Lawyers for the Profession®

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Conflict of Interest – Current Clients – Duty of Care with Respect to Unrelated Matters

***Oakland Police & Fire Retirement System, et al. v. Mayer Brown, LLP,* 861 F.3d 644 (7th Cir. 2017)**

Risk Management Issue: Does a Law Firm #1 representing Party #1 in a transaction owe a duty of care to Party #2 to the transaction which has its own counsel for the transaction, when Law Firm #1 represents Party #2 in other, unrelated matters?

The Case: Mayer Brown represented General Motors in two secured transactions with the plaintiffs, a group of lenders who used JP Morgan Bank as their agent in those transactions. JP Morgan, which was a current client of Mayer Brown in unrelated matters, retained separate counsel in negotiating the transactions. One loan was made in 2001; a second loan was made in 2006. General Motors filed bankruptcy in 2009 and for the first time General Motors and JP Morgan noticed that the closing papers for the 2001 loan "accidentally also terminated the lenders' security interests in the collateral securing the 2006 loan" – a $1.5 billion mistake.

The plaintiff lenders did not sue JP Morgan (the plaintiffs' agent) or JP Morgan's attorney in the transactions, but rather brought a legal malpractice action against Mayer Brown. The district court dismissed, holding that Mayer Brown did not owe a duty to plaintiffs who were non-clients. Plaintiffs appealed on three theories: (a) JP Morgan is a long-standing client of Mayer Brown on unrelated matters and therefore not a non-client; (b) even if JP Morgan was a non-client, Mayer Brown assumed a duty to the plaintiffs by drafting the transaction documents; and, (c) the primary purpose of General Motors' relationship with Mayer Brown was to improperly influence JP Morgan. The 7th Circuit affirmed the district court's decision holding that Mayer Brown owed no duty of care to the plaintiffs.

The plaintiffs argued that JP Morgan was not a non-client because of its attorney-client relationship with Mayer Brown on unrelated matters, and that Mayer Brown therefore owed the plaintiffs (as JP Morgan's principals) a duty of care, an argument the Court characterized as "astonishing." The Court noted that it would be "flabbergasted" if Mayer Brown had not obtained a waiver as required by Rule 1.7, and could have employed an ethical screen to accomplish the commonplace situation of representing opposing parties in different, unrelated transactions. "If plaintiff's theory held water, the law firm would continue to owe a duty of care to look out for the adverse party's interests in conflict with its duties to its client in the matter at hand. The law firm would then face an impossible and unwaivable conflict of interest. Plaintiffs' theory thus conflicts with the rules of professional conduct that allow such waivers…"

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The court acknowledged that under Illinois law there are circumstances where an attorney may owe a duty to a third party, citing *Pelham v. Griesheimer,* 440 N.E.2d 96, 99 (Ill. 1982). However, the court rejected the plaintiffs' argument that *Pelman* exceptions applied because Mayer Brown circulated the first drafts of the documents. The court simply stated that in a transaction, someone has to create the first draft and that does not create a duty to the non-client. The court also held that Mayer Brown's representation of General Motors was to advise its client, not to be an "attorney to the transaction" and influence JP Morgan.

The court unanimously held that plaintiffs could not establish a duty of care between Mayer Brown and JP Morgan with respect to this transaction, much less with the plaintiffs.

Risk Management Solution: This decision underscores the importance of obtaining effective, written conflict waivers from clients before undertaking representations adverse to the firm's other clients in unrelated matters, and in employing ethical screens, if permitted by the jurisdiction.

Lawyer Liability to Third Parties – Statutory Liability – Fair Labor Standards Act

***Arias v. Raimondo*, No. 15-16120, 9th Cir. 2017**

Risk Management Issue: Can an employer's attorney be held liable for retaliating against the client's employee because of the attorney's actions in connection with the employee's law suit against the attorney's employer client for violations of workplace law?

The Opinion: Plaintiff was a milker for Angelo Dairy. When Plaintiff began work, Angelo Dairy did not complete and file a Form I-9, a document required by U.S. Citizenship and Immigration Services, and used to verify the identity and employment of people hired for employment in the United States. Employers are required to file an I-9 for both citizen and noncitizen employees. When Plaintiff later advised Angelo Dairy that he was offered a position at a different dairy company, the employer responded that it would report the other dairy company to federal immigration authorities as an employer of undocumented workers. Plaintiff decided to remain working at Angelo Dairy.

