Ethical Coffee Break No. 13 (May 2012)

FEDERAL

Fourth Circuit: the rules of the jurisdiction where attorneys are admitted govern their conduct. Repeated misrepresentations to a court, even though harmless, warrant a public sanction.

In *In Re Liotti*, decision No. 10-9504 (December 9, 2011), the Fourth Circuit held that attorney T. Liotti, ("Attorney"), violated the applicable rules of professional conduct because of his repeated misrepresentation.

The Fourth Circuit's Standing Panel on Attorney Discipline initiated a disciplinary proceeding against Attorney because of several misrepresentations in the appeal of a case of one of his clients. In particular, Attorney (1) combined separate passages in his client's reply brief in order to make them appear consecutive; (2) falsely accused the trial judge of suppressing evidence; (3) in support of his appellate contention that venue should be transferred to New York, Attorney falsely accused the government of intentionally overestimating the length of the trial to keep the case in South Carolina; (4) misrepresented that his client had conducted prior to trial an internet chat in Attorney's office that established his client's innocence. Though his client later admitted that the conversation was a fake, Attorney did not disclose the fact to the court; (5) stated without any supporting evidence that two of the Secret Service agents involved in his client's investigation had been fired for misconduct; he later tried to withdraw these statements at oral argument. Attorney admitted the allegations but maintained that they were mere mistakes.

Under Fourth Circuit rules, because Attorney had his office in New York, the New York Rules of Professional Conduct apply. Indeed, the Local Rules provide in pertinent part that:

> (1) A member of the bar of this Court may be disciplined as a result of
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> …
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> (c) Conduct with respect to this Court which violates the rules of professional conduct or responsibility in effect in the state or other jurisdiction in which the attorney maintains his . . . principal office [.] Local R. App. P. 46(g)(1)(c)

New York has rules prohibiting misrepresentation that are not different in any significant respect from those in force in other jurisdictions.

The Fourth Circuit, applying the accepted "clear and convincing evidence" standard in disciplinary proceeding, found the respondent guilty of misconduct.

The Court held that the "*unsettling repetition*" of Attorney's misrepresentation and "*the need to deter others from engaging in similar conduct*" required public discipline. However, because (i) Attorney's "*misrepresentations appear to have been largely discovered by the Court … [and] there was no resulting prejudice to either party*"; (ii) he did not have any selfish motive; (iii) he did not have any prior records and (iv) the case was taken on a court's appointment, the Fourth Circuit found that public admonishment – i.e. "*one of the less severe disciplines available*" - was the appropriate sanction.

East District of New York: litigation hold for transactional lawyers?

In *FDIC v. Malik*,[1] a Brooklyn federal district court seems to create a new duty for transaction lawyers, i.e. the duty of preservation of evidence acquired during negotiations. The judge held that a transactional lawyer may be sanctioned for spoliation if he failed to preserve documents, including emails, relating to the lawyer's negotiation and documentation of a loan agreement.

Plaintiff Federal Deposit Insurance Corporation filed a motion seeking sanctions, including an adverse inference, against defendant Malik Firm that had represented AmTrust Bank in loan transactions.

The judge restated that the plaintiff seeking sanctions has to prove three elements.[2] While the plaintiff here proved two of the elements (i.e. that Malik having

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[1] 2012 WL 1019978 (E.D.N.Y). For a comment to this decision, see David B. Picker*, Do Transactional Lawyers Have a Duty to Preserve Evidence?*, available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1337529491217&Do_Transactional_Lawyers_Have_a_Duty_to_Preserve_Evidence&slreturn=1. For guidelines on preservation of evidence by transactional lawyers, see ABA Informal Opinion 1384 (1977); Association of the Bar of the City of New York Formal Opinion 1986-4 and 2008-1.

[2] [A] party seeking an adverse inference instruction based on the destruction of evidence must establish [that] (1) … the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) … the records were destroyed `with a culpable state of mind'; and (3) … the destroyed evidence was `relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002) (quoting Byrnie v. Town of Cromwell, 243 F.3d 93, 107-12 (2d Cir. 2001)).

control over the evidence had an obligation to preserve it and that the destroyed evidence was `relevant' to the party's claim or defense), the missing element (i.e. Malik's culpable state of mind) will have to be proved in a hearing called especially therefore.

