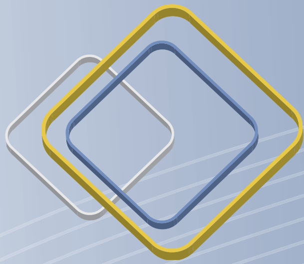

Lawyers' Professional Liability UPDATE

July 2010 Issue 7

Damages

Hypothetical Contingency Fee Could Not Be Offset From Damages Nor From Prejudgment Interest Because of Serious Fiduciary Breaches

***Shoemake ex rel. guardian v. Ferrer*, 168 Wash. 2d 193, 225 P.3d 990 (2010)**

The Washington Supreme Court examined the damage exposure in a case involving an attorney's repeated failures and misrepresentations. Because the lawyer failed to file a required confirmation of joinder pleading, the personal injury case was dismissed. He subsequently managed to persuade a judge to reinstate the claim, but failed to show up for the trial. The attorney told the clients that the delay was due to a backlog at the court. When the clients learned the truth, the lawyer stated that he would try to get the case reinstated. The attorney was ultimately not able to get the case reinstated. The clients then learned that their uninsured motorist carrier had offered its $100,000 policy limit to settle, and that the lawyer had not communicated the offer. With other counsel, they obtained the limits and sued for legal malpractice.

Although the lawyer admitted fault, he asserted that he was entitled to a set-off for the amount of his 40 percent contingency fee. The Court disagreed, explaining that the clients "had to expend fees on a second lawyer in order to finish the job the first lawyer neglected to do." The clients also sought interest for the 10 years they did not have the money and attorneys' fees they incurred.

The additional issue was whether the lawyer's liability for prejudgment interest would be net of the 40 percent contingency fee. The Court held that the lawyer's fiduciary breaches were so serious that "a legal malpractice plaintiff's damages may appropriately include forfeiture of the attorney's hypothetical contingency fee." Thus, prejudgment interest was based upon the entire $100,000 until successor counsel obtained that sum.

Anti-SLAPP Statute Applied to Protect Lawyer's Public Conduct, Although Adverse to Former Client

***Oasis West Realty, LLC v. Goldman*, 106 Cal. Rptr. 3d 539 (2d Dist. 2010)**

The appellate court reversed the trial court's refusal to apply the anti-SLAPP statute to a claim that a lawyer acted adversely to plaintiff, his former client. The court did not simply accept plaintiff's claim that an "ethical" duty precluded application of Cal. Civ. Proc. Code § 425.16, but looked to the factual showing to determine that an ethical duty was not presented.

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The Reed Smith LLP law firm, and its partner, Kenneth Goldman, represented plaintiff Oasis West Realty, LLC in efforts to redevelop real estate in Beverly Hills, California. Two years after the representation ended, Goldman acted to oppose the very same redevelopment project. Oasis sued Goldman and Reed Smith on the theory that Goldman's acts constituted a breach of ethical duties to a former client. Specifically, plaintiff alleged that Goldman "lent his support to a citizen's group opposed to the Project and campaigned for and solicited signatures for a Petition circulated by said citizen's group that sought to abrogate the City Council's approval of the Project and instead place approval of the Project in the hands of the citizenry by proposition. . . ." The trial court held that the statute did not apply because the factual basis of the claim was that defendants had breached their ethical duties to plaintiff.

The court acknowledged the duty of loyalty, but found no evidence of a breach by way of successive, adverse representation. In addition, there was no evidence that Goldman had revealed any confidential information. He did not "trade on his former representation of Oasis to lend credence to his opposition." Goldman's conduct was principally as a citizen, circulating a referendum petition that was concerned about the size and traffic impact of the project, and urging his neighbors to sign.

After reviewing all of the evidence, the court concluded that the communicative conduct by Goldman met the first prong of the statute. But the same evidence established that Oasis could not meet its burden of producing evidence that created a *prima facie* breach of a duty or loyalty to the company, including a disclosure of its confidences.

Evidence

Expert Testimony Not Admissible Regarding Insurance Issue Concerning Prior Knowledge

***Minnesota Lawyers Mutual Insurance Co. v. Batzli*, ___ F. Supp. 2d ___, 2010 WL 670109 (E.D. Va. 2010)**

The court addressed the subject of whether expert testimony is admissible on the issue of whether a lawyer should have reasonably foreseen that particular circumstances were reasonably likely to give rise to a claim. A Virginia federal district court stated that the expert's opinion about the reasonableness and foreseeability of the legal malpractice claim presented issues for the trier of fact, which lay jurors would be able to evaluate without the need for expert testimony. The conclusion does not necessarily always follow, however, because the standard under the policy is foreseeability by a lawyer, not a layperson. Legal training and experience may enable understanding of a perceived error and the evaluation of the likelihood of a claim, which would not be within the knowledge of a layperson.

