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Recent Developments in Risk Management **July 2019** | Volume 24 | Issue 4

Doing Business with a Client – Rule 1.8 Conflicts Arising from Transactions with Clients – Enforceability of the Transaction

***Calvert v. Mayberry*, 2019 CO 23**

Risk Management Issue: What are the risks for an attorney who enters into a contract to engage in a business transaction with a client in violation of Rule 1.8?

The Case: Based on the corresponding Model Rule, Colorado Rule of Professional Conduct 1.8 ("Rule 1.8") governs specific conflicts of interest, including business transactions between lawyers and clients. In this case, the Supreme Court of Colorado held that a contract between a lawyer and a client that violates Rule 1.8 is presumptively void, although an attorney can rebut the presumption.

On the facts of *Calvert v. Mayberry*, the plaintiff-attorney ("Calvert") was unable to rebut the presumption and summary judgment was entered against him, voiding the contract he sought to enforce.

Mayberry initially engaged Calvert to help secure title to her home in her name, which Calvert successfully accomplished. Later, Calvert gave Mayberry approximately $193,000 in various increments to help renovate the house. Calvert then attempted to secure the loan using Mayberry's house as collateral. The repayment and security agreement were never put into writing and Calvert never advised Mayberry to seek independent legal counsel in connection with the transaction. The Colorado Supreme Court found Calvert's conduct to be a violation of Rule 1.8 and disbarred him before this case commenced.

Following his disbarment, Calvert sued Mayberry for breach of the oral agreement that was the subject of his disbarment proceeding. Mayberry moved for summary judgment, arguing the oral agreement violated public policy and was therefore void. Summary judgment for defendant Mayberry was granted and affirmed by both Colorado's Court of Appeals and Supreme Court.

The Colorado Supreme Court held the oral agreement clearly violated Rule 1.8, and therefore was presumptively void as a matter of public policy. The court stated that an agreement reached in violation of Rule 1.8 is unenforceable unless the lawyer can demonstrate that it did not "offend the public policy goals underlying the Rule." Calvert was unable to meet this burden.

Risk Management Solution: Violation of a Rule of Professional Conduct can have both expected and unexpected consequences. In Colorado, violation of a Rule can result not only in disciplinary action, but may also void a contract. This is not true in all jurisdictions, so lawyers should consult the law of the state in which they're licensed. In any event, a lawyer should take great care when entering into any business relationship with a client. Such arrangements carry multiple risks for claims of conflicts, breaches of duty, and claims of undue influence by the lawyer, which can give rise to civil liability or disciplinary consequences, or both.

Fee-Shifting – Reasonable and Necessary Fees – Evidence Required

***Rohrmoos Venture v. UTSW DVA Healthcare, LLP* (2019 Tex. LEXIS 389)**

Risk Management Issue: What evidence is required to establish reasonable and necessary attorneys' fees? And what are the consequences when the evidence presented is found to be insufficient?

The Case: Nearly every state in the country calculates attorneys' fees using the lodestar method. In fact, only Tennessee and New Hampshire explicitly reject lodestar; Alaska and Maine elect to use the percentage method; and Arkansas has refused to specify a preference. In an exhaustive review of Texas case law, the Texas Supreme Court clarified the state's lodestar method and—in an opinion that could also influence other states' attorneys' fee reviews—strongly suggested that a prevailing party must present more than "general, conclusory" testimony to support requested fees.

The parties to the case entered into a lease for commercial property which tenant UTSW utilized as a dialysis clinic. After state health inspectors uncovered moisture under the tile flooring in the facility, UTSW determined that the property was not suitable for its clinic. It terminated the lease and vacated the premises—while still owing $250,000 in rent—and sued landlord Rohrmoos for breach of contract and declaratory relief. Rohrmoos counterclaimed for the unpaid rent. The jury found that both parties had failed to comply with the lease, but that Rohrmoos had breached first. No money damages were awarded.

The parties' lease provided that "the prevailing party shall be entitled to an award for its reasonable attorneys' fees from the non-prevailing party in any action to enforce the terms of the lease." Based on this provision, UTSW requested attorneys' fees.

In support of its request for attorneys' fees, UTSW presented the testimony of its attorney Wade Howard. Howard testified as to his experience, his standard rate, and the reasonable number of hours spent on the case. He also testified that he spent more time than typical on this case due to voluminous discovery. Based on Howard's testimony, the trial court awarded $1,025,000 in fees. The appellate court affirmed, and Rohrmoos appealed to the Texas Supreme Court.

First, the Texas Supreme Court confirmed that UTSW was the prevailing party. Monetary damages were not necessary for a party to prevail for purposes of fee-shifting. In this case, UTSW was a prevailing defendant, receiving a favorable verdict on all of Rohrmoos' cross-claims.

Next, the court summarized Texas's legal standard for determining reasonable and necessary attorneys' fees. The court acknowledged that fee-shifting is designed to compensate a prevailing party for its reasonable losses from litigation and is not mechanism for improving an attorneys' economic situation.

