

**Presentation Outline: Ethics, Lies & Videotape: *Chevron v. Donziger***

Presenter: Virginia Fitt, Senior Counsel, GlaxoSmithKline

Virginia Fitt previously was an Associate with Gibson, Dunn & Crutcher LLP in Orange County, California, where she played a key role on the investigative and litigation teams for the firm's largest client and highest-profile case, representing Chevron in *Chevron v. Donziger* and associated cases. Virginia Fitt is licensed in California, a 2010 Duke University School of Law graduate, and was named to the *Legal Elite* list for Corporate Counsel by *Business North Carolina* in both 2015 and 2016.

- I. Introduction and Case Background
  - a. TexPet's operations in Ecuador, the development of the Consortium for oil operations, consolidation under Petroecuador (the government-owned oil extraction corporation), and the exit and remediation of TexPet.
  - b. Lawsuit Round 1: Forum *non conveniens* dismissal in the United States
- II. The Lago Agrio Plaintiffs
  - a. ABA Model Rule 1.2 – Client Lawyer Relationship
    - i. Lago Agrio Plaintiffs' representation agreement with Bonifaz
      1. Bonifaz terminated, subsequently sanctioned and fined meritless claims (plaintiffs never had cancer, failure to investigate claims)
    - ii. Lago Agrio Plaintiffs' representation agreement with Fajardo
    - iii. Frente de Defensa de la Amazonia (FDA)
  - b. ABA Model Rule 1.4 – Communication, ABA Model Rule 1.7 – Conflicts of Interest
    - i. Client group in conflicting positions.
    - ii. Characteristics of the client group
    - iii. *Aguinda v. Chevron* – Maria Aguinda video
  - c. ABA Model Rule 1.5 – Fees
    - i. Waterfall Agreement – Funders
    - ii. Interests in the Judgment
- III. *Crude*: The Documentary
  - a. ABA Model Rule 1.6 – Confidentiality
    - i. Video Clips
  - b. ABA Model Rule 3.5 – Impartiality & Decorum of the Tribunal
    - i. Richard Cabrera, neutral court-appointed independent expert
      1. Stratus Consulting ghostwriting
    - ii. "Judicial pressure" campaign
      1. ABA Model Rule 3.6 Trial Publicity
    - iii. Nicolas Zambrano, Ecuadorian judge who was on rotation at the conclusion of the trial and issued the final judgment (*Sentencia*) in Ecuador totaling \$19 billion USD
    - iv. Alberto Guerra, former case judge and plaintiff paid "ghostwriter" to Nicolas Zambrano
- IV. Commencement of United States Section 1782 Discovery Actions
  - a. ABA Model Rule 1.16 – Declining or Terminating Representation
    - i. Constantine Cannon's Withdrawal

- ii. The Crime-Fraud Exception to attorney-client privilege
      - 1. Revisit ABA Model Rule 1.6
    - iii. Discovery Sanctions for Failure to Comply with Court Orders
      - 1. ABA Model Rule 3.4 – Fairness to Opposing Party and Counsel
- V. RICO Trial in the Southern District of New York
  - a. ABA Model Rule 3.7 – Lawyer as Witness
  - b. Withdrawal of Counsel – Keker van Nest, Emery Celli, Smyser Kaplan & Veselka
    - i. Fee Non-Payment vs. Deliberate Non-Payment of Fees
    - ii. Model Rule 1.3 – Diligence (Cancellation of Numerous Relevant Depositions)
- VI. The Fall Out from the Collapse of the Fraud
  - a. Third Party Litigation Funders – Burford, DeLeon
    - i. Ethical issues raised by third party litigation funders: disclosure, client control, confidentiality, client awareness
  - b. Consultants – Stratus, H5
  - c. Patton Boggs
    - i. “Fall of the House of Patton Boggs”
    - ii. Merger Liability for the Firm
    - iii. Two Attorneys Subjected to Depositions, Not Included in the Merger (Eric Westenberger, James Tyrrell)
  - d. Attempts to Collect in Other Jurisdictions
    - i. Bilateral Investment Treaty Arbitration
    - ii. Canada
    - iii. Argentina
    - iv. Brazil
    - v. Ecuador – Reduced to \$9.5 billion on appeals just before RICO trial
  - e. Ecuadorian Counsel – Local lawyer involved in fraud, Pablo Fajardo, fired by Frente de Defensa de la Amazonia in August 2016
  - f. Judges who participated in fraud: Nicolas Zambrano, Alberto Guerra
- VII. A Review of Ethical Failures: A Look at ABA Model Rule 8.4