Evidence & Privilege

Order Compelling Disclosure of Attorney-Client Communications Not Appealable

***Kurstin v. Bromberg Rosenthal, LLP*, 191 Md. App. 124, 990 A.2d 594 (2010)**

Lawyer defendants often seek to discover communications between the client and the client's other lawyers. In this case, the Maryland Court of Special Appeals examined whether an order compelling such disclosure was appealable as an interim order or only from the judgment.

The law firm represented plaintiff in her divorce, where the marital settlement provided that the husband would maintain his life insurance for the benefit of plaintiff's four children. Thereafter, with other counsel, plaintiff sued her former husband for breaching the agreement by removing her children as beneficiaries under the life insurance policy. That litigation was settled by allowing the husband to withdraw $250,000 of the $1.5 million value. Represented by the same lawyer, plaintiff sued defendant law firm for negligence in failing to assure that the beneficiary designation was irrevocable. The law firm sought to discover her communications with present counsel regarding the compromised litigation. The trial court found a waiver of the attorney-client privilege.

The issue on appeal was whether the order could be appealed in the absence of a final judgment. In looking to the "collateral order doctrine," the court agreed that the protection of attorney-client communications presented a very important issue. Nevertheless, the court concluded that the order was reviewable from a final judgment. The court relied on a 2009 decision by the U.S. Supreme Court in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S.Ct. 599, 175 L.Ed.2d 458, which addressed appellate review of discovery orders that compelled disclosure of attorney-client communications. In that case, the Supreme Court held that, "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence."

Conflicts

Per Se Conflict in Representing Both Spouses to a Prenuptial Agreement

Ware v. Ware, 224 W.Va. 599, 687 S.E.2d 382 (2009)

The West Virginia Supreme Court held a marital settlement agreement to be unenforceable. Comparing a prenuptial agreement to a divorce action, the court stated that "the parties' interests are fundamentally antagonistic to one another" because the purpose the agreement is to protect the property of one spouse from the other. The purported conflict waiver was overshadowed by the lawyer's statement that he had fully advised the spouse "of her legal rights and of the consequences associated with entering into the Agreement."

Mediation Confidentiality Can Preclude Malpractice Claim

Benesch v. Green, 2009 WL 4885215 (N.D. Cal. 2009)

Plaintiff was represented by defendant in a dispute against plaintiff's daughter, son-in-law and former estate planning attorney. The dispute was resolved through mediation, resulting in a settlement in the form of a term sheet, which a state court turned into a judgment. The court noted that the term sheet stated that it was binding and enforceable.

Plaintiff then sued defendant, contending that the term sheet did not reflect her intent. Defendant sought summary judgment on the ground that mediation confidentiality prevented her from effectively defending herself because establishing an error in the term sheet required reference to communications in and during the mediation. The court agreed that statements and writings in mediation are neither discoverable nor admissible, except in limited circumstances. The court cited to Cal. Evid. Code § 1122, which permits disclosure if:

> (1) All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with [Cal. Evid. Code §] 1118, to disclosure of the communication, document, or writing; or
>
> (2) The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with [Cal. Evid. Code §] 1118, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

Under Section 1118, an oral agreement must be recorded, transcribed and signed by the parties within 72 hours.

Plaintiff relied on *Cassel v. Superior Court*, 101 Cal. Rptr. 3d 501 (2009), where the court concluded that the communications between counsel and his client, not in the presence of opposing counsel or the mediator, were admissible if they did not concern what was said or done in the mediation. The district court found *Cassel* "in significant tension with the large majority of California appellate decisions that apply mediation confidentiality more expansively . . . ,"

The court stated:

> Even if the *Cassel* majority's decision correctly states California law, different equitable considerations arise in this case. Specifically, it would be inequitable and unfair if Plaintiff could provide evidence of communications with Defendant when they were alone together during the mediation, but Defendant, by virtue of the mediation confidentiality statutes, could not defend herself with other relevant evidence such as communications with opposing parties in the mediation and / or the mediator.

The court was skeptical that plaintiff could make her case against defendant with admissible evidence. Because the question of what evidence would remain after applying the mediation confidentiality statutes was not directly addressed, the court denied the motion without prejudice for a further showing of whether there was other evidence that is not protected by the confidentiality statutes.

Notably, in February 2010, the California Supreme Court granted review in *Cassel v. Superior Court*. The briefs filed with the court cited *Benesch v. Green*.

