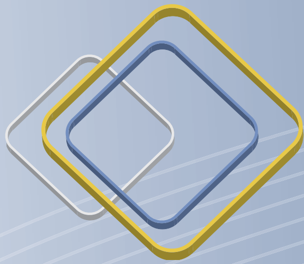

Lawyers' Professional Liability UPDATE

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Privilege

A Client's Refusal to Waive the Attorney-Client Privilege May Provide a Defense

***Dietz v. Meisenheimer & Herron*, 177 Cal. App. 4th 771, 99 Cal. Rptr. 3d 464 (2009)**

The case of *Solin v. O'Melveny & Myers, LLP*, 89 Cal. App. 4th 451 (2001) was urged as the basis for reversing a $260,000 judgment entered in favor of a referring lawyer for breach of an agreement to pay him 25 percent of the fee recovered. Although the joint client had waived the privilege as to the negotiation of fees, fee matters and communications on tax issues, there were four areas where the client did assert the privilege. The trial court balanced the permitted disclosure and privileged areas, upholding the lawyer's defense as to fraud and allowing the others claims to go forward. The appellate court agreed:

> *Solin* does not prohibit a trial court from considering the interests of a plaintiff in bringing a potentially meritorious claim that is not premised on confidential information, in the course of determining whether a defendant's right to present a defense premised on confidential information requires dismissal of the claim. On the contrary, in our view, a trial court is required to consider such competing interests before taking the "drastic action" of dismissing a plaintiff's claim.

The court identified four factors to consider. First, the evidence at issue must concern the client's confidential information, which the client insists remains confidential. Second, the confidential information at issue must be "highly material" to the lawyer's defenses. Third, before considering the dismissal, the trial court should determine whether *ad hoc* measures are available, such as "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings." Finally, the court should determine whether allowing the action to proceed would be "fundamentally unfair." The court explained that this is "an extension of the principle that, "'the privilege which protects attorney-client communications may not be used both as a sword and a shield.'" Here, the trial court appropriately balanced the factors.

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Conflicts & Discipline

Attorney Who Represented Feuding Family Members Gets Six-Month Suspension

In re Botimer, 166 Wash. 2d 759, 214 P.3d 133 (2009)

In summary, an attorney violated the conflicts rule by representing multiple family members without obtaining informed consent to joint representation. When a dispute arose among the family members, the attorney also violated the confidentiality rule by revealing confidences across the line of dispute.

The Washington Supreme Court suspended attorney Larry Botimer for six months based on his conduct in representing multiple members of the Reinking family: Ruth, her son Jan, and Jan's wife. For a number of years, Botimer prepared tax returns for all three. Botimer also represented all three in matters regarding Magnolia Health Care Center, Inc. (Magnolia), which Ruth owned and leased to Jan. Finally, Botimer advised Ruth regarding another company, Alternative Care Corporation, which was run by another son, James. Ruth guaranteed Alternative Care Corp.'s loans, using her interest in Magnolia as collateral.

A dispute arose when James disagreed with the others about ownership in Alternative Care Corp. Botimer represented Ruth and Jan in negotiations with James on this issue. Another dispute later arose following the sale of Magnolia. Jan expected to receive proceeds from the sale and Botimer expected his attorney fees to be paid out of the sale, but Ruth used the proceeds to satisfy her loan guarantees to Alternative Care Corp. Botimer then terminated his representation of Ruth and took various actions against her interests. He informed the United States Internal Revenue Service (IRS) of errors on Ruth's prior tax returns. Further, after Jan sued Ruth, James and Alternative Care Corp., Botimer provided Jan's lawyer with declarations, including information about Ruth's business affairs and her tax returns.

The Court held that Botimer had violated two ethical rules. It first held that Botimer violated the concurrent client conflicts rule by failing to obtain informed consent from Ruth, Jan and his wife before representing them in various business arrangements that had the potential of resulting in conflicts. One such arrangement was the Magnolia lease. Botimer also violated his duty of confidentiality twice by revealing Ruth's confidences to Jan's attorney and to the IRS without Ruth's consent. Botimer's first violation was not mitigated by the fact that the judge in the underlying dispute between Jan and his family members admitted Botimer's declarations into evidence. Nor was Botimer aided by the judge's apparent finding that Ruth had waived the attorney-client privilege as to the information in Botimer's declarations. Botimer argued that this finding collaterally estopped the Court from finding that he violated the duty of confidentiality, but the Court noted that privilege issues are distinguishable from confidentiality issues, and therefore that collateral estoppel did not apply.

