Ethical Coffee Break No. 15 (September-November 2012)

FEDERAL - FOURTH CIRCUIT

The Fourth Circuit decides in two partially contradictory opinions the impact of a lawyer's wrong advice as it relates to the consequences of a guilty plea. In *Akinsade* the Court found that misadvice in this context is such a fundamental error that it can ground a writ of error *coram nobis*, while in *Mathur* the court held that the misadvice does not cast serious doubt on the truthfulness of the defendant's guilty plea which therefore cannot be vacated.

See *United States v. Akinsade* 686 F.3d 248 (July 25, 2012) and *United States v. Mathur*, 685 F.3d 396 (July 11, 2012).

Where alleged wrongdoing occurs while a trustee is acting in his official capacity, leave of court is required to pursue claims against the trustee and the trustee's attorneys under the *Barton* doctrine.

The dispute in *McDaniel v. Blust*[1] arose due to conduct occurring during a bankruptcy proceeding. EBW Laser, Inc. ("EBW") entered bankruptcy and the court appointed Ivey as trustee. Ivey retained his own firm ("IMGT") to assist in an adversarial proceeding against McDaniel and Epes ("Appellants"), former employees of EBW.

Appellants brought claims against IMGT alleging that during discovery, an attorney with IMGT wrongfully submitted documents to certain deponents and allowed them to rely on these documents to find fraudulent behavior by Appellants. Further, it was alleged that IMGT impermissibly obtained personal income tax returns for McDaniel from McDaniel's accountant.

IMGT and the individual attorneys sought dismissal of the claims based on the *Barton* doctrine[2] asserting that Appellants failed to seek leave of the court that had appointed Ivey as trustee, and, therefore, the district court lacked subject matter jurisdiction. The Fourth Circuit agreed.

The court outlined that, under the *Barton* doctrine, leave of the court that appoints a trustee must be obtained before another court obtains subject matter jurisdiction over a suit filed for acts that the trustee (or a trustee's counsel) committed in the trustee's official capacity. In bankruptcy, this limitation applies to acts of the trustee committed within the role of recovering assets for the estate with an initial presumption that any acts are committed within this function. The doctrine, noted the Fourth Circuit, allows the court to monitor the trustee with an eye to future appointments and protects trustees from unjustified personal liability that would make the acceptance of appointments less likely.

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[1] 668 F.3d 153 (February 9, 20120).

[2] *Barton v. Barbour,* 104 U.S. 126, 129, 26 L.Ed. 672 (1881) (holding that in order to sue a court-appointed receiver, the petitioning party must first seek leave of the court that issued the receiver's appointment.)

Appellants argued that the acts committed were beyond the scope of authority of the trustee and that Ivey did not direct his counsel to commit the wrongdoings they alleged. The court rejected this argument holding that there is no authority that requires that the trustee *direct* the acts of attorneys retained for applicability of the *Barton* doctrine. The court also held that there was no legitimate dispute that the acts occurred in the context of prosecuting the adversary proceeding against Appellants and "[t]he allegations that the challenged conduct was wrongful, certainly not unexpected in a lawsuit, do not preclude application of the *Barton* doctrine."

NEW YORK

An expert's review of attorney work-product documents prior to testimony does not waive the attorney work product privilege but the privilege is limited to information or instructions imparted from attorney to expert.

The issue in *Beach v. Touradj Capital Mgt., LP*,[3] was whether reports prepared by a forensic examiner in connection with a discovery request were privileged attorney work-product and if they were, whether or not the privilege was waived.

The underlying action arose after Plaintiffs left Defendant's employment and opened a competing business. While Plaintiffs alleged that compensation was owed to them, Defendant counterclaimed that Plaintiffs had stolen proprietary information to start their new business. Relevant to this discussion, Defendant requested that it be allowed to examine two personal computers belonging to one of the Plaintiffs. Plaintiffs did not comply with the request; instead Plaintiffs arranged for a forensic examination of the computers. The examiner located hundreds of files that were responsive to Defendant's discovery request. These documents were produced. Defendant sought an order compelling production of the two computers for examination. The request was denied in lieu of a four hour deposition of the forensic examiner.

