



Lawyers' Professional Liability UPDATE

February 2010 Issue 2

Discipline

Washington Attorney Disbarred Following Guilty Plea Based on Failure to Report Receipt of \$20,000 in Cash *In re Vanderveen*, 166 Wash. 2d 594, 211 P.3d 1008 (2009)

In summary, the Washington Supreme Court disbarred an attorney who pled guilty to violations of 31 U.S.C. §§ 5331(a) and 5332 as a result of failing to report the receipt of \$20,000 in cash for representing a client. Attorney Mark Vanderveen was asked by attorney James White to represent Wesley Cornett, a person who was then being investigated by the FBI for participation in a major drug ring. At the time, White represented Robert Kiesling, one of the top participants in the drug ring and Cornett's supplier. White also informed Vanderveen that Cornett's "friends or associates" would pay Cornett's legal fees.

White arranged for two \$10,000 cash payments to Vanderveen. The first payment was left in a paper bag in judicial chambers at a municipal court at which both White and Vanderveen served as part-time judges. The second was delivered to Vanderveen in a parking lot outside of a bank. Vanderveen did not report either of these cash receipts on Internal Revenue Service (IRS) Form 8300. He also did not enter the receipt of these funds on the books and records of his law practice. Instead, he kept the funds in a safe at his home. After he was caught, Vanderveen pleaded guilty to violations of 31 U.S.C. §§ 5331(a) and 5332. In essence, 31 U.S.C. § 5331(a) requires persons, including lawyers, to report such cash receipts, and 31 U.S.C. § 5332 makes it a felony for an individual to willfully not report.

The Supreme Court held that Vanderveen's guilty plea precluded him from denying in the disciplinary proceeding that his conduct was intentional because that was the required mental state applicable to these crimes under *Ratzlaf v. United States*, 510 U.S. 135 (1994). Vanderveen had not filed a so-called *Alford* plea, in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970), whereby he could have protested the mental state required as a part of the plea. In addition, there was no evidence that Vanderveen had not understood his plea agreement. However, the Court found that other evidence in the record also established that Vanderveen's conduct was intentional.

Editor

Terrence P. McAvoy
222 North LaSalle Street
Suite 300
Chicago, Illinois
312-704-3281

Randal N. Arnold
Milwaukee, Wisconsin
414-276-6464

Thomas L. Browne
Chicago, Illinois
312-704-3576

Anthony E. Davis
New York, New York
212-935-1100

David A. Grossbaum
Boston, Massachusetts &
Providence, Rhode Island
617-213-7003

Peter R. Jarvis
Portland, Oregon
503-243-7696

Ronald E. Mallen
San Francisco, California
415-362-8112

Thomas P. McGarry
Chicago, Illinois
312-704-3506

Michael E. O'Neill
Schererville, Indiana
219-864-4522

Victoria L. Orze
Phoenix, Arizona
602-337-5524

Thomas P. Sukowicz
Ft. Lauderdale, Florida
954-375-1142

Philip Toutou
New York, New York
212-471-6211

www.lawyringlaw.com

The Supreme Court further found that Vanderveen had violated the prohibition in Washington RPC 8.4(b) against criminal acts which reflect adversely on a lawyer's fitness to practice. The Court also determined that Vanderveen had violated the "dishonesty" prong of RPC 8.4(c), which generally prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," on the ground that his conduct constituted "dishonesty" because it reflected untrustworthiness and a lack of integrity.

The Supreme Court held that disbarment was the appropriate sanction. It stated that the criminal punishment meted out to Vanderveen as a result of the guilty plea did not constitute a mitigating factor as a sanction already imposed upon him because, in the Court's view, criminal sanctions serve a different purpose than disciplinary sanctions. The Court also held that the judicial sanction against Vanderveen (who, as noted, had also been a part-time municipal court judge) was not a mitigating factor; that he had not proved a good reputation in the community; and that the adverse publicity to his family and to him was insufficient to constitute a mitigating factor. The Court also found relevant to its analysis the fact that Vanderveen had been disloyal to his client Cornett by helping White investigate certain of Garnett's actions for the benefit of White and his client, Kiesling.

The sole dissent focused primarily on two issues. One was that, by and large, prior Washington disciplinary cases involving failures to file income tax returns had almost always resulted in far less severe sanctions than disbarment. The other was that prior Washington "dishonesty" cases generally required an affirmative finding of fraud, misrepresentation or concealment when there was a duty to speak that, in the dissent's view, was not present here.

IRS Form 8300s must be filed by criminal defense lawyers who receive sufficient cash as well as by their civil counterparts. This opinion should serve as a warning that the failure to file these forms can have substantial disciplinary consequences. It is also possible to assert, however, that the Supreme Court's decision was influenced at least to some degree by the fact that Vanderveen was also extraordinarily disloyal to his client.

