Ethical Coffee Break No. 16 (December 2012 – February 2013)

FEDERAL – SECOND CIRCUIT

The Second Circuit holds that failure by counsel to update an email address, in compliance with electronic case filing system rules, constitutes inexcusable neglect that prevents counsel from relying on Federal Rule of Appellate Procedure 4(a)(6) to extend the time for filing an appeal.

In *Communications Network International, Ltd. v. MCI WorldCom Communications, Inc.*[1] the Second Circuit limited the discretion of a district court to reopen the time in which to file an appeal under Federal Rule of Appellate Procedure 4(a)(6), excluding that the rule could apply in case of counsel's inexcusable neglect.

Counsel for Communications Network International, Ltd. ("CNI") failed to update his new address in the electronic case filing ("ECF") system. As a result, the notification regarding a certain district court ruling did not reach him. CNI's counsel filed a notice of appeal after the time to file had expired. The other party moved to dismiss the appeal as untimely, and CNI moved to reopen the time to file in reliance on Rule 4(a)(6).[2]

While the district court ruled in favor of CNI,[3] the Second Circuit reversed. The court held that this rule exists to relieve strict sanctions for failure to monitor the dockets, which is still counsel's duty. The court held that CNI did not receive actual "notice" within the meaning of the rule because the notice was sent to an old email address.[4]

However, although CNI satisfied the Rule 4(a)(6) elements, the Second Circuit held that the district court abused its discretion in applying the rule. Meeting the elements of the rule allows the court to reopen the time to file an appeal in its discretion (*i.e.*, reopening is not mandatory) but the district court should have applied its discretion with regard to the application of the rule. The failure to receive notice was the *fault* of CNI rather than the clerk or the postal service.[5] The Second Circuit held that "[t]here is nothing in the legislative history…to suggest that the drafters sought to provide relief when the fault lies with the litigants themselves" and that "a

[1] 57 Bankr. Ct. Dec. 122 (January 24, 2013).

[2] CNI also could have proceeded under Rule 4(a)(5) but did not do so.

[3] Rule 4(a)(6) prerequisites are: (1) the party seeking to reopen the time to appeal did not receive notice of the ruling under Rule 77(d) – which requires the clerk to immediately serve notice of orders or judgments as a convenience to the parties – within 21 days after entry of the judgment or order sought to be appealed; (2) the party files the motion within the earlier of 180 days after the judgment or order or within 14 days of receiving Rule 77 notice; and (3) the court finds that prejudice would not result.

[4] Highlighting the distinction between the terms "service" and "receipt", the court held that the drafters of the rule used the term "receipt" and intended for it to mean *actual receipt* rather than proper service.

[5] In this case, CNI failed to comply with ECF rules which require an attorney to update changes to information previously provided. The court held that it was "remarkable" that a litigant who relied entirely on the ECF system for notification would fail to make this update.

district court exercising discretion under Rule 4(a)(6) should give substantial weight to indications that the failure of receipt was the litigants fault."[6]

SOUTH CAROLINA

The Ethics Advisory Committee has issued three Ethics Advisory Opinions, one dealing with automated clearing house transfers, one with a lawyers' sharing of expenses arrangement and one dealing with the payment of an investigator.

Are Automated Clearing House transfers "collected funds"?

Ethics Advisory Opinion 12-11 addresses the issue of when Automated Clearing House transfers to an attorney's trust account are considered "collected funds" for purposes of Rule 1.15(f) so that they may be disbursed in real estate transactions. A reversing entry on such a transfer can be entered up to five banking days after the date the deposit is reflected on the books of the receiving bank under certain circumstances. Therefore, an attorney must wait until the expiration of at least five banking days before considering such funds "collected funds".

In case of an arrangement in which lawyers share a name, expenses and liability insurance, work in the same building, but do not divide profits, they cannot advertise as a partnership. In particular, an "eat what you kill" arrangement contradicts the normal meaning of a partnership.

Rule 7.1 and 7.5 allow lawyers to state that they are practicing in a partnership when such statement is accurate and not misleading. In Ethics Advisory Opinion 12-12, the inquirer wanted to know if a group of attorneys could practice as "XYZ Law Firm" under the following arrangement: (i) firm letterhead, signs, and telephone listings would identify the law firm and the members as partners; (ii) professional liability insurance would be obtained in the name of the firm and would protect the firm and its members; (iii) expenses would be shared but (iv) profits would be shared only on case-by-case basis; (v) the partners (rather than the firm) would file tax returns individually; (vi) the lawyers would obtain business licenses and (vii) maintain trust accounts individually; (viii) each lawyer would hire its own support staff; and (ix) the salary of a receptionist would be shared by the lawyers who would work in the same building. While the Committee did not opine as to whether a partnership could actually exist on these facts, it did state that representations by these lawyers that they practice in a partnership would be *misleading*. An arrangement where partners do not share in profits is unusual and contradicts the normal meaning of a partnership. In addition, noted the Committee, the lawyers shared very little and a trade name should

[6] The dissent noted that by reaching the conclusion that there was an abuse of discretion "for no reason other than that the appellant was to blame…the majority effectively adds an additional condition to Rule 4(a)(6)…("unless the litigant was without fault.")

reflect the reality of the practice rather than merely an office lease or insurance arrangement.