Nine years later, Plaintiff sued Angelo Dairy in California state court on behalf of himself and other employees under, among others, California's Unfair Competition Law for a variety of work place violations, including failure to provide overtime pay and rest and meal periods. Ten weeks before trial, Angelo Dairy's attorney contacted U.S. Immigration and Customs Enforcement, and arranged to have the agency take Plaintiff into custody during a scheduled deposition, and remove him from the United States. The attorney likewise attempted to have Plaintiff's legal assistance attorney blocked from representing Plaintiff. Prior to trial, the parties engaged in a settlement conference and Plaintiff ultimately agreed to a settlement in part due to the threats that he would be deported.

Plaintiff subsequently sued the attorney in the Eastern District of California for violations of the Fair Labor Standards Act ("FLSA") alleging that the attorney, acting as an agent for Angelo's Dairy, retaliated against him in violation of the FLSA. The attorney argued that he was never Plaintiff's employer and, thus, could not be liable under the Act. The District Court dismissed Plaintiff's complaint.

On appeal, the Ninth Circuit considered whether the attorney could be held liable for retaliating against his client's employee because of the attorney's action in connection with the employee's law suit against the attorney's employer client for violations of workplace laws. Reversing the lower court's decision, the appellate court reasoned that the anti-retaliation provision of the FLSA applies to "any person" and concluded that the attorney's actions fell within "the purview, the purpose and the plain language" of the anti-retaliation provision of the FLSA. Notably, the appellate court stated that its interpretation of the FLSA was limited to the anti-retaliation provision. Non-employers, such as the attorney, would not be liable for any wage and hour economic provisions.

Comment: It is natural for lawyers to want to resolve matters in favor of their clients as quickly as possible. However, zealous advocacy (even in those states that still require it in their rules of professional conduct) has its limits. Additionally, the Rules of Professional Conduct govern lawyers' conduct towards third parties – including adversaries. In this case, the attorney's actions, if ultimately proven, potentially violate ABA Model Rule 4.4(a), which addresses respect for the rights of third persons, and Model Rule 8.4(d), which provides that it is misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice.

Risk Management Solution: This case illustrates the importance of two elements of risk management: first, regular training of all the firm's lawyers on the way legal ethics apply to individual lawyers' practices. Second, regular internal review and oversight of lawyers' work, so that lawyers are not operating as, in effect, solo practitioners, albeit under the firm's umbrella, can help prevent inappropriate actions in the course of representing clients.

Disqualification – Conflicts of Interest – Prospective Clients

Kidd v. Kidd, 219 So. 3d 1021 (Fla. Dist. Ct. App. 2017)

Risk Management Issue: What duties are owed to people who consult with an attorney about the possibility of forming an attorney-client relationship?

The Case: In a family law proceeding between former spouses, the trial court granted the husband's motion to disqualify the wife's attorney because the attorney had a prospective client consultation with the husband prior to representing the wife. The Florida Court of Appeal granted a writ of certiorari and quashed the trial court's order disqualifying the wife's counsel.

Florida Rule of Professional Conduct 4-1.18, which embodies duties to prospective clients, provides in relevant part that an attorney "may not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter." Because the trial court found counsel's testimony credible that no confidential information had been divulged during the prospective client consultation with the husband, and, therefore there was no harm or disadvantage to the husband, counsel was not prohibited from representing the wife.

Comment: With respect to duties to prospective clients, an attorney cannot represent a client with interests that are materially adverse to a prospective client in the same or substantially related matter where the attorney learned information from the prospective client that could be used to the prospective client's disadvantage unless the provisions of Rule 1.18 are strictly adhered to. In particular, the Model Rule version of 1.18 provides that if a lawyer has received disqualifying information, representation is permissible only where both the affected client and the prospective client have given written informed consent. Alternatively, representation is permissible where the lawyer attempted to avoid learning more information than was reasonably necessary to decide whether to proceed with the representation; the lawyer is screened from participation in the matter and receives no part of the fee; and the prospective client is notified in writing.

Risk Management Solution: In addition to complying with the provisions of Rule 1.18, to avoid disqualification in subsequent representation of another person adverse to the prospective client, attorneys should do their best to limit the exchange of information during an initial consultation with prospective clients to prevent creating a conflict with future potential clients. To the greatest extent possible, lawyers should use communications with prospective clients to obtain only the information reasonably necessary to determine whether to represent the prospective client. Only after establishing an attorney-client relationship should confidential information be shared.