

Lawyers' Malpractice Prevention **Update**

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Third Circuit Upholds \$1 Million Non-refundable Retainer

In a challenge by a bankruptcy trustee, the Court of Appeals for the Third Circuit upheld a law firm's entitlement to keep a \$1 million non-refundable retainer. *Ryan v. Butera, Beausang, Cohen & Brennan, P.C.*, 193 F.3d 210 (3rd Cir.1999). Raymark engaged a nationwide network of attorneys for fixed quarterly fees to defend approximately 68,000 asbestos-related lawsuits, with an initial \$1 million retainer, all of which was specified to be non-refundable. The fee arrangement was for an indeterminate amount of work, offered on a "take-or-leave-it" basis. The law firm was terminated two months later after billing 333.5 hours and incurring disbursements of \$37,000. The law firm was terminated for spending too much time - one month - in investigating the facts underlying a complaint prepared by another law firm which Raymark wanted filed immediately. Although the court recognized that other jurisdictions had disapproved special or specific retainers, it held that a general retainer was permissible under Pennsylvania law. The arrangement here was reasonable considering the indeterminate amount of work anticipated over an approximate three-year period.

Consent to Limitation on Representation Must Equate to Informed Consent

A legal malpractice claim was made against a law firm retained to handle a dispute with a podiatrist who withdrew from a clinic to allegedly compete at a local hospital in violation of a covenant. *Indianapolis Podiatry, P.C. v. Efroymsen*, 720 N.E.2d 376 (Ind.App.1999). The

clinic claimed the law firm had a conflict of interest because it represented the hospital. The court found, however, that there was disclosure of the relationship and consent that the law firm would not participate in a claim against the hospital. The court emphasized that the disclosure to the client of the limitation on representation must equate to seeking consent to the risk of a conflict. In citing to Rule 1.2(c), which allows an attorney to limit the objectives of the representation, the court noted the rule provides: "A lawyer may limit the objectives of the representation if the client consents after consultation." Although approving the disclosure, the court was critical that the law firm's advice was minimal, not informative of the consequences of accepting the limited representation, and not in writing.

Under California Law Employee Can be Required to Sign Arbitration Agreement Concerning Work-Related Disputes

ADR may also be of interest to law firms regarding disputes with employees. *Lagatree v. Luce, Forward, Hamilton & Scripps*, 74 Cal.App.4th 1105, 88 Cal.Rptr.2d 664 (1999). The law firm had employed a secretary for about four years when he was asked to sign a predispute arbitration agreement requiring that work-related disputes be resolved through binding arbitration. He refused and was fired. The court concluded the termination did not violate public policy and could not be the basis of a tort claim.

Withdrawing Partners Must Provide Notice to Avoid Vicarious Liability

A Pennsylvania bankruptcy court addressed the issue concerning several partners of a Philadelphia law firm who withdrew before the debts were incurred. *In Re: Labrum & Doak, LLP*, 237 B.R. 275 (Bkrcty.E.D.Pa.1999). The court observed that the Uniform Partnership Act did not address the issue and that under the Revised Uniform Partnership Act ("RUPA"), liability is avoided only if the third party had notice of the dissolution. The notice could be achieved by publication of the dissolution in a newspaper. Since Pennsylvania did not adopt the RUPA, and since the withdrawing partners could not point to any notice, they were liable for debts incurred after they withdrew.

Use of Confidential Information Received by Client Can be Tortious

In *Biddle v. Warren General Hospital*, 86 Ohio St.3d 395, 715 N.E.2d 518 (1999), the Ohio Supreme Court adopted a variation of the tort in an action against a hospital and a law firm which were provided confidential patient information to determine whether social security payments could be obtained. The court held that a third party could be liable for inducing the unauthorized, unprivileged disclosure of nonpublic medical information learned by a physician or hospital in a physician-patient relationship. The court stated:

To establish liability the plaintiff must prove that: (1) the defendant knew or reasonably should have known of the existence of the physician-patient relationship; (2) the defendant intended to induce the physician to disclose information about the patient or the defendant reasonably should have anticipated that his actions would induce the

physician to disclose such information; and (3) the defendant did not reasonably believe that the physician could disclose that information to the defendant without violating the duty of confidentiality that the physician owed the patient.

Insurer Not Liable for Alleged Risk Management Negligence

A Washington law firm sought indemnification for clients' funds embezzled by a secretary. *Stouffer & Knight v. Continental Casualty Co.* ("CNA"), 96 Wash.App. 741, 982 P.2d 105 (1999). The court held that the "arising out of" provision in the fraud exclusion precluded coverage though the law firm was alleged to have negligently supervised the secretary. The court reasoned that the embezzlement was the proximate cause, though negligence may also have been involved. The alteration on the checks could have been easily detected by comparing the monthly checking account statements with the check register.

The law firm then claimed that CNA was liable for negligence in providing loss control services. The court observed that the policy did not provide for such services, nor was compensation provided for those services. To the contrary, CNA reduced insurance premiums for those insureds who participated in the program. The insured acknowledged that CNA was not expected to audit the firm's books. The court stated: "The evidence is undisputed that CNA never undertook provision of loss control services for Knight. Thus, CNA owed no duty to provide loss control for Knight, and, as a matter of law, Knight cannot maintain an action against CNA based upon negligent provision of loss control services."

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