Lawyers' Professional Liability UPDATE

December 2010 Issue 11

Statutory Liability

Georgia Supreme Court Holds That Fair Business Act of 1975 Does Not Apply to Lawyers

State ex rel. Doyle v. Frederick J. Hanna & Associates, P.C., 287 Ga. 289, 695 S.E.2d 612 (Ga. 2010)

The Administrator of the Georgia Governor's Office of Consumer Affairs sent an investigative demand to a debt collection law firm regarding alleged abusive practices. The operative statute, the Fair Business Practices Act of 1975 (FBPA), enabled an objection to such a demand on the basis of a "legal right or privilege." Noting that the statute was silent as to lawyers, the Supreme Court of Georgia stated:

> '[N]o statute is controlling as to the civil regulation of the practice of law in this state. Only this Court has the inherent power to govern the practice of law in Georgia.' *GRECAA v. Omni Title Services*, 277 Ga. 312 – 13, 588 S.E.2d 709 (2003). In the exercise of that power, we administer the Rules of Professional Conduct . . .

Thus, the Supreme Court held: "the representation of clients by a law firm does not come within the FBPA even if certain services were provided by non-lawyers within the firm and could have been offered by a company without any attorneys. If Appellee's employees engaged in wrongful conduct against debtors, the remedy must be found outside the FBPA." The Court therefore did not need to address whether the application of the FBPA to the practice of law would violate the constitutional separation of powers doctrine.

Conflicts – Disqualification

New Jersey Supreme Court Elaborates on Meaning of "Substantially Related Matters" Under Former-Client Conflicts Rule

City of Atlantic City v. Trupos, 201 N.J. 447, 992 A.2d 762 (2010)

A law firm represented the city of Atlantic City in certain real estate tax appeals in 2006 and 2007. The firm discontinued that representation and later represented a number of taxpayers in an appeal of 2009 real estate tax assessments. The city moved to

Editor

Terrence P. McAvoy
222 North LaSalle Street
Suite 300
Chicago, Illinois
312-704-3281

Randal N. Arnold
Milwaukee, Wisconsin
414-276-6464

Thomas L. Browne
Chicago, Illinois
312-704-3576

Anthony E. Davis
New York, New York
212-935-1100

David A. Grossbaum
Boston, Massachusetts &
Providence, Rhode Island
617-213-7003

Peter R. Jarvis
Portland, Oregon
503-243-7696

Ronald E. Mallen
San Francisco, California
415-263-8112

Thomas P. McGarry
Chicago, Illinois
312-704-3506

Patrick P. Devine
Schererville, Indiana
219-864-4524

Victoria L. Orze
Phoenix, Arizona
602-337-5524

Thomas P. Sukowicz
Ft. Lauderdale, Florida
954-375-1142

Philip Touitou
New York, New York
212-471-6211

www.lawyeringlaw.com

HINSHAW & CULBERTSON LLP

disqualify the law firm under the former-client conflicts rule, asserting that the firm's former representation and current representation were substantially related. The New Jersey Supreme Court held that the matters were not substantially related.

For purposes of disqualifying a lawyer—which requires a balance between clients' right to counsel of their choice and safeguarding the highest professional standards—the Court held that matters are substantially related if: (1) the attorney received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client; or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation.

The New Jersey Supreme Court noted that the burden of establishing former client-status rests on the alleged former client, and that once that burden has been met, the burden of production shifts to the lawyer(s) facing disqualification to establish that the matters were not substantially related. But the burden of persuasion on this latter issue remains with the moving party.

The Court held that the city failed to meet its burden of persuasion because it did not point to any potentially harmful confidential information that it shared with the law firm, and because the firm's prior work for the city involved different properties, appraisers and relevant facts. The law firm did participate in the city's selection of a revaluation company that later participated in the 2009 tax assessments. But the Court held that absent evidence that the firm was privy to substantive information such as that company's valuation methodology, this fact did not establish that the firm received relevant confidential information during its representation of the city.

This is the first New Jersey case since the state overhauled its Rules of Professional Conduct in 2004 in which the meaning of "substantially related matters" is elaborated upon. Unlike jurisdictions that may focus on whether allegedly related matters involve overlapping issues of law, New Jersey's test largely focuses on whether the matters are substantially factually related. This test requires more than an appearance of impropriety and more than a mere inference that certain confidential information that could be used adversely was shared during the prior representation. The New Jersey Supreme Court's decision is consistent with cases in other jurisdictions that indicate that the court will not presume there is an actionable ethical violation without some basis to conclude that there is actual harm or prejudice.

Duty

New York Relaxes Privity Rule for Personal Representative's Legal Malpractice Claims

***Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 933 N.E.2d 718 (2010)**

In summary, in New York, estate planning attorneys may be sued for legal malpractice by personal representatives, but not by other third parties such as beneficiaries.

