.

   b. Apology may be construed or used as a non-hearsay admission by a party-opponent under FRE 801(d)(2) or, if declarant is unavailable as a witness, as a statement against interest per FRE 804(b)(3).

5. For further reading, see Deborah L. Levu, Note, The Role of Apology in Mediation, 72 N.Y.U. L. Rev. 1165 (1997) – compare tactical, explanatory, formalistic, and "happy ending" apologies.

6. For further information, note organizations, trainings, websites, and classes.

II. CONFESSION OF ERROR – A SPECIFIC TYPE OF ATTTORNEY APOLOGY

A. Background

1. Rough definition – (government) attorney admits to a court a mistake or misconduct that improperly supported winning a prior decision (usu. on appeal).

2. Long history by Solicitor General (SG) before Supreme Court – beginning with SG and later President and Chief Justice Taft in 1891; every SG has done this, roughly two or three times per Supreme Court term.

3. Derived from duty to court and justice overcoming duty of zealous advocacy – done to "ensure the proper and fair administration of justice[,]" "it is of the utmost importance that we correct mistakes when we make them."

4. Note especially "the traditionally special relationship between the Supreme Court and the Solicitor General which permits the Solicitor General to make broad use of judicial notice and commands special credence from the Court[.]" *Hirabayashi v. United States*, 828 F.2d 591, 602 (9th Cir. 1987).

5. See Neal Kumar Katyal, The Solicitor General and Confession of Error, 81 Fordham L. Rev. 3027 (2013); Carol W. Lewis and Stuart C. Gilman, The Ethics Challenge in Public Service 185-86 (3d ed. 2012); Alexander L. Meritt, *Confession of Error by Administrative Agencies*, 67 Wash. & Lee L. Rev. 1197 (2010); David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2117 (1994).

6. Neal Katyal, Acting Solicitor General, Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases (May 20, 2011) (DOJ blog post) - admit failure to inform the Supreme Court of a key report that undermined the federal positions in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), notwithstanding the Solicitor General's "special credence" before and "duty of absolute candor" to the Supreme Court.

B. Why Should the US Apologize? Federal Fisc Protection Trumps the Truth

1. "Strategic Objective 2.6: Protect the federal fisc" – U.S. Dept. of Justice, Envt. & Natural Resources Division ("ENRD"), FY2013 Performance Budget Congressional Submission 2.

2. "The effectiveness of our defensive litigation" concerning tribal trust litigation is measured in part by "savings to the federal fisc." – *Id.* at 11.

3. "Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic." *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754 (1997), *rev'd sub nom. on other grounds, Suess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008).

4. "In its response, the Government quotes this text but carefully omits the patently relevant portion . . . . To note that the Court is highly dismayed with Defendant's brief in this regard is an understatement. It flatly will not countenance any such misbehavior in the future." – *Entergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 744 n.4 (2010).

5. Affirm federal attorney sanction for misquoted judicial opinions in brief to conceal adverse authority, "'which intentionally or negligently misled the

court'" – *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1355-57 (Fed. Cir. 2003).

6. State secrets doctrine established in *United States v. Vinson* (1953) based on federal misrepresentation to shield possible embarrassment or liability for poor maintenance regarding B-29 crash – Allen Pusey, *A State Secrets Doctrine is Born*, ABA Journal, March 2015, at 72.

C. Why Else the US Does Things that May Warrant Confession? It Wants to Win

1. Report and recommendation of Hearing Committee No. 9, *In re Kline* (D.C. Court of Appeals Bd. On Professional Responsibility, No 11-BD-007 (2012) – sanction federal prosecutor for violating duty to disclose exculpatory evidence.

2. Opinion & Order, *National Immigration Project of the National Lawyers Guild v. U.S. Dept. of Homeland Security*, No. 11-3235 (S.D.N.Y. Feb. 7, 2012) – finding in a FOIA case that the Office of Solicitor General ("OSG) had made an unfounded factual representation of an established federal policy to the Supreme Court in *Nken v. Holder*, 129 S.Ct. 1649 (2009), which the Court expressly relied on for its decision regarding alien removal.

D. Examples of Judicial Findings of Federal Misrepresentations in Indian Cases

1. *Assiniboine & Sioux Tribes of Fort Peck Reservation v. United States*, 16 Cl. Ct. 158, 164-65 (1989) – impose sanction for federal factual misrepresentation.

2. *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 21 CI.Ct. 176, 192 (1990) – "Such an assertion [by the United States], we find, is shocking, insofar as it is a gross misstatement of the law."

3. *Mescal v. United States*, 161 F.R.D. 450, 454-55 (D.N.M. 1997) – sanction federal attorney sua sponte for obstruction of justice.

4. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 135-37 (2004) – "Contrary to defendant's importunings, this court plainly has the authority to issue such orders" to require preservation of relevant evidence, contrary to US position in two prior cases.

