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The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

Engagement Letters – Shareholder's Standing to Sue Corporate Counsel

***Kurre v. Greenbaum, Rowe, Smith, Ravin, Davis, and Himmel, LLP*, 2010 WL 2090092 (N.J. Super. Ct. App. Div. Apr. 16, 2010)**

Risk Management Issue: What can law firms do to avoid representing unintended clients?

The Case: Individual shareholders of a corporation which owned an auto dealership franchise sued the company's law firm, alleging that the lawyers failed to timely inform the company that it could appeal the franchisor's notice to terminate their franchise. The law firm argued that the shareholders lacked standing to sue because the law firm represented the corporation only and not the individuals. The firm's arguments prevailed. The court relied on the engagement letter, which informed the shareholders that the firm would not represent them and encouraged them to retain separate counsel. The court rejected the shareholders' argument that the engagement was limited in scope because the letter defined the scope of engagement in broad terms.

Risk Management Solution: A well-drafted engagement letter that plainly establishes the identity of the clients and the scope of representation is likely to defeat claims from third parties that they were intended beneficiaries of the engagement and therefore should be entitled to sue for malpractice.

Attorney-Client Relationship – Advocate Witness Rule and Former Client Conflict – Court Denies Motion to Disqualify Where Former Client Fails to Establish Present Attorney-Client Relationship

***Worldhill Ltd. v. Sternberg et al.*, Slip Copy 25 Misc.3d 1224(A), available at 2009 WL 3805610 (N.Y. Sup. Ct. Nov. 2009)**

Risk Management Issue: What can lawyers do to avoid being the target of a disqualification motion based upon the movant's claim of prior related representation?

The Case: Defendants in a contract dispute moved to disqualify plaintiff's attorney, Moskovitz, claiming that he represented both parties in the underlying transaction. Moskovitz admitted that he had represented both parties in a prior unrelated matter, and he submitted a written engagement letter for that case, signed by plaintiff, which disclosed and waived any conflicts arising out of the joint representation in that matter. The court noted that plaintiff failed to present evidence establishing an attorney-client relationship in this case, and that it was persuaded by Moskovitz's evidence that there was not a present relationship. The motion to disqualify was denied.

Risk Management Solution: This case illustrates the value of using written engagement agreements for each new matter, even if the client is an established one, and of preparing non-engagement letters when dealing directly with unrepresented parties. An explicit communication of non-engagement is particularly important when the law firm previously represented a now opposing, nonrepresented party. Also, where appropriate, written communications with nonrepresented parties should begin with a statement that the lawyer is not representing that party. A lawyer dealing with an unrepresented party may want also to recommend that the party consult with his or her own attorney as appropriate.

Engagement Letters – Nonrefundable Fees – Fixed Fees – Handling Advance Fee Payments

Missouri Supreme Court Advisory Committee, *Formal Opinion 128,* May 18, 2010 (Nonrefundable Fees)

Risk Management Issues: May a lawyer charge and retain client funds as a "nonrefundable" fee? Into what account should a lawyer place client funds paid in advance as a fixed fee? What language should a lawyer use in an engagement letter when receiving client funds in paid advance of services received?

The Opinion: The Missouri Supreme Court Advisory Committee (Advisory Committee) issued Formal Opinion 128 to clarify the rules on three issues. First, Missouri does not allow "nonrefundable" fees. Regardless of the terminology used to describe it, if the ultimate fee is unreasonable in light of the factors listed under Mo. Sup. Ct. R. 4-1.5(a),

Engagement Letters – Nonrefundable Fees, continued on back

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the unreasonable portion must be refunded. Secondly, a flat fee paid in advance should be deposited into the lawyer's trust account, not in his or her operating account. Earned portions of fixed fees should be promptly removed from the trust account. What is "earned" may be based upon "reaching a particular stage of a case or based on some other reasonable criteria, depending on the nature and circumstances of the representation." Finally, Formal Opinion 128 cautions lawyers to avoid using undefined terms such as "retainer," which may have inconsistent connotations and confuse clients, especially when the attorney actually means an advance fee deposit, flat fee, initial deposit, or otherwise. Attorneys best fulfill their duty of communication about fees when they use plain language that clients are likely to understand.

Risk Management Solution: Lawyers should monitor what fee arrangements are permitted in the jurisdictions where they practice, and how client payments should be handled. Attorneys should also take heed of the warming in Formal Opinion 128 that commonly used terms, such as "retainer", may be ambiguous and unclear to clients. They should seek to "use plain language that clients are likely to clearly understand" to describe fee and payment arrangements.