A decedent's estate sued defendants for legal malpractice, alleging that they had negligently failed to advise the decedent regarding transfer of ownership of his life insurance policy, resulting in enhanced estate tax liability for the estate. The trial court and the intermediate appellate court dismissed the action for lack of privity. The New York Court of Appeals reversed and reinstated the claim. The Court held that sufficient privity exists between a personal representative of an estate and an estate planning attorney for the former to bring a malpractice suit. In support of this holding, the Court cited N.Y. Est. Powers & Trusts Law § 11-3.2, as generally in accord. Section 11-3.2 provides that a personal representative may pursue any cause of action that the decedent could have pursued.

The Court made clear, however, that in the estate planning context, privity remains a bar to the malpractice claims of beneficiaries and other third parties. The Court noted that without such a bar, estate planning attorneys would be subject to too much uncertainty and limitless liability.

New York remains in the minority of jurisdictions by virtue of disallowing beneficiaries' legal malpractice suits. This opinion marks a move toward a somewhat more relaxed privity standard—at least for personal representatives.

Miscellaneous

Avoiding a Set-Up by Intervention

***Ternes v. Galichia*, 43 Kan. App. 2d 857, 234 P.3d 820 (Kan. App. 2010)**

In an underlying lawsuit brought by plaintiff for medical malpractice, plaintiff's law firm inadvertently named only a surgeon's professional corporation. Plaintiff dismissed the action, and with other counsel, refiled the case. The surgeon moved to dismiss the action against him individually based on the statute of limitations, and plaintiff sued the law firm. Because plaintiff did not oppose the surgeon's motion to dismiss in the underlying case, the law firm sought to intervene. The trial court allowed intervention, but granted the motion to dismiss.

The court held that the law firm had standing to intervene and to appeal because Kansas law permits intervention when a party has an interest in the property or the transaction that is the subject of the action. Here, the claim against the law firm was predicated on the underlying claim against the surgeon being time-barred. Although there was no precedent involving a lawyer charged with malpractice, the three essential factors were: (1) timely application; (2) a substantial interest in the subject matter; and (3) a lack of adequate representation. Once intervention is allowed, the intervening party has the same status as the plaintiff and can appeal, although plaintiff here did not. On the merits, the court found that the surgeon's active participation in the litigation constituted a waiver of the defense.

Privilege

No Attorney-Client Privilege for Corporation That Failed to Confirm In-House Attorney's Licensure Status

***Gucci America, Inc. v. Guess?, Inc.*, No. 09 Civ. 4373 (S.D.N.Y. June 29, 2010)**

In summary, a magistrate judge in the U.S. District Court for the Southern District of New York held that communications between a corporate client and its in-house attorney were not privileged because the lawyer was not actively licensed. The court held that the client had no reasonable basis for believing that the attorney was actively licensed because it had failed to investigate the attorney's credentials.

U.S. Magistrate Judge James L. Cott held that a corporate plaintiff's communications with its in-house attorney were not privileged because the lawyer was an inactive member of the State Bar of California. Judge Cott reached this conclusion under two separate attorney-client privilege tests.

The first test, which was based primarily on Southern District of New York (S.D.N.Y.) precedent, required that the attorney be "a member of the bar of a court." The court made clear that the lawyer's status as an inactive member of the California Bar did not meet this standard, and that it did not matter whether the attorney's inactive status was voluntarily or involuntary (*i.e.*, resulting from disciplinary sanctions). In reaching this conclusion, the court focused on the fact that in California the practice of law is explicitly limited to active members. Further, although the lawyer had been admitted in two federal districts in California, Judge Cott noted that such membership requires admission to the State Bar of California, and that therefore the attorney was constructively suspended from practice in both districts.

The second test was based on Supreme Court Standard 503, which requires that the client reasonably believed the attorney to be authorized to practice law. Judge Cott, relying on a factually similar S.D.N.Y. opinion written by U.S. Magistrate Judge Ronald L. Ellis, held that plaintiff did not have a reasonable basis to believe that the attorney was authorized to practice law because plaintiff never investigated the attorney's qualifications. Judge Cott held that at a minimum, the employer must confirm the attorney's licensure to practice law in some jurisdiction without suspension or pending disciplinary sanctions.

This opinion requires corporate clients to confirm the licensure of in-house lawyers in order to assert the attorney-client privilege as to communications with such attorneys. Although for some purposes an attorney-client relationship may be recognized between a client and a nonlawyer, Judge Cott's ruling forecloses this possibility for purposes of the attorney-client privilege. The reach of Judge Cott's decision is unclear, but this opinion suggests that it may be limited to situations involving corporate clients and in-house counsel.

Privilege

D.C. Circuit Clarifies Scope of Work Product Protection

***U.S. v. Deloitte LLP and Dow Chemical Co.*, 610 F.3d 129 (D.C. Cir. June 29, 2010)**

In summary, the U.S. Court of Appeals for the District of Columbia Circuit upheld a company's assertion of work product protection for three documents in the files of an outside independent tax auditor. The decision clarifies that the D.C. Circuit follows the majority of federal circuits adopting the "because of" test for work product, particularly regarding financial audits.