## ETHICS, LIES & VIDEOTAPE: *CHEVRON V. DONZIGER*

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*“The problem, my friend, is that the effects are potentially devastating in Ecuador (apart from destroying the proceeding, all of us, your attorneys, might go to jail.”<sup>1</sup> – E-mail from Ecuadorian plaintiffs’ attorney Julio Prieto to Ecuadorian and U.S. co-counsel Juan Pablo Saenz, Pablo Fajardo and Steven Donziger.*

Outside of legal publications that follow the careers of excellent lawyers, the brilliant brief-writing, strong oral argument, or diligent preparation of lawyers and their staff members rarely overtake the story of the case in the national media. Excellent lawyers often endeavor to keep their clients’ story—not their own—at the forefront of any public focus on the case.

The story of the cases surrounding a dispute over oil extraction in a region in eastern Ecuador (*El Oriente*, and specifically Lago Agrio) was eventually overshadowed by the stories of the attorneys, on opposite sides and for opposite reasons. The case<sup>2</sup> that started as a collection of indigenous persons and other individuals from Ecuador against Chevron Corporation eventually became the case of *Chevron v. Donziger*, a RICO action filed by Chevron in the Southern District of New York against plaintiffs’ attorney Steven Donziger, his co-counsel, his clients and his litigation consultants.<sup>3</sup>

As plaintiffs’ attorney Steven Donziger took center stage, he followed in the footsteps of his predecessor on the case and one-time mentor, Cristobal Bonifaz, who was sanctioned and fined in a U.S. court for failing to investigate his clients’ false claims that they had contracted cancer due to Chevron’s actions.<sup>4</sup> Chevron had learned that three of Bonifaz’s plaintiffs had never had cancer at all.<sup>5</sup>

Donziger made the questionable decision to participate in a documentary by filmmaker Joe Berlinger, *Crude*. Donziger may have initially believed that his cause was just: a suit against Big Oil, ostensibly on behalf of indigenous Ecuadorians in the rainforest, over health concerns and pollution that they may have originally believed could be attributed to a company purchased by Chevron. And if he could make a billion dollars and a name for himself, all the better. He also had a theory on asymmetric

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<sup>1</sup> Michael D. Goldhaber, *Inside Chevron’s Discovery Campaign in Ecuador*, THE AMERICAN LAWYER, July 30, 2014 (citing e-mail from Julio Prieto to Pablo Fajardo, Juan Pablo Saenz, and Steven Donziger).

<sup>2</sup> There are actually dozens of cases associated with the same underlying fact pattern, which have gone through a number of iterations throughout the years. For simplicity, the cases will be collectively referred to as a single consolidated name, “*Chevron v. Donziger* (No. 1:11-cv-00691-LAK-JCF (S.D.N.Y. Mar. 4., 2014) (trial court opinion) and associated cases.”

<sup>3</sup> Some of the original targets in the RICO action were subsequently dropped from the case after discovery or settlement with Chevron.

<sup>4</sup> Roger Parloff, *Three Human Rights Lawyers Fined in Chevron Case*, FORTUNE.COM, Oct. 20, 2007, <http://fortune.com/2007/10/20/3-human-rights-lawyers-fined-in-chevron-case/>.

<sup>5</sup> *Id.*

litigation he wanted to test: Donziger believed that human rights lawyers for poor clients could force settlement with large corporations through a sustained public relations campaign that threatened more harm to the corporation than a settlement, regardless of the claims. Participation in a documentary, celebrity endorsements, red carpet events focusing on his case, black tie fundraisers, and media stunts from Washington, D.C. to Chevron shareholders meetings to the homes of Chevron executives, and mass demonstrations intended to make the judges fear for their personal safety were all part of that campaign.<sup>6</sup>

When his case encountered setbacks or problems, Donziger did whatever it took to “solve” them. When the parties’ separate chemical analyses of environmental sites weren’t going well, he ordered his experts to stop testing for certain compounds.<sup>7</sup> When his separate analysis continued to yield unfavorable results, he engineered a “global inspection” process with an independent, court-appointed expert. Donziger then, in his own words, went over to the “dark side” and “made a bargain with the devil”—he co-opted the supposedly “independent” expert Richard Cabrera via bribery and secretly made him a part of the plaintiffs’ team.<sup>8</sup> Donziger didn’t believe that the expert was sophisticated enough to help him prove his case—so he contracted with American scientific consulting firms and others to ghostwrite the “independent expert’s” report and its many appendices.<sup>9</sup>