Botimer argued that his revelation of Ruth's confidences to the IRS was permissible: (1) under the tax code, (2) to mitigate Botimer's risk of perjury prosecution, and (3) under the crime/fraud exception to the confidentiality rule. The Court noted that the tax code merely requires tax preparers to inform clients, not the IRS, of errors on tax returns. Further, Botimer was not at risk of perjury prosecution because when he signed the returns, he was unaware of any false information contained therein. Finally, the Court noted, the crime/fraud exception to the confidentiality rule only pertains to future crime or fraud.

This case demonstrates two common pitfalls of joint representation: the potential for conflicts between co-clients and issues of confidentiality between co-clients or former co-clients. Both hazards can and should be addressed in a conflicts waiver.

Fee Agreements / Fees

D.C. Court Holds "Earned On Receipt" Fees Unreasonable

In re Mance, 980 A.2d 1196 (D.C. 2009)

In summary, the District of Columbia Court of Appeals held that flat fees do not become attorney property, and therefore must be held in trust, until earned by the attorney. Moreover, it is unreasonable to consider a fee "earned" before the attorney renders any services.

Attorney Robert Mance agreed to represent a client for a flat fee. He deposited the fee into a client trust fund. The client terminated Mance early in the representation. Mance agreed to return the client's initial payment, but after waiting nearly three months to receive the money, the client filed a complaint with Bar Counsel. Although Mance returned the money a week later, Bar Counsel — despite the client's wishes — pursued the complaint.

Bar Counsel argued that Mance's conduct violated, *inter alia*, Rule 1.15(d) of the D.C. Rules of Professional Conduct. Rule 1.15(d) generally requires lawyers to treat fees paid in advance as client property until earned. The point at which client property becomes attorney property is significant because under Rule 1.15(a) of the D.C. Rules of Professional Conduct, the two types of property cannot be commingled. The Board of Professional Responsibility found that Mance's flat fee was not an advance fee and instead characterized it as attorney property which was earned on receipt. The Board therefore sanctioned Mance for commingling his own property (the flat fee) with client property by depositing the fee in a client trust fund. Bar Counsel took exception to this interpretation of Rule 1.15 of the D.C. Rules of Professional Conduct and appealed.

The District of Columbia Court of Appeals agreed with Bar Counsel, holding that a flat fee paid at the beginning of representation is an advance of unearned fees and under Rule 1.15(d) of the D.C. Rules of Professional Conduct, is client property until earned. Drawing from the Rule 1.5 of the D.C. Rules of Professional Conduct requirement that fees must be reasonable, the court held that it is unreasonable to consider a fee to be earned on receipt unless the fee is an engagement retainer designed simply to ensure the availability of the attorney.

Also significant to the court's decision was the policy embedded in Rule 1.7(b) of the D.C. Rules of Professional Conduct, which gives clients the right to terminate representation. This right, the court noted, could be impaired if clients considering termination were faced with the prospect of forfeiting a flat fee paid in advance. The court noted, however, that a flat fee is permissible to the extent the client consents to an arrangement whereby the attorney earns portions of the fee upon reaching certain milestones.

Finally, and because Rule 1.15(d) of the D.C. Rules of Professional Conduct was not clear on its face, the court made its holding prospective. The court therefore adopted the Board's recommended sanction of public censure based on a failure to timely return funds.

Some District of Columbia lawyers may be surprised by the court's holding in light of the language of Rule 1.15(d) of the D.C. Rules of Professional Conduct. This continues to be an issue in which the results can vary from jurisdiction to jurisdiction and are still unclear in a number of jurisdictions.

Jurisdiction

Patent Law and the Debate of Federal Jurisdiction Continues

***Minton v. Gunn*, 301 S.W.3d 702 (Tex. App. Fort Worth 2009)**

A client's infringement claim was precluded after the patent was held invalid based on the "on sale bar rule" because it was put into commercial use more than one year from when the inventor applied for the patent. The client contended the law firm failed to raise the "experimental use doctrine," which provides an exception where the use was primarily experimental as opposed to commercial. The court held that the defense did not apply because the evidence established a commercial intent. To reach that result, a divided appellate court rejected certain United States Court of Appeals for the Federal Circuit decisions as intruding into issues of state law:

