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Newsletters

Lawyers' Professional Liability Update - April 2010

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Privilege

A Client's Refusal to Waive the Attorney-Client Privilege May Provide a Defense
Dietz v. Meisenheimer & Herron, 177 Cal. App. 4th 771, 99 Cal. Rptr. 3d 464 (2009)

The case of *Solin v. O'Melveny & Myers,* LLP, 89 Cal. App. 4th 451 (2001) was urged as the basis for reversing a $260,000 judgment entered in favor of a referring lawyer for breach of an agreement to pay him 25 percent of the fee recovered. Although the joint client had waived the privilege as to the negotiation of fees, fee matters and communications on tax issues, there were four areas where the client did assert the privilege. The trial court balanced the permitted disclosure and privileged areas, upholding the lawyer's defense as to fraud and allowing the others claims to go forward. The appellate court agreed.

Conflicts & Discipline

Attorney Who Represented Feuding Family Members Gets Six-Month Suspension
In re Botimer, 166 Wash. 2d 759, 214 P.3d 133 (2009)

In summary, an attorney violated the conflicts rule by representing multiple family members without obtaining informed consent to joint representation. When a dispute arose among the family members, the attorney also violated the confidentiality rule by revealing confidences across the line of dispute.

Fee Agreements / Fees

D.C. Court Holds "Earned On Receipt" Fees Unreasonable
In re Mance, 980 A.2d 1196 (D.C. 2009)

In summary, the District of Columbia Court of Appeals held that flat fees do not become attorney property, and therefore must be held in trust, until earned by the attorney. Moreover, it is unreasonable to consider a fee "earned" before the attorney renders any services.

Jurisdiction
Patent Law and the Debate of Federal Jurisdiction Continues
Minton v. Gunn, 301 S.W.3d 702 (Tex. App. Fort Worth 2009)

Service Areas

Appellate

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A client's infringement claim was precluded after the patent was held invalid based on the "on sale bar rule" because it was put into commercial use more than one year from when the inventor applied for the patent. The client contended the law firm failed to raise the "experimental use doctrine," which provides an exception where the use was primarily experimental as opposed to commercial. The court held that the defense did not apply because the evidence established a commercial intent. To reach that result, a divided appellate court rejected certain United States Court of Appeals for the Federal Circuit decisions as intruding into issues of state law.

Conflicts

Second Circuit Limits Use of Witness-Advocate Rule for Disqualification
Murray v. Metropolitan Life Ins. Co., 583 F.3d 173 (2d Cir. 2009)

In summary, the United States Court of Appeals for the Second Circuit took a fact-specific and critical approach in applying the witness-advocate rule to a motion to disqualify counsel. The court requires the moving party to establish that the lawyer's testimony will both prejudice the client and harm the integrity of the judicial system. Class action plaintiffs sued Metropolitan Life Insurance Company (MetLife) for violating securities laws when the company demutualized. Plaintiffs were MetLife policyholders. After nine years of litigation, plaintiffs moved to disqualify MetLife's counsel, Debevoise & Plimpton LLP, because the firm had represented MetLife policyholders during MetLife's demutualization. The district court disqualified Debevoise & Plimpton but the Second Circuit reversed, holding that plaintiffs had no attorney-client relationship with Debevoise & Plimpton and that the witness-advocate rule did not apply.

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