To give the “independent” expert’s report an air of authenticity, the *same consulting firms which drafted the original report* then drafted a subsequent report strategically criticizing parts of the report. The layers of cover-up continued: the consultants then drafted a response, ostensibly from the independent expert.<sup>10</sup> When damage estimates from the consultants were coming in too low, Donziger drove them up—to an astonishing \$27 billion.<sup>11</sup>

This system of bribery and ghostwriting worked so well for the independent expert’s report that Donziger then redeployed that same system for the judgment: his team bribed the judge on the case, then wrote the judgment itself, and paid a second judge to “dress up” the judgment they’d written to make it sound more official.<sup>12</sup>

Underlying this stunning chain of events was the assumption that U.S. legal ethics rules did not apply extraterritorially—Ecuador was different. A country with a “weak” judicial system, a strong executive branch willing to exert significant control over the judiciary, and a culture of bribery in the judicial system in Ecuador invited these actions, in Donziger’s mind. It was simply how it was done in Ecuador. And besides, Donziger believed that the case (at least for review on its merits) would never return to the United States, and there was no litigation discovery in Ecuador.

Donziger was wrong, of course: Chevron’s attorneys found a way to obtain discovery in the United States under 28 U.S.C. § 1782. Chevron won access to the outtakes from the documentary and

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<sup>6</sup> See e.g., *Chevron v. Donziger* (No. 1:11-cv-00691-LAK-JCF, at 17-49 (S.D.N.Y. Mar. 4., 2014) (trial court opinion).

<sup>7</sup> *Chevron v. Donziger*, No. 1:11-cv-00691-LAK-JCF, at 50-72 (S.D.N.Y. Mar. 4., 2014) (trial court opinion).

<sup>8</sup> *Id.* at 72-95.

<sup>9</sup> *Id.* at 95-115.

<sup>10</sup> *Id.* at 111-114.

<sup>11</sup> *Id.* at 41-50; *id.* at 78; *id.* at 179-82.

<sup>12</sup> *Id.* at 218; *id.* at 237-40; *id.* at 279-80.

wound up with over 600 hours of raw footage including discussions of case strategy, startling admissions and a plan to corrupt the judicial process that were all left on the cutting room floor.

As Donziger's case unraveled, he struggled even harder to protect his potential billion dollar windfall. But every attempted cover-up led to continued ethics violations, now in the United States, and consequences that benefited Chevron. Chevron won access to his hard drives after Donziger attempted to obstruct the discovery process, sacrificing attorney-client privilege. His local counsel in one U.S. jurisdiction withdrew, citing "ethical reasons", because he could not act in furtherance of a fraud or crime.

As Chevron's lawyers continued to reveal the story of the underlying fraud, funders fled. Subsequent law firms withdrew from representation in the RICO case for deliberate nonpayment. Key third party litigation funders eventually settled with Chevron, claiming that they had been deceived by Donziger. Many of his consultants named in the RICO suit also settled with Chevron and denounced the case. Patton Boggs, Donziger's key law firm backer, settled with Chevron. Meanwhile, Donziger testified in his trial, continuing to protect his lies with vague responses and incredible assertions that he could not recall important facts. Judge Kaplan in the Southern District of New York issued a scathing 485-page ruling in favor of Chevron, issuing finding of facts against Donziger that constitute grave violations of legal ethics, Ecuadorian law, U.S. law or both. Donziger's devastating loss was confirmed at the Second Circuit Court of Appeals. Donziger's enforcement cases have been lost or stalled out in Canada, Argentina and Brazil.

As the District Court noted in its opinion in *Chevron v. Donziger*, "Justice is not served by inflicting injustice. The ends do not justify the means." The downfall of Donziger's Ecuadorian fraudulent attempts to collect from Chevron also demonstrates that ethical violations can result in catastrophic consequences—for the attorneys, those who participate in unethical conduct, and for the clients, who were used as pawns in an international fraud. Donziger will likely never see a dime from the \$27 billion judgment he originally won (subsequently reduced to \$9 billion by Ecuador's highest court) and his colleagues have been dismissed by the plaintiffs' group. In February 2017, the National Review took up the call for Donziger's prosecution, saying: "Having reported on this case for a few years now, I believe the time long ago passed for this entire madness to end, except for one aspect. Donziger needs to be prosecuted."<sup>13</sup>

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<sup>13</sup> Jack Fowler, "(N)O Canada!", National Review, Feb. 7, 2017, <http://www.nationalreview.com/corner/444690/chevron-steven-donziger-canada>.