Lawyers not responsible for payment to investigator in an indigent defendant's criminal case.

Ethics Advisory Opinion 13-02 addressed a situation in which an investigator was contacted to assist in case by an attorney appointed to represent an indigent defendant in a Rule 608 criminal case. The investigator was to be paid by the South Carolina Commission on Indigent Defense ("CID") and the attorney instructed the investigator to perform no work until the investigator was pre-approved for reimbursement by CID. Nevertheless, the investigator started work without pre-approval, was denied reimbursement for pre-approval expenses, and demanded payment from the attorney citing *In re Jackson*.[7] The Committee opined that the attorney had no ethical obligation to pay the investigator stating that "[n]othing in the South Carolina Rules of Professional Conduct requires counsel to serve as a guarantor of payment to investigators in Rule 608 cases." The outcome might be different where a contractual obligation exists.

Post-conviction relief application results in an order for a new trial in a case of ineffective assistance of counsel.

In *Vail v. State*,[8] defendant was granted a new trial resulting from ineffective assistance of counsel who failed to object to multiple hearsay statements made by witnesses during trial. Defendant was found guilty. The court of appeals articulated the two prong test that defendant had to show for a grant of PCR which is (1) failure of reasonably effective assistance of counsel under prevailing norms and (2) prejudice.

The court first held that the statements made at trial were indeed hearsay and turned to trial counsel's articulated strategy to determine whether effective assistance of counsel was rendered.[9] The court held that failing to object to hearsay statements because they would be introduced through defendant's testimony was not a valid rationale. In addition, some of the hearsay testimony did not fit within any of the articulated strategies and only served to bolster the victim's story.

As to the prejudice prong, the court held that cumulative and improper corroboration testimony cannot be harmless and a new trial was granted.

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[7] 365 S.C. 176 (2005).

[8] Opinion No. 5092 (February 20, 2013).

[9] The court noted the presumption favoring effective assistance and stated that where a valid trial strategy can be articulated, assistance will not be deemed ineffective. Trial counsel posited several strategies including that some of the hearsay statements would be elicited in defendant's testimony, transparency to bolster defendant's credibility, relying on alibi witnesses to establish the defense, and painting a picture of victim's teenage obsession with defendant.

An attorney who was retained in a prior criminal proceeding and was the subject of an ineffective assistance claim may still represent the same defendant in a subsequent criminal proceeding when the defendant is fully informed of the conflict, does not object, and explicitly requests that the attorney continue to represent him.

The Supreme Court of South Carolina was presented with a unique conflict of interest issue raised by an appellant seeking to overturn a conviction for murder and armed robbery in *State v. Stanko*.[10] While appellant raised a number of other arguments, this comment will focus solely on the conflict of interest issue.

Appellant's trial counsel, Diggs, had previously represented appellant in a separate capital murder case where appellant was found guilty (the "first trial"). Although appellant filed a post-conviction relief ("PCR") application from the first trial claiming Diggs' assistance was ineffective, appellant requested that Diggs represent him in a second case that became the subject of the instant appeal (the "second trial"). Appellant argued that this arrangement gave rise to a conflict of interest and the second trial court erred by accepting appellant's "inadequate" waiver of the conflict. After reviewing the facts, the Court concluded that the argument was not preserved for appeal and that appellant waived the conflict anyway.

The Supreme Court held that appellant failed to preserve his argument regarding the conflict because, in addition to never raising a single objection, he emphatically requested that Diggs represent him in the face of questioning by both the second trial court and the PCR court. The Court concluded that "[a]ppellant cannot argue now on direct appeal that the trial court erred in acquiescing to his express and informed desire." Had the issue been preserved, the Court added that appellant was fully informed of the conflict and his "extensive endorsement of Diggs's continued representation constituted a valid waiver."

NEW YORK

Preclusion sanctions are awarded where a party wrongfully denied being in possession of discoverable material, disobeyed a discovery order, and only made complete disclosure by a discovery supplement after the case was put on the trial calendar.