Dow Chemical (the Company) challenged a tax assessment by the federal government and hired an independent outsider auditor, Deloitte LLP (the Auditor), to review its tax returns. After litigation commenced, the government sought review of three documents that the Company had placed on its privilege log. The first was an analytical draft memo, prepared by the Auditor, which contained the thoughts and impressions of the Company's legal counsel. The second and third documents were given to the Auditor by the Company. One was a memo prepared by Company employees (an accountant and an in-house counsel); the other was a tax opinion prepared by the Company's outside counsel. The government issued a third-party subpoena to the Auditor for those documents. The Company and the Auditor both objected to producing the three documents, arguing that each was protected by the work product protection.

Without an *in camera* review, the district court denied the government's motion to compel, finding that all three documents were work product. The court held that the memo was work product, even though it was prepared by the Auditor, because the contents recorded the thoughts of the Company's counsel regarding the prospect of litigation. The district court also stated that as to the other documents, there was no waiver by giving the documents to the Auditor because the Auditor was not a potential adversary and it was not unreasonable for the Company to expect the Auditor to maintain confidentiality of the documents and the thoughts and impressions within them.

On appeal, the D.C. Circuit affirmed. The government argued that the work product doctrine protects only those documents prepared by a party or a party representative. The Company countered that despite the Auditor's independent nature, the memo was prepared using the mental impressions of the Company's attorneys. The court reaffirmed that the protection extends not merely to documents but also to "intangible" things, such as the attorney's mental impressions. Moreover, the proper analysis should consider not simply the maker of the document in question but rather whether the document contains mental impressions of the attorney, prepared in anticipation of litigation.

Second, the government argued that the document was not work product because it was prepared during an annual audit, not in anticipation of litigation. That is, that the document's function (rather than its content) determines whether it is work product or not. The court disagreed, adopting the overwhelming majority rule that the test is not whether the document is prepared in anticipation of litigation, but rather whether it was prepared because of the anticipated litigation. (This is in contrast only to the Fifth Circuit, which requires that the anticipation of litigation be the "primary motivating purpose" behind the document's creation.) Accordingly, the circuit court instructed the district court to analyze the Auditor memo and determine which sections contained the mental impressions of the Company's counsel and whether there were select portions that could be produced.

As for the second and third documents—those prepared by the Company itself—the government conceded that they were work product, but argued that the Company had waived the work product protection when it disclosed them to the Auditor. The court disagreed, finding no waiver. Unlike the attorney-client privilege, which ordinarily is waived through voluntary disclosure, the court stated that work product is waived only in limited circumstances when the work product is voluntarily disclosed to an adversary or a conduit to other adversaries. The government argued that the Auditor was an adversary because disputes sometimes arise between independent auditors and their clients. The court disagreed, concluding that the mere potential of litigation did not present sufficient tension between the parties to create an adversary relationship that would support a waiver. Instead, the circuit court found that the test is whether the Auditor could be the Company's adversary in the sort of litigation in the underlying suit. Because the present dispute was with the Internal Revenue Service, not with the Auditor, the circuit court found that the Auditor could not be considered a potential adversary with respect to the remaining documents in dispute.

The government also argued that the Auditor was a conduit to the Company's other adversaries. The court found that the proper test hinged upon whether there was a reasonable expectation that the recipient would keep the disclosed material confidential. This reasonable expectation could be found in common litigation interests between the disclosing party and the recipient or in a strong or sufficiently unqualified confidentiality agreement. Here, the circuit court found that the Company had this reasonable expectation of confidentiality because the Auditor had a professional obligation, found within the independent auditor's code of professional conduct, to refrain from disclosing confidential client information. As such, the Company did not waive work product protection for the remaining two documents when it voluntarily gave them to the Auditor.

This decision clarifies the scope of work product protection in important and recurring contexts. Significantly, the court reinforces the ability of companies to deal with independent outside auditors with a clearer eye on which communications may be protected from disclosure in anticipated litigation

Lawyers' Professional Liability Update is published by Hinshaw & Culbertson LLP. Hinshaw is a national law firm with approximately 500 lawyers in 24 offices. We offer a full-service practice, with an emphasis in litigation, business law and corporate transactions, environmental, intellectual property, labor and employment law, professional liability defense, estate planning and taxation matters. Our attorneys provide services to a range of for-profit and not-for-profit clients in industries that include alarm and security services, construction, financial services, health care, hospitality, insurance, legal, manufacturing, real estate, retail and transportation. Our clients also include government agencies, municipalities and schools.

Hinshaw was founded in 1934 and is headquartered in Chicago. We have offices in 12 states: Arizona, California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New York, Oregon, Rhode Island and Wisconsin.