Clear Notice of Termination – Continuous Representation and Statute of Limitations

[Editors' Note: We take this opportunity to provide an update on a case discussed in the January 2009 issue of *The Lawyers' Lawyer Newsletter* in conjunction with a new case that presents related risk management issues.]

***Laclette v. Galindo*, 184 Cal. App. 4th 919 (Cal. App. 2 Dist. May 17, 2010)**

Risk Management Issue: What can lawyers and law firms do to avoid the application of the "continuous representation" doctrine that would deprive them of a statute of limitations defense to malpractice claims?

The Galindo law firm defended two sellers of property who were sued by the purchaser for alleged misrepresentations. The case settled for $350,000 during trial, with each client agreeing to pay half of the settlement. One of the clients then sued the law firm, claiming that Galindo had a conflict of interest in representing both co-defendants. The law firm argued that the action was barred by the statute of limitations, because it had had no contact with plaintiff client since the settlement. The client argued that the statute was tolled because certain issues in the case were still disputed. The trial court granted summary judgment to the firm, finding that there was no such tolling. But the appellate court reversed, holding that an attorney's representation does not end until the client actually did not and reasonably could not expect that the attorney would provide further services.

Another decision involving these issues was recently overturned. *Gotay v. Breitbart*, 58 A.D.3d 25 (N.Y. Nov. 2009), *reversed by* 912 N.E.2d 1056 (June 25, 2009) (see the January 2009 edition of *The Lawyers Lawyer Newsletter*) turned on the affidavit of attorney Hankin that he had personally met with and informed plaintiff that he would not handle her case. The firm argued that this meeting terminated the relationship and triggered the limitations period. The trial court granted dismissal, holding that the limitations period had run because the meeting had indeed ended the attorney-client relationship. That result was overturned by the intermediate appellate court, which found that a factual dispute existed over whether the attorney-client relationship was terminated at that meeting. **The New York Court of Appeals subsequently reversed, and reinstated the trial court's dismissal, in a Memorandum Decision without an opinion.**

Risk Management Solution: These cases are classic examples of the value of instituting a policy that when representation ends, lawyers and law firms should send closing letters to their clients. In either of these cases, a very simple letter would have sufficed to put plaintiff on notice that the relationship had terminated, allowing these firms to avoid years of litigation over the single issue of whether the attorney-client relationship had or had not been concluded.

Outside Counsel's Affirmative Duties to Oversee Their Clients' Compliance With Discovery Obligations – Duty to Investigate

UPDATE: *Qualcomm vs. Broadcom Corporation*, 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010)

The April 2008 edition of *The Lawyers' Lawyer Newsletter* included a discussion of the original sanctions order of U.S. Magistrate Judge Barbara L. Major in this case. (*See Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008); 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

Some of the sanctioned lawyers objected to the Magistrate's Order and convinced the district court that they should have been able to use communications between outside counsel and the client to defend themselves, despite the absence of a "self defense" exception to the confidentiality provision in the California Rules of Professional Conduct. On rehearing, they presented extensive evidence, after which the Magistrate Judge declined to impose sanctions. The Magistrate concluded that, "while significant errors were made by some of the Responding Attorneys, there is insufficient evidence to prove that any of the Responding Attorneys engaged in the requisite 'bad faith' or . . . failed to make a reasonable inquiry before certifying Qualcomm's discovery responses." Thus, the lawyers in question were put through enormously burdensome and stressful proceedings for an extended period before finally receiving what can fairly be described as at best a lukewarm vindication.

Risk Management Solution: When a law firm takes on complex litigation involving a client which it has not previously represented in litigation, it should, in addition to explaining the rules regarding the requirement of a litigation hold to prevent any document destruction, also seek a comprehensive agreement with the client at the outset regarding the management of the document retention and discovery process. The law firm should obtain all litigation clients' written commitment to give the firm full access to the information the firm deems necessary to comply with discovery obligations. If the client is reluctant to agree to the arrangements presented by the law firm, the law firm should reconsider whether to accept or continue the engagement. Even when the client's in-house lawyers want to maintain control over the discovery process and its results, and are willing to personally verify all discovery responses before relying on the responses, as discussed in *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. 2004), outside counsel may still be held accountable if in fact the client's document retention and production efforts are found to have been inadequate.