The New York Supreme Court, Appellate Division, Second Department evaluated the appropriate sanctions for a party who provided false and incomplete responses during discovery and failed to correct the misleading responses, despite

[10] Opinion No. 27224 (February 27, 2013).

having numerous opportunities to do so, until on the verge of trial. *Arpino v. F.J.F. & Sons Electric Co., Inc.*[11]

Following a vehicle accident Plaintiff Arpino sued Foronjy, the truck driver and F.J.F. & Sons Electric Co., Inc. ("FJF"), the owner of the truck. Plaintiff served discovery demands on Defendants seeking information concerning witnesses to the accident and any relevant photographs or videos. Defendants failed to respond within the 20-day deadline and failed again to respond within the deadline established after the preliminary conference. After the deadline, Defendants' attorney sent a letter stating that Defendants were not aware of any additional witnesses and did not have any photographs. Several months later, Foronjy was deposed and he revealed that there were additional witnesses. A further discovery request was sent to Defendants seeking photographs of post-incident damage to Defendant's vehicle; Defendants' counsel responded by letter that they were not in possession of any "upon information and belief." The parties even stipulated that disclosure was complete.

Several months later, Defendants served a supplementary response identifying four witnesses (but providing no addresses) and later on Defendants served an expert witness disclosure noticing intent to call an expert witness. Attached to the notice was a report completed by the expert, which relied in large part on non-disclosed witnesses and on 18 photographs, and a "video run". Nearly 17 months after the deadline to respond to plaintiff's initial discovery demands Defendants served a supplemental response to the discovery demands which included the names and addresses of witnesses and 18 photographs of Defendants' vehicle (ten of which were date stamped 15 days after the accident). Plaintiff rejected the supplemental response and moved for available discovery sanctions.

The court held that sanctions were warranted. The court held that this case was distinguishable from others where sanctions are not awarded when discovery was served late. The distinguishing facts here are that full disclosure was made after multiple false representations and was completed only as a result of the case being put on the trial calendar. The court contrasted the extreme sanction of striking pleadings with that of preclusion, both being warranted by willful and contumacious behavior. The court held that preclusion was appropriate here: Defendants could only present evidence at trial that was disclosed during discovery in a reasonable and timely manner. In sum, the preclusion sanction prevented defendants from calling their lately disclosed witnesses, from introducing the post-accident photographs or the video run, and from eliciting testimony from or using portions of the report created by the expert which would rely on any of the precluded evidence.

Although attorneys allegedly made deceitful remarks to a motion court regarding the existence and nature of a document essential to the action, plaintiff was time-barred from seeking relief.

[11] Slip opinion 8271 (December 5, 2012).

In *Melcher v. Greenberg Traurig, LLP*[12] an action was brought against the law firm that had assisted a party in a membership share of profits action. Under part one of Judiciary Law § 487, treble damages can be awarded to a party who is injured by an attorney's deceit or collusion intended to deceive the court or any party.

In the underlying case, the defendant law firm had represented to plaintiff and his counsel that sums owed to plaintiff were dramatically reduced by an amendment to the operating agreement, which they did not show but vouched it existed. Plaintiff requested that the amendment be made available for forensic testing. Several days later, plaintiff was informed that an accidental fire had destroyed the document. Defendants moved to dismiss the membership share of profits action on the basis of the purported amendment. They represented to the court during a hearing that they were holding the original amendment in escrow. Defendants did not disclose that they had learned that it had been destroyed.

Later on, in the Judiciary Law § 487 action, plaintiff asserted that the statement made by defendants was not only false but was part of an effort to mislead the court into believing the document was safe when it was not (if ever existed.)

Regardless of the truth of plaintiff's allegations, the First Department dismissed the action based on the statute of limitations. The critical inquiry was at what point the cause of action accrued. The court noted that plaintiff had the longer of three years from the deceit or two years from when the deceit was (or should have been) discovered.[13]

The court held that "an attorney's concealment from a court of a fact he or she is required by law to disclose is tantamount to the assertion of a false material fact" that falls within the proscription of Judiciary Law § 487. The cause of action accrued on March 20, 2004 by virtue of a letter from plaintiff's counsel that made clear he was aware of the alleged concealment. Also, the accrual date was not extended by any subsequent deceit by defendants because "[a] new cause of action for fraud does not accrue each time plaintiff discovers new elements of fraud in a transaction or new evidence to prove such fraud." (Citations and internal quotations omitted).

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[12] Slip opinion 256 (January 17, 2013).

[13] The court dispensed with plaintiff's contention that the statute of limitations did not run until the underlying action was resolved. Damaging to plaintiff was a letter written to the motion court by plaintiff's counsel on March 20, 2004 that complained of "defendants' concealment of material facts and misleading representations" concerning plaintiff's request for production of the amendment and stated awareness of the destruction of the document.