With particular reference to the preservation duty, the judge held:

> The Malik defendants' preservation obligation attached in 2008 when they represented AmTrust in the loan transactions at issue. That obligation was violated when employees of the Malik Firm were permitted to delete emails that were neither preserved in hard copy nor backed-up electronically.

While the judge found that a duty arose in 2008, this holding is questionable. Normally a duty to preserve evidence only arises at the earliest when litigation is reasonably foreseeable.[3]

SOUTH CAROLINA

The SC Supreme Court held that an expert affidavit does not have to address causation.

On May 2, 2012, the S.C. Supreme Court held that pursuant to S.C. Code Section 15-79-125(A) and Section 15-36-100(B) an expert affidavit does not have to address causation. *Grier v. AMISUB,* No. 27118.

Evelyn Grier, as personal representative of the estate of W. J. Fee, who died while in the care of AMISUB of South Carolina, Inc., d/b/a Piedmont Medical Center ("Piedmont"), brought a medical malpractice claim against Piedmont. Plaintiff's claim was that Piedmont's failure to monitor and treat the patient for bedsores and sepsis contributed to his death. Sharon Barber, a nurse with experience in treating bedsores ('Nurse") rendered the affidavit pursuant to Sections 15-36-100 and 15-79-125 of the South Carolina Code (Supp. 2011). The Nurse opined that "*Piedmont breached its duty of care towards Fee in multiple respects and these breaches were a contributing cause of Fee's death*." The Nurse was not "*qualified to render an opinion as to cause of death*." The circuit court found that it was "*implicit in the Tort Reform Act … that a showing of proximate cause must be made.*" Because the affidavit did not

[3] See Nathan M. Crystal, Ethical Responsibility and Legal Liability of Lawyers for Failure to Institute or Monitor Litigation Holds, 43 Akron L. Rev. 715 (2010).

contain a competent opinion on proximate cause, the court dismissed plaintiff's claim. Grier appealed.

The South Carolina Supreme Court's opinion is a catalogue of settled principles of statutory interpretation: (i) in interpreting a statute, "*we must follow the plain and unambiguous language … and have no right to impose another meaning*" (ii) "*[it] is only when applying the words literally leads to a result so patently absurd that the General Assembly could not have intended it that we look beyond the statute's plain language*"; (iii) "*in ascertaining the meaning of language used in a statute, we presume the General Assembly is aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense*" (iv) "*when Congress uses language with a settled meaning at common law, Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word … unless otherwise instructed*" (v) statutes in derogation of the common law are to be strictly construed. Citations omitted.

Applying these principles, the Court held that an opinion on causation in the affidavit was not required. Because Section 15-36-100(B) is unambiguous, "*its plain language*" must be applied. "*The language … [of] the affidavit … encompasses only the breach element of a common law negligence claim and not causation.*"[4] "[*T]he General Assembly used a term of art which has a well-defined common law meaning as just breach, and we can find nothing indicating the General Assembly intended to vary from it.*" In addition, section 15-36-100 "*restricts a plaintiff's common law right to bring a malpractice claim by imposing this requirement. Consequently, the language in the statute is to be strictly construed.*" Because the Court held "*that Section 15-36-100(B) requires that the expert render an opinion only as to a breach of the standard of care,*" the decision was reversed and remanded.

Only a S.C. Lawyer may operate a S.C. IOLTA account.

A South Carolina attorney ("Attorney") is the sole employee of the South Carolina office of a Texas-based law firm. Attorney opened a IOLTA account in South Carolina. According to the firm's internal procedures, Attorney should send the checks for the IOLTA account to Virginia, where Partner -- who is not licensed in South Carolina -- is based and where the law firm's accounting office is located. Attorney

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[4] Section 15-36-100(B) only requires the submission of "*an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.*"

will deposit client funds in the account and inform Partner of such deposits. Attorney will submit disbursement requests to Partner, and Partner will have the sole ability to write checks.

