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Newsletters

# Lawyers' Professional Liability Update - July 2010

**July 29, 2010**

**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.

**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.

**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

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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.

**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.

**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.

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