5. *Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611, 613-14 – reject asserted absolute privilege against disclosure to tribes of their own trust asset management information, noting statutory language, prior loss on issue, and contrary prior position.

6. *Osage Tribe v. United States*, 75 Fed. Cl. 462, 468 69, 480 81 (2007) – reject argument previously rejected six times by the Supreme Court and the Federal Circuit that failure to collect money limits liability for failure to accrue interest,

noting that "Defendant's argument would . . . 'reward the government for inaction that violates the government's fiduciary duties to collect funds and accrue interest.'"

7. *Osage Tribe v. United States*, 93 Fed. Cl. 1, 6-7 (2010) – reject assertion that the United States is not bound by prior rulings in case on breach of trust duties, noting that "[t]he court is dismayed by defendant's approach to the resolution of plaintiff's claims".

8. *Colorado River Indian Tribes v. United States*, __ Fed. Cl. __, __ (2015) – "Although defendant's argument has been rejected numerous times in the past, as discussed below, defendant, once again in this case, asserts that this court is divested of jurisdiction upon filing of a complaint in a District Court "regardless of the filing sequence of Plaintiff's district court case and this case."

9. *Quapaw Tribe v. United States*, __ Fed. Cl. __, __ (2015) – "The Court will not employ a twisted interpretation of the 1833 Treaty to allow the Government to escape a promise it so clearly made. The idea that Congress would appropriate funds for educational payments each year without actually paying the funds to the Tribe would make the Treaty obligation illusory and give the Tribe nothing. . . . . Reading the Treaty as the Quapaw Tribe would read it (or indeed as any reasonable person would read it), the Government has breached its promise to make annual educational payments, and should be held accountable."

10. *Id.* – "A 2011 case in this Court involving nearly identical facts is dispositive of Defendant's position. There, in a comprehensive opinion, the Court rejected the Government's claim preclusion defense . . . . Defendant's counsel in *Round Valley* was the same as in this case, yet Defendant did not even disclose or discuss *Round Valley* in its brief to the Court."

E. Special Category – Federal Denial of Fiduciary Duties in Indian Trust Cases – At least six times over the last 35 years, the Supreme Court and federal appellate courts have rejected Executive Branch arguments that there is essentially no enforceable federal-tribal fiduciary relationship because the United States is not subject to any duty that is not expressly spelled out in statutes or regulations.

1. *Navajo Tribe v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980) – "Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . ."

2. *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981) – reject that "a federal trust must spell out specifically all the trust duties of the Government"

3. *Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001) – per M*itchell II*, "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law"

4. *United States v. White Mountain Apache Tribe*, 537 U.S. at 476-77 (2003) – affirm trust duty even though relevant law did not suggest such a mandate.

5. *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004) – under *White Mountain Apache*, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation"

6. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011) – "We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed."

7. *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 738 (2011) – "Defendant would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable . . . , that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics. . . . . Were the court convinced even to attempt this tumbling run, it almost certainly would end up flat on its back and thereby garner from the three judges reviewing its efforts a combined score of "zero"—not coincidentally, precisely the number of decisions that have adopted defendant's position."

8. *Sisseton Wahpeton Oyate of Lake Traverse Reservation v. Jewell* (D.D.C. Sept. 17, 2015) – "Defendants argue that they owe no common law fiduciary duty to Plaintiffs . . . ." "Defendants' arguments that Plaintiffs' claims are improperly based on an inherent fiduciary duty owed by the government to the Plaintiffs are misguided. Plaintiffs are entitled to seek enforcement of their statutory rights provided for in the 1994 Act."

F. Special Category – Fiduciary Standards Versus Arbitrary & Capricious Review

1. Consistent federal assertion contrary to fifteen prior decisions by the Supreme Court and lower federal courts.

2. *See, e.g., Jicarilla*, 100 Fed. Cl. at 739 (quoting, citing, and discussing prior decisions); *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1, 20 & n.28 (2009) (same, noting, "it is often observed that the duty of care owed by the United States 'is not mere reasonableness, but the highest fiduciary standards'") (citation omitted), *mandamus denied on other ground sub. nom, In re United States*, No. 09-908 (Fed. Cir. Aug. 3, 2011).

III. *CALIFORNIA INDIAN LAW ASSOCIATION V. U.S. DEPARTMENT OF JUSTICE*

A. Katyal Speech

1. Neal Katyal, Acting Solicitor General, Presentation to Federal Bar Association 36th Annual Indian Law Conference (April 8, 2011) (YouTube video) – apologize for material misrepresentations in *United States v. Sandoval*, 231 U.S.

28 (1913), and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and provide general information on *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011), and *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), which were both then pending before the Supreme Court.