Finally, the court held that sufficient evidence of reasonable and necessary attorneys' fees includes, at a minimum, evidence of: (1) particular services performed; (2) who performed the services; (3) approximately when the services were performed; (4) the reasonable amount of time required to perform those services; and (5) the reasonable hourly rate of each person performing such services. Contemporaneous billing records are not required but are "strongly encouraged."

The court found that Attorney Howard's testimony did not provide sufficient evidence of reasonable and necessary attorneys' fees. Although Howard testified about the complexities of the case—the volume of discovery and deposition, as well as the lengthy motion practice—he did not establish the actual time he spent on any particular project and how much time he spent on particular tasks. As a result, the court was unable to determine how Howard arrived at his requested total fees.

Risk Management Solution: When calculating and proving reasonable fees, lawyers everywhere should be mindful of the Texas Supreme Court's "suggestion" that contemporaneous billing records be provided to support a lodestar calculation. While other states have not yet gone as far as the Texas Supreme Court, this case is likely to be persuasive authority regarding the evidence necessary to establish "reasonable fees."

Attorney-Client Privilege – Waiver – Communication with PR Consultants

***Universal Standard Inc. v Target Corporation, et al*. Case No. 1:2018 CV 0642 (S.D.N.Y. 2019)**

Risk Management Issues: Is the attorney-client privilege lost when a PR consultant, hired by a party to a lawsuit, is included in correspondence between the party and the party's lawyers?

The Case: Plaintiff clothing company filed suit against Defendant retailer alleging trademark infringement and unfair competition under the Lanham Act and related state law claims. During the deposition of Plaintiff's Chief of Staff and in-house counsel, it was revealed that emails between Plaintiff, its attorneys, and a public relations firm hired by Plaintiff, had not been produced during discovery or identified on a privilege log. The emails involved discussions regarding a public relations strategy surrounding the filing of the lawsuit and whether a press release should be issued.

Defendant moved the court for an order deeming the emails non-privileged, arguing Plaintiff had waived any privilege by failing to include the emails on the privilege log and by including the public relations firm on the email chain. The court agreed, holding that attorney-client privilege had been waived and the work product doctrine did not apply. However, the court did not address the question of whether the failure to identify the emails on the privilege log warranted waiver of privilege, as waiver was established on the merits.

The court explained that disclosure of attorney-client communication to a third party typically waives whatever privilege the communication may have originally possessed. However, there are four exceptions to the waiver doctrine, depending on the status of the third party: (1) third party shares a common legal interest; (2) third party is necessary for communication between client and counsel; (3) third party is the functional equivalent of a corporate employee of a party to the litigation; and (4) third party is used by lawyer to aid in legal tasks.

The court found that none of these exceptions applied to disclosure in this case, and therefore the privilege was waived. The first exception was inapplicable because the public relations firm was neither involved in the litigation, nor did it share any common interest with the Plaintiff.

The second exception applies where the third party enables counsel to understand aspects of the client's own communications that could not otherwise be appreciated. This exception did not apply because Plaintiff did not need its public relations firm in order to effectively communicate with the attorneys. Any questions regarding the propriety of a press release could simply have been communicated to the attorneys by Plaintiff without the public relations firm's involvement.

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The third exception applies when the third-party is considered the functional equivalent of a corporate employee of a party to the litigation. In determining whether this exception applies, courts have considered whether the third party: (1) exercised independent decision making on the company's behalf; (2) possessed information held by no one else at the company; (3) served as a company representative to third parties; (4) maintained an office at the company or otherwise spent a substantial amount of time working for it; and (5) sought legal advice from corporate counsel to guide work for the company. This exception did not apply because none of the public relations firm's duties related to seeking legal advice.

The final exception applies when the function being performed by the third-party is necessary to achieve a circumscribed litigation goal. In the case of a public relations consultant, courts have generally limited the application of this exception to situations where the consultant was hired by the lawyers to assist them in dealing with media and where communications are made for the purpose of giving or receiving advice directed at handling the client's legal problems. The court found no evidence that the purpose of the communication with the public relations firm was to assist Plaintiff's attorney in performing a legal task.

The court found the emails were not afforded work-product protection because Plaintiff was unable to proffer any evidence to support the conclusory statement that the doctrine applied. It should be noted that many courts have rejected work-product protection for materials relating to public relations activities.

Risk Management Solution: Attorneys should advise their clients to limit third-party involvement in correspondence with attorneys to those necessary to the litigation or who are aiding the litigation. The fact that the third-party has been hired by the client as a result of the litigation is of no consequence. If the third-party's role is outside the scope of legal advice and assistance, or is not for the purpose of directly facilitating legal advice and assistance, there is a risk that attorney-client and/or the work-product privileges will be found to have been waived, or to be inapplicable. However, analysis and outcomes with respect to communications with PR consultants vary by jurisdiction, so attorneys should consult the law of the jurisdiction in which they practice and advise their clients accordingly.