The Ethics Committee opined that, while the arrangement appears to comply with Rule 1.15[5] and Rule 412 (IOLTA accounts rules), it does not comply with Rule 417, SCACR, as amended in September 2011. This rule gives requirements for record keeping with respect to *all* client trust accounts, including IOLTA. In particular, it provides that "*only a lawyer admitted to practice law or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account.*" The Comment to Rule 2 specifies that the lawyer's duty to protect funds is "*nondelegable*" and that nonlawyer access to a trust account "*should be limited and closely monitored.*" The Committee finds the term "nonlawyer," as used in Rule 2 to include lawyers admitted to practice in jurisdictions other than South Carolina, like Partner here. *Ethics Advisory Opinion 12-05.*

Ethics rules do not prevent a lawyer, who is also a certified civil court mediator, to participate in an organization of non-lawyers providing mediation service and to share in the profits, provided that the provision of legal services is excluded.

The Ethics Committee was asked to render an opinion on whether it was proper for a lawyer who has her own practice and who is also a certified civil court mediator, to form a partnership or agreement with several non-lawyers who are trained mediators to provide mediation services. The organization would operate for a profit, in which the lawyer wants to share. *Ethics Advisory Opinion 12-06.*

The relevant rules are Rule 5.4 and 7.2(c). The Committee reasoned that neither rule was applicable because both concern legal services while "*mediation is not the practice of law and … admission to the Bar is not a prerequisite to service as a mediator*" (*Ethics Advisory Opinion*, 94-10). The attorney, however, must be careful

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[5] Rule 1.15(a) of the Rules of Professional Conduct ("Safekeeping Property")

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person … Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of representation. A lawyer shall comply with Rule 417, SCACR (Financial Record-keeping)

in avoiding "*any appearance that he or she is practicing law concomitantly with the practice of mediation*".

Therefore the arrangement is proper.

In further support of its decision, the Committee could have cited Rule 5.7, which provides that a lawyer is not subject to the rules of professional conduct with regard to non law-related services if they are rendered in an entity separate from the practice of law and the lawyer gives notice to clients that the protections of the attorney-client relationship do not apply.

NEW YORK

Continuous representation doctrine does not apply to claims against a decedent's attorney because decedent's death severs the relationship.

In *Pace v Raisman & Asso.,* a legal malpractice action brought by the decedent's son, who is also the executor of the estate, against the lawyers who drafted the decedent's trust and gave tax advice to the estate, the statute of limitations was an issue.

The defendant Raisman, on January 9, 2001, amended a trust created by the decedent. The decedent wanted to amend his trust in order to leave him, as grantor, with limited power over the assets so that the latter would not be included in his estate at the time of his death for tax purposes. After the amendment the decedent conveyed numerous assets and gifts to the trust. He died on October 7, 2005. In January 2007 the defendants helped to prepare the tax returns for the decedent's estate. The IRS audit of the estate tax return resulted in additional taxes, interest and penalties because the IRS determined that the amendment to the trust, drafted as an "*intentionally defective grantor trust*", "*provided the decedent with too much authority to borrow the corpus or income from the trust without adequate consideration.*"

Among other causes of action, the executor sued the firm for legal malpractice in the drafting of the trust. The law firm moved to dismiss the legal malpractice claim because time-barred. They alleged that the statute of limitation expired because suit was commenced more than three years after the decedent's death. The supreme court denied the motion. The court applied the continuous representation doctrine and found that the suit was commenced within three years of the termination of the representation.

The Appellate Division of the Second Judicial Dept reversed the order and granted the motion.

> Contrary to the plaintiff's contention, the statute of limitations was not tolled by the doctrine of continuous representation where … the original client, died, severing the attorney-client relationship … and the law firm defendants' representation of the decedent's estate in connection with legal advice … was separate and distinct from the alleged negligent creation of the trust ... Further, contrary to the plaintiff's contention, the legal malpractice cause of action did not accrue at the time that the IRS conducted its audit in 2009.

Probono requirements in NY to become a lawyer.

New York Chief Judge Jonathan Lippman announced that NY prospective lawyers applying after 2012, will have to perform 50 hours of *pro bono* before they can qualify as attorneys. New York will be the first state with this pro bono requirement.[6]

For further information, please contact info@nathancrystal.com.

[6] The Committee on Pro Bono and Legal Services of the New York City Bar sent a letter to Chief Judge Lippman to clarify the details of the requirements. The letter is on the website of the New York City Bar Association. http://www.nycbar.org.