2. One week before oral argument in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), where US again argued no fiduciary duties to Indian tribes.

3. One month before published Japanese Internment Confession of Error.

B. FOIA Request

1. August 2011 – CILA submitted FOIA request to OSG for records;

   a. Concerning content and preparation of Katyal Speech, including drafts or discussions of it, and correspondence from, to, or within the OSG concerning development, preparation, text, or delivery of the Speech.

   b. Records sought for October 2011 CILA conference ethics presentation on *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

2. April 2012 – OSG responded with 78 pages of records:

   a. 34 pages – completely redacted;

   b. 11 pages – copies of a public brochure and an agenda for the conference where the Katyal Speech was presented.

   c. 33 pages – partly redacted emails, most involving the ASG, including emails with MSU professor Matthew Fletcher, who had solicited the Speech. Those reflected that the ASG had recorded the Speech and sent it to Fletcher for presentation at the conference.

   ⇨ No copy of text or recording of the speech was disclosed – "Though Katyal was clearly reading from written remarks, they were apparently never published or posted online." Tony Mauro, *Suit Seeks Docs on SG Apology*, The National Law Journal, April 20, 2015.

   ⇨ Redaction reasons – work-product privilege and deliberative process privilege under FOIA Exemption Five, 5 U.S.C. § 552(b)(5), and FOIA Exemptions Two and Six, id. §§ 552(b)(2) and (6) (concerning "internal personnel rules and practices" and "invasion of personal privacy")

3. June 2012 – CILA filed administrative appeal to DOJ's Office of Information Policy (OIP) because "the text and drafts of and communication about a public speech consisting of an apology regarding prior cases and public information about pending cases cannot constitute either attorney-work product . . . or a deliberative process regarding the announcement of a federal policy."

4. September 2012 – OIP remanded for further processing of responsive records.

5. February 2013 – OSG disclosed only less redacted versions of two emails, which disclosed the FedEx number for the delivery of the speech recording.

6. April 2013 – CILA filed a second appeal because there was still no legal or factual basis for the redactions.

7. CILA never received a response, though DOJ in Answer asserted that it had responded by letter in April 2013.

C. FOIA Lawsuit

1. April 2015 – Complaint

2. August 2015 – Answer

3. October 2015 – pending settlement:

   a. DOJ will prepare and file with stipulation a transcript of the speech;

   b. DOJ will pay CILA $200 (half of the complaint filing fee).

   c. Settlement will waive claims for fees or costs and avoid privilege claims for speech drafts.

IV. PROFESSIONALISM (competence, communication, candor, plus settlement)

A. ABA Model Rules of Professional Conduct (2013)

1. *Rule 1.1, Competence* – "A lawyer shall provide competent representation to a client."

2. *Rule 1.4(a), Communication* – "A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information

3. *Rule 3.1, Meritorious Claims and Contentions* – "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

4. *Rule 3.3(a), Candor Toward the Tribunal* - A lawyer shall not knowingly: "(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel[.]"

5. *Rule 4.1, Truthfulness In Statements To Others [Besides Clients]* – "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited . . . ."

B. California Rules of Professional Conduct (Jan. 1. 2015)

1. *Rule 3-110(A), Failing to Act Competently* – "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

2. *Rule 3-500, Communication* – "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

3. *Rule 5-200(B), Trial Conduct* – In presenting a matter to a tribunal, a member "shall not seek to mislead the judge, judicial officer, or jury by an artifice of false statement of fact or law."

4. For truthfulness in statements to others – "gross misconduct in respect of the subject of the Model Rule [4.1] is already subject to discipline under Business and Professions Code sections 6068(d) and 6106. . . . To the extent Model Rule 4.1 is intended to assure that lawyers be candid and complete in dealing with opposing parties, the law of civil liability for incomplete statements and disclosures . . . is well established." State Bar of California Commission for the Revision of the Rules of Professional Conduct – Rules and Concepts that Were Considered, But Are Not Recommended for Adoption 19 (July 2010).

5. State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2009-176 – Applying California RPC 1-500 (Agreements Restricting a Member's Practice) and 3-510 (Communication of Settlement Offer) and Business and Professions Code Sections 6068(a), (b), (c) and (h), and 6103.5, regarding fee-waiver settlements:

   a. A lawyer must inform the client of a fee-waiver settlement offer and consummate the settlement in accordance with the client's wishes even if it reduces the likelihood of recovering some or all of his or her fees.

   b. A lawyer does not violate any ethical obligation by recommending or conveying a fee-waiver settlement offer in a given case.

c. A lawyer does not violate any ethical obligation by recommending or conveying fee-waiver settlement offers in cases generally.

V. CONCLUSIONS

A. "Great nations, like great men, should keep their word." – *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., diss.).

B. "Who will protect us from our protector?" – Peterson Zah