Statutory Liability

Attorney May Send Unsolicited Informational Messages Under TCPA

Stern v. Bluestone, 12 N.Y.3d 873, 883 N.Y.S.2d 782 (N.Y. 2009)

In summary, an attorney's unsolicited faxes containing essays related to his area of practice were not prohibited advertisements under the Telephone Consumer Protection Act (TCPA). Plaintiff Stern sued attorney Bluestone under the TCPA after Bluestone sent Stern 14 unsolicited faxes containing essays on the subject of attorney malpractice. Because Bluestone specialized in bringing legal malpractice actions, the trial court and the Appellate Division had held the faxes were prohibited under the TCPA as unsolicited advertisements. See Hinshaw & Culbertson LLP's March 13, 2008 Lawyers for the Profession® Alert article, "New York Court Holds Attorneys Who Send Faxes on Legal Issues May Be Unlawful Advertisers Under TCPA." These courts also held that Bluestone had willfully violated the act because he lost a similar case under the TCPA the prior year. Both holdings were granted on summary judgment.

The New York Court of Appeals reversed, based at least in part on a regulatory and intervening clarification by the Federal Communications Commission (FCC). In 2006, the FCC had clarified that unsolicited informational messages containing merely incidental advertisements do not violate the TCPA. The Court held that Bluestone's faxes were informational messages because their content varied from issue to issue and they did not promote commercial products. Further, and to the extent Bluestone's faxes were designed to attract referrals, they still merely amounted to incidental advertisement.

The Court, which hinted that it would have been willing to grant Bluestone summary judgment if he had so moved, seemed to think that Bluestone's faxes were well within the ambit of "informational messages." Nonetheless, the line between informational messages and unsolicited advertisements may still need further clarification.

In Pari Delicto Defense Applied to Bar Legal Malpractice Claim

Intentional Wrongdoer Cannot Sue for Legal Malpractice

Whiteheart v. Waller, 681 S.E.2d 419 (2009)

In summary, the North Carolina Court of Appeals affirmed the dismissal of a legal malpractice claim based on the doctrine of *in pari delicto*. Dismissal under the doctrine was appropriate, despite the lawyers' misconduct, because plaintiff was collaterally

estopped from denying that he had committed intentional misconduct. Plaintiff, William Whiteheart, sued his former law firm, Waller & Stewart, for malpractice. Whiteheart's claim was based on multiple instances in which Waller & Stewart facilitated Whiteheart's wrongdoing. For example, Waller & Stewart reviewed a per se defamatory letter that Whiteheart wrote about one of his business competitors. Waller & Stewart did not warn Whiteheart of potential liability for the letter, and he later distributed the letter. In a related matter, Waller & Stewart helped Whiteheart maintain a billboard well past the term of the billboard's lease, even though the landlord had rightfully sought removal of the billboard. Waller & Stewart even went so far as to obtain a temporary restraining order to prevent removal of the billboard, despite no apparent legal basis for maintaining the billboard on the property.

The landlord and the defamed business competitor successfully sued Whiteheart, and obtained a verdict of more than \$700,000. Whiteheart then sued Waller & Stewart seeking damages that would cover that judgment. The trial court dismissed Whiteheart's action for failure to state a claim upon which relief could be granted.

The court of appeals affirmed based on the doctrine of *in pari delicto*, which prevents courts from redistributing losses among wrongdoers. The court held that the doctrine bars recovery in legal malpractice actions unless the client acts pursuant to legal advice so complex that assessing the illegality of the advice would not be possible. The court held that Whiteheart was barred from arguing that he was ignorant of any wrongdoing because in the prior proceeding, the court had found Whiteheart's misconduct intentional.

Whiteheart was thus collaterally estopped from arguing against the court's application of *in pari delicto*. Because no North Carolina court had applied *in pari delicto* to a legal malpractice case, the court of appeals looked to other jurisdictions for guidance. The court noted that allowing malpractice recovery in such cases could encourage clients to commit illegal acts upon the advice of their lawyers, and that malpractice liability is not needed to deter such faulty legal advice because the threat of attorney discipline serves as an adequate deterrent.

This case marks an area in which professional liability and civil liability do not overlap. Although an unethical lawyer will always be subject to discipline, the lawyer may be shielded from liability to unethical clients.

Conflicts

Firm Can Represent Both Executor and Beneficiary of Will

Baker Manock & Jensen v. Superior Court, 175 Cal. App. 4th 1414, 96 Cal. Rptr. 3d 785 (2009)

In summary, the court held that a law firm that drafted a will did not have a conflict of interest in later representing both an executor and a beneficiary of that will against another beneficiary because the former two parties had aligned interests and the latter party was not a client. A law firm, Baker Manock & Jensen (Baker Manock), drafted a will for Lillian Salwasser, which created a trust for two of her sons, George and Gary, but omitted her other two sons, Marvin and Denis. Upon Salwasser's death, Baker Manock represented George, who was a co-executor of the will along with Gary. Salwasser's will left the rest of her property to her husband, Walter, who died shortly after Salwasser's will was probated.

