



## Newsletters

### Lawyers' Professional Liability Update - October 2010

October 29, 2010

#### Conflicts & Privilege

##### Corporate Officer's Communications With Firm Not Privileged

*Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 927 N.E.2d 794 (2nd Dist. 2010)

A law firm initially represented a corporation and its president. That representation continued after the corporation was acquired by Mueller Industries (Mueller). After the president resigned and went to work for a competitor, Mueller sued him for fiduciary breaches as president for favoring a primary supplier in which he had an undisclosed financial interest. The issue before the court was the discoverability of communications with the law firm relating to the supplier.

#### Sanctions

##### Second Circuit Splits on Authority of Magistrate Judge to Impose Rule 11 Sanctions Absent Consent of the Parties

*Kiobel v. Millson*, 592 F.3d 78 (2nd Cir., Jan. 8, 2010)

In summary, a panel of the U.S. Court of Appeals for the Second Circuit filed separate concurring opinions on the nature of a magistrate judge's authority to issue Fed. R. Civ. P 11 orders sanctioning attorneys absent consent of the parties. Because the panel split evenly, the question of the deference to be paid to a magistrate judge's sanctions order remains unresolved.

#### Privilege

##### State Appeals Court Adopts U.S. Supreme Court's Recent Mohawk Industries Holding: Privilege Ruling Not Subject to Interlocutory Appellate Review

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

In summary, discovery rulings adverse to the attorney-client privilege are not immediately appealable under the collateral order doctrine. The law firm of Bromberg Rosenthal LLP (Bromberg) represented a client in her divorce. A contract dispute involving the divorce settlement agreement later arose. In that dispute, the client employed new counsel and eventually settled. Bromberg later sued the former client for unpaid legal fees. The client brought a malpractice

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counterclaim based on economic harm she had suffered in settling the post-divorce litigation. Bromberg argued that this harm was caused by her new counsel, rather than by Bromberg's work on the original divorce settlement. Bromberg sought to depose the client's new counsel and sought discovery of all documents related to his representation of the client. The client moved for a protective order based on her attorney-client privilege. The Montgomery County Circuit Court (Maryland) denied the motion based on waiver of the privilege. The client sought immediate appeal of this order.

### **“But For” Causation**

#### **The Trial-Within-a-Trial Presents an Issue of Fact as to What a Party in the Underlying Matter Would Have Done Absent the Law Firm's Error**

*Suder v. Whiteford, Taylor & Preston, LLP*, 413 Md. 230, 992 A.2d 413 (Md.2010)

Plaintiff was appointed personal representative of her husband's estate. Because she was uncertain about whether to elect to take her statutory share instead, several extensions of time to do so were requested and granted. The first two she requested in pro per. The law firm then undertook her representation and made additional requests, but it failed to request a fifth extension, precluding plaintiff from making an election. Had plaintiff been able to do so, the decedent's son, as the sole residuary beneficiary, would have received one-third less. The law firm did not dispute fault, but contended that the cause of loss was plaintiff's initial failure to request an extension until after the time to do so had lapsed, although the court granted the request. In the legal malpractice action, the trial court granted summary judgment for the law firm.

### **Conflicts**

#### **Conflicting Testimony of Fault Concerning Adverse Representation Was for the Jury to Resolve**

*Alpha Capital Management, Inc. v. Rentenbach*, \_\_\_ Mich. App. \_\_\_, \_\_\_ N.W.2d \_\_\_, 2010 WL 1051193 (2010)

Burrell and Warfield jointly owned ACM, a financial consulting business. Burrell also owned SymCom, an information systems and management consulting business to which the law firm of Dykema Gossett, P.L.C. (Dykema) served as general counsel. The law firm also formed ACM and acted as its counsel. The two principals undertook to terminate their relationship. Dykema requested a conflict waiver so it could represent Warfield. Although Burrell refused, the law firm prepared draft agreements for the buyout and billed ACM. Burrell and ACM sued Warfield and others, and Dykema undertook to defend Warfield and the other defendants, which ultimately settled in favor of Burrell and ACM.

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