The examiner testified regarding his methods but noted that he could not recall the specifics of his findings. Answering a question, the examiner stated that he created written reports of his findings and that he consulted these reports prior to his deposition. Defendant applied for production of the reports arguing that they were not privileged, or alternatively, that the privilege was waived when the examiner used the reports to refresh his memory prior to being deposed. The application was denied on the ground that the reports were privileged or prepared for litigation and not discoverable.

The First Department held that the privilege enjoyed by attorney work-product extends to experts retained to assist in analyzing or preparing for a case. The court cited case law limitations on this general rule:

> [the] doctrine affords protection *only to facts and observations disclosed by the attorney*. Thus, it is the information and observations of the attorney that are conveyed to the expert which may thus be subject to trial

[3] Slip opinion 06004 (August 21, 2012).

exclusion. The work product doctrine does not operate to insulate other disclosed information from public exposure. (emphasis added).

The court illustrated an important distinction (seemingly causing confusion) between the attorney work-product privilege and the conditional privilege for material prepared for litigation: while the former is not waived by an expert's review of a work-product document prior to testimony, the latter *is* waived.

Portions of the reports reviewed by the examiner such as "the information … as to how the search was conducted, what was found, what was deleted, when it was deleted, etc." were deemed by the court to constitute material prepared for litigation. Such portions, noted the court, are subject to the conditional privilege which was overcome by Defendant's demonstration of substantial need (i.e., the reports contained information Defendants could not obtain from another source.) In addition, the conditional privilege was waived when the expert reviewed the reports prior to the deposition.

As for the information, instructions, impressions, etc. imparted from the attorney to the expert (the examiner in this case), these are subject to the attorney work-product doctrine. The court concluded that, to the extent the reports reviewed by the examiner contained any such information, the privilege was applicable and was not waived by the examiner's review of the reports prior to the deposition. The remainder of the information in the reports, however, was not entitled to the attorney work-product privilege.

Sanctions for failure to meet discovery deadlines should ordinarily be imposed against the attorney rather than against the party.

In a case in which a New Jersey-based distributor of "PET" sued its Taiwanese supplier for breach of contract (among other causes of action), the United States District Court for the Southern District of New York granted several requests to extend the discovery schedule.[4] Plaintiff filed its expert report with seven-weeks delay. The court granted Defendant's motion to strike the expert's report and its claim for damages pursuant to *Fed. R. Civ. P. 37*.

The Second Circuit vacated the sanction because the district court acted without providing plaintiff with (1) sufficient notice of the severe consequences for late filing; and (2) opportunity to respond before being sanctioned. In addition, according to the Second Circuit the penalty imposed "far outweighed the transgression".

Commenting on the attorney's mistake (i.e., the late filing of the expert's report) the court held that:

> While we do not doubt that a sanction is appropriate, the facts before us suggest that sanctions should be imposed on the attorney, and not bar [Plaintiff] from a full presentation of its case. When an attorney's misconduct or failing does not involve an attempt to place the other side at an unfair disadvantage, any sanction should ordinarily be directed against the attorney rather than the party, absent strong justification.

[4] 694 F.3d 155 (September 14, 2012).

The decision whether or not to submit lesser offenses to the jury is a tactical decision (as opposed to a fundamental decision) which defense counsel makes.

The Court of Appeals faced the issue of whether the decision to seek a jury charge of lesser-included offenses is fundamental and reserved for the defendant or is a matter of strategy and tactics for the defense counsel to decide. In *People v. Colville*,[5] the answer to this question controlled whether defendant was deprived of his Sixth Amendment rights.

During an altercation, defendant stabbed and killed a cohabitant of his floor. There were differing accounts as to who the aggressor was and other facts surrounding the incident.