Marvin, served as the executor of Walter's will. Denis, the fourth son, died shortly after Walter. Marvin applied for a determination of ownership of his parents' community property. George argued that Marvin's application violated the no-contest clause in their mother's will. In response, Marvin petitioned to disqualify Baker Manock for having conflicts of interest. Marvin alleged three conflicts: (1) between George as a beneficiary and George as an executor; (2) between George as a beneficiary and the other beneficiaries, and (3) between the beneficiaries and Baker Manock as the drafter of the will. The trial court granted Marvin's petition, and Baker Manock petitioned for a writ of mandate.

The appellate court granted the writ, noting that because the trial court's order was based on an error of law, the lower court's discretion was not entitled to deference. First, the appellate court held that there was no divergence of interest between George as an executor and as a beneficiary. Second, because George's opposition to Marvin's application was for purposes of preserving the assets of Salwasser's estate, George's actions were in line with the beneficiaries' interests. Moreover, even when the executor advocates a certain dispositive scheme under the will, such advocacy is in line with the executor's duty to assist the court in interpretation of the will, the court held. Third, although the drafter of a will may be liable to third-party beneficiaries for negligent drafting, the court held that there is no attorney-client relationship between the drafter and the beneficiaries, and therefore no possibility of a conflict of interest.

Because probate proceedings often involve many divergent parties and interests, they are potentially fruitful breeding grounds for conflicts. The court dealt with this seemingly complex fact pattern by reducing it to a simple question: did Baker Manock represent clients on two sides of an issue in the same matter? The court found the clear answer to be that the law firm did not.

Insurance

Insurer Cannot Necessarily Deny Coverage If Attorney Ignores Malpractice Claim

McCabe v. St. Paul Fire and Marine Ins. Co., 884 N.Y.S.2d 634 (2009)

In summary, an attorney failed to notify an insurer of a malpractice claim and to respond to plaintiff's repeated attempts to obtain insurer information until after the policy notification period had lapsed. The insurer tried to deny coverage based on late notice, but plaintiff had a statutory right to give notice after policy period had lapsed because she diligently sought insurer information and expeditiously gave notice upon receiving such information.

Plaintiff, Amy McCabe, retained a lawyer, David E. Fretz, to handle a fire loss claim. After Fretz, who was suffering from mental incapacity, neglected the matter, McCabe sued Fretz for legal malpractice. Fretz failed to timely notify his insurer, St. Paul Fire and Marine Insurance Company (St. Paul), of the claim. After many repeated attempts, McCabe obtained Fretz' insurance information and notified St. Paul of the malpractice claim. St. Paul denied coverage because it had not been notified within the period set forth in the policy. Although it was clear that the policy's notification period had lapsed, McCabe argued that under N.Y. Ins. Law § 3420(a), she was not bound by the policy's notification period.

The court held for McCabe, requiring St. Paul to indemnify Fretz for his malpractice. The court noted that under N.Y. Ins. Law § 3420(a), there are circumstances in which injured parties can notify insurers of claims after the policy notification period has lapsed. Section 3420(a) applies to policies covering "injury to a person" and allows notification after the policy period has lapsed if it was not "reasonably possible to give such notice within the prescribed time[.]" Section 3420(a) also calls for notice to be given as soon as reasonably possible once the insurer's identity is discovered.

St. Paul argued that Fretz' policy did not cover "injury to a person" because it specifically excluded coverage for "bodily injury." The court found this argument unconvincing given that the policy expressly did cover "personal injury" and defined that term to not include "bodily injury." The court held there was no basis, in statutory law or in the policy itself, for differentiating between "personal injury" and "injury to a person."

The court then addressed the reasonableness of McCabe's notice by assessing whether she acted diligently in attempting to ascertain the identity of Fretz' insurer and expeditiously in notifying the insurer after discovering its identity. The court held that as a matter of law, McCabe acted diligently in notifying St. Paul because she sought insurer information from Fretz by way of multiple phone calls and four letters over a three-month period, and a court order; and she notified St. Paul immediately upon finally obtaining the information.

This opinion gives injured parties in New York some potential freedom from the strictures of policy notification periods. It is, however, a trial court opinion and not an appellate court decision.

Hinshaw & Culbertson LLP prepares this newsletter to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

Lawyers' Professional Liability Update is published by Hinshaw & Culbertson LLP. Hinshaw is a national law firm with approximately 500 lawyers in 24 offices. We offer a full-service practice, with an emphasis in litigation, business law and corporate transactions, environmental, intellectual property, labor and employment law, professional liability defense, estate planning and taxation matters. Our attorneys provide services to a range of for-profit and not-for-profit clients in industries that include alarm and security services, construction, financial services, health care, hospitality, insurance, legal, manufacturing,

real estate, retail and transportation. Our clients also include government agencies, municipalities and schools.

Hinshaw was founded in 1934 and is headquartered in Chicago. We have offices in 12 states: Arizona, California, Florida, Illinois, Indiana, Massachusetts, Minnesota, Missouri, New York, Oregon, Rhode Island and Wisconsin.

Copyright © 2010 Hinshaw & Culbertson LLP, all rights reserved. No articles may be reprinted without the written permission of Hinshaw & Culbertson LLP, except that permission is hereby granted to subscriber law firms or companies to photocopy solely for internal use by their attorneys and staff.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1