> Not only is the federal law issue insubstantial, but the exercise of federal jurisdiction over this state-law malpractice claim would disturb the balance between federal and state judicial responsibilities. 'Legal malpractice has traditionally been the domain of state law, and federal law rarely interferes with the power of state authorities to regulate the practice of law.' To extend federal jurisdiction to every instance in which a lawyer commits alleged malpractice during the litigation of a patent claim (or other federal law claim) would 'constitute a substantial usurpation of state authority in an area in which states have traditionally been dominant.' . . . .
>
> [W]e decline to follow the Federal Circuit's decisions in *Immunocept* and *AMT* for two reasons: First, the Federal Circuit's holdings are not binding on this court. The Supreme Court of Texas has explained that: 'While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.' Second, we believe the Federal Circuit misapplied United States Supreme Court precedent by disregarding the federalism analysis that the Supreme Court has applied to restrict the scope of federal 'arising under' jurisdiction to a 'small and special category' of cases where a substantial question of pure federal law is in dispute that has precedential value. According to the United States Supreme Court, claims that are 'fact-bound and situation-specific,' such as the legal malpractice claim at issue

> in this case, do not fall within the scope of federal 'arising under' jurisdiction. While this result may conflict with Federal Circuit decisions, we are obligated only to follow the rules for determining 'arising under' jurisdiction established by the United States Supreme Court. [footnotes omitted].

Conflicts

Second Circuit Limits Use of Witness-Advocate Rule for Disqualification

***Murray v. Metropolitan Life Ins. Co.*, 583 F.3d 173 (2d Cir. 2009)**

In summary, the United States Court of Appeals for the Second Circuit took a fact-specific and critical approach in applying the witness-advocate rule to a motion to disqualify counsel. The court requires the moving party to establish that the lawyer's testimony will both prejudice the client and harm the integrity of the judicial system. Class action plaintiffs sued Metropolitan Life Insurance Company (MetLife) for violating securities laws when the company demutualized. Plaintiffs were MetLife policyholders. After nine years of litigation, plaintiffs moved to disqualify MetLife's counsel, Debevoise & Plimpton LLP, because the firm had represented MetLife policyholders during MetLife's demutualization. The district court disqualified Debevoise & Plimpton but the Second Circuit reversed, holding that plaintiffs had no attorney-client relationship with Debevoise & Plimpton and that the witness-advocate rule did not apply.

Prior to ruling on the disqualification issue, the district court ruled, in the context of a discovery dispute, that plaintiffs had an attorney-client relationship with Debevoise & Plimpton and were therefore not exempt from discovery based on the attorney-client privilege. The district court then expanded this finding of an attorney-client relationship into a finding of a disqualifying conflict.

On interlocutory appeal, the Second Circuit began by noting that because the district court's finding of an attorney-client relationship was inextricably intertwined with its finding of a conflict, both issues were subject to review. The Second Circuit held that plaintiffs never had an attorney-client relationship with Debevoise & Plimpton based on the well-settled principle that an attorney who represents a corporation does not thereby represent its constituents. The court also noted that merely being a beneficiary of an attorney's advice does not create an attorney-client relationship.

Plaintiffs further argued for disqualification based on the rule prohibiting a lawyer from being an advocate in a dispute in which he or she—or someone from his or her firm—is likely to be called as a witness. The Second Circuit noted that the concerns behind this rule are less serious in imputation cases where the potential witness is not acting as trial counsel but is merely a member of trial counsel's firm. The court noted that none of the likely Debevoise & Plimpton witnesses were trial counsel for MetLife. It also cautioned that this rule is subject to abuse as a tactical tool to disqualify counsel. The court therefore formulated a rule designed both to curb such abuse and to promote the policy behind the rule in imputation cases:

> [W]e now hold that a law firm can be disqualified by imputation only if the movant proves by clear and convincing evidence that [A] the witness will provide testimony prejudicial to the client, and [B] the integrity of the judicial system will suffer as a result.

Applying the first prong, the court stated that even if the Debevoise & Plimpton lawyers' testimony would be somewhat adverse to MetLife, the fact that the company desired to keep the law firm as counsel militated strongly against a finding of prejudice. Applying the second prong, the court noted that disqualifying Debevoise & Plimpton would be just as likely to harm the integrity of the judicial system as keeping the firm in place because judicial efficiency would be compromised.

The court's witness-advocate rule allows the court to make fact-specific inquiries but places a heavy burden on movants.

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