Defendant was tried for second-degree murder and, at the close of trial, defense counsel sought a jury instruction regarding lessor offenses of first- and second-degree manslaughter to which the judge eventually acquiesced. After consultation with defendant, defense counsel informed the judge that defendant had changed his position and did not want the lesser charges to go to the jury. Defense counsel conveyed to the judge on multiple occasions his strong belief that the lesser included offenses should be submitted but felt forced to comply with defendant's instructions. The judge questioned defendant directly several times regarding the manslaughter charges, however, defendant remained steadfast in his stance stating that he was prepared for whatever sentence he might face. Finally, defense counsel reviewed and shared the verdict sheet with defendant. The judge noted that "we can't do any more than we have done." Defense counsel did not object to the verdict sheet but reiterated that his advice to defendant was different.

The jury returned a guilty verdict on the murder charge and defendant was sentenced to incarceration of 22 years to life.

Colville is quite unique. More frequently it happens just the reverse: defense counsel makes the decision to "go for broke" and forces the jury to decide between a harsh penalty versus a not guilty verdict with no compromising middle-ground. In this context, noted the Court of Appeals, the rule is that the trial court may "in its discretion submit a lesser-included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater." And where a reasonable view of the evidence supports submission of a lesser-included offense, the court "*must* do so" if "requested by *either party*."

Here the Court of Appeals found that the trial judge had made clear that defendant's decision would control, notwithstanding defense counsel's request that the manslaughter charges be included and his repeated advice that submission of these charges was in defendant's best interest. Thus, this was not a case where a tactical decision was made by attorney to forgo the manslaughter charges, but rather an instance where the judge simply would not include the charges without defendant's concurrence. The judge left defense counsel with no alternative. This, the Court held, warranted reversal and a new trial because the decision regarding inclusion of lesser offenses was the attorney's and defendant was so deprived of his Sixth Amendment rights.

[5] Slip opinion 07047 (October 23, 2012).

A recent amendment authorizes liens for services performed by attorneys on sums received by clients from alternative dispute resolution and settlements.

On October 3, 2012, an amendment to Section 475 of the Judiciary Law was passed that renders collection of attorneys' fees for services in settlement or alternative dispute resolution easier.[6]

The amendment allows attorneys to attach a lien to funds received from "the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute."

Under prior law, liens attached only after commencement of "an action" which was long interpreted to exclude alternative dispute resolution and settlements. The result was that court proceedings were necessary for a lien to arise.

The legislation will take effect 90 days from the approval.

The New York City Bar gives guidelines for attorneys' use of social media and Internet for juror research.

Because of the increasing use of social networking platforms and the Internet during and after trial by both attorneys and jurors, the New York City Bar Association issued Formal Opinion 2012-02. Indeed, the issue is delicate: misuse of technology by attorneys resulted in ethical violations while jurors' misuse resulted in jurors being held in contempt or even in mistrials.

The opinion provides practical application of Rules 3.5 (Maintaining and Preserving the Impartiality of Tribunals and Jurors) and 8.4 (Misconduct) in this context.

In general, Rule 3.5(a)(4) prohibits communication with a member of the *venire* during *voir dire* and the jury during trial. Rule 8.4(a) forbids an attorney from violating a rule through the acts of another and 8.4(c) prohibits deception and misrepresentation.

The concluding paragraph of the opinion provides concise guidance to lawyers for communication with (a) potential or sitting jurors and (b) discharged jurors.

As for communications with jurors, the Committee opined that "an attorney may research potential or sitting jurors using social media services or websites, *provided that a communication with the juror does not occur*." [emphasis added.] The Committee warns that "communication," "should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney's research efforts." In particular, the Committee reminds that "[i]n the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research." The Committee specifies that "[t]he attorney must … avoid engaging in deception or misrepresentation in conducting such research, and may not use third parties to do that which the lawyer cannot."

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[6] A5275-2011 (same as S1546-2011). The justification for the amendment (see memo for the bill) is that attorneys currently take a great risk in performing services that will not conclude in litigation. Instead, "the public interest would be best served were lawyers not confronted with having to decide between following the best course of action for the client, which may be a form of alternative dispute resolution, and ensuring that the lawyers will be compensated for their services."

As for communications with discharged jurors, the Committee opined that "although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication."

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