Bankruptcy & Statutory Liability

U.S. Supreme Court Weighs in on Applicability of 2005 Bankruptcy Law to Attorneys' Advice and Advertising

Milavetz, Gallop & Milavetz v. United States, ___ U.S. ___, 130 S. Ct. 1324, 2010 WL 757616 (2010)

In summary, the U.S. Supreme Court held that attorneys are "debt relief agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The Court also held that two provisions of BAPCPA were constitutional under the First Amendment. The first such

provision prohibits advising consumer debtors to incur debt because of impending bankruptcy, but does not prohibit giving such advice for other valid reasons. The second provision imposes certain advertising disclosure requirements on debt relief agencies.

The three issues in this case involved the application of the BAPCPA to attorneys. The statute regulates a broad category of professionals known as "debt relief agencies." Such professionals are prohibited under 11 U.S.C. § 526(a)(4) from advising consumer debtors "to incur more debt in contemplation of filing" for bankruptcy. They are also required under 11 U.S.C. § 528 to make disclosures in their advertisements regarding the advertiser's legal status and the type of assistance provided.

Plaintiffs argued that the term "debt relief agencies" does not include lawyers, and that 11 U.S.C. §§ 526(a)(4) and 528 are unconstitutional under the First Amendment. The U.S. Court of Appeals for the Eighth Circuit held for plaintiffs only on the 11 U.S.C. § 526(a)(4) issue. The Supreme Court granted certiorari on all three issues, reversing on the Section 526(a)(4) issue and otherwise affirming.

The Court first held that attorneys, including partnerships and partners, fall under the definition of debt relief agencies. That term includes anyone who provides qualifying bankruptcy services to assisted persons. The high court noted that under the BAPCPA, some forms of bankruptcy assistance (*e.g.*, legal advice) must be provided by attorneys.

The Supreme Court also addressed plaintiffs' argument that including attorneys among those regulated by the BAPCPA impermissibly encroached on states' authority to regulate the practice of law. This argument was supported to some degree by the BAPCPA itself, which provides that 11 U.S.C. §§ 526, 527 and 528 should not "be deemed to limit or curtail" states' authority to "determine and enforce qualifications for the practice of law . . . ." The Court rejected this argument because "bankruptcy courts have long overseen aspects of attorney conduct in this area of substantial federal concern."

The Supreme Court then reversed the Eighth Circuit's holding regarding 11 U.S.C. § 526(a)(4). The court of appeals had pointed to the language prohibiting "advis[ing] an assisted person . . . to incur more debt in contemplation of" filing for bankruptcy in finding the section to be substantially overbroad. Although the Eighth Circuit had interpreted this language to prohibit certain types of reasonable financial advice, the Supreme Court interpreted the statute narrowly, to avoid vagueness or overbreadth, to merely prohibit "advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose."

In reaching this narrower reading, the Supreme Court relied on the historical meaning and historical and statutory context of "in contemplation of" filing for bankruptcy, and the need for open communications between attorney and client. The Court held that the inhibition of frank discussion between lawyers and clients would serve no conceivable statutory purpose here. The high court noted that under ABA Model Rule of Professional Conduct 1.2(d), lawyers are free to talk candidly about the consequences of criminal conduct, and cited to its recent decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ___, 130 S. Ct. 599, 175 L.Ed.2d 458 (2009) regarding the importance of privilege in protecting the attorney-client relationship and robust communications.

Finally, the Supreme Court held that 11 U.S.C. § 528 was constitutional as applied to plaintiffs. Starting with the understanding that Section 528 pertained to inherently misleading commercial speech, the Court contrasted two of its prior decisions — both involving attorney advertising rules — to decide between intermediate and low-level scrutiny. The high court noted that intermediate scrutiny applied to affirmative limitations which restrict speech that is not inherently misleading. In contrast, where a disclosure requirement is intended to combat inherently misleading commercial advertisements, it need only be rationally related to the goal of preventing consumer deception. Because Section 528 imposes a disclosure requirement, the Court applied the latter level of scrutiny and held that Section 528 was rationally related to the government's interest in preventing consumer deception.

Justice Antonin Scalia concurred, except to the extent that the Supreme Court cited legislative history in support of its definition of "debt relief agency." Justice Clarence Thomas concurred, but disagreed with the Court's line between disclosure requirements and prohibitions and the resulting effect on standard of review.

The Supreme Court's opinion affects both the practice of bankruptcy law and First Amendment jurisprudence. It is another in a series of recent federal court decisions opining on Congress' authority to directly or indirectly regulate the practice of law. Here, the Court recognized a broad scope of congressional authority in the area of bankruptcy law, but also interpreted the statute so as not to unduly impinge on lawyers' ability to represent and advise their clients.

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