



# Lawyers' Professional Liability UPDATE

June 2010 Issue 6

## Evidence

### Narrow Interpretation of Spoliation of Evidence Tort Offset by Potential Ethical, Criminal and Other Civil Liability

*Kearney v. Foley & Lardner, LLP*, 582 F.3d 896 (9th Cir. 2009)

In summary, although alleged suppression of evidence will not necessarily establish a viable spoliation of evidence tort claim, lawyers who help clients suppress material evidence could nonetheless be subject to potential ethical or criminal charges, or subject to other civil liability despite the immunities contained in the Noerr-Pennington doctrine and anti-SLAPP statutes.

Plaintiff, Joan Brown Kearney, following a state court eminent domain trial against a school district represented by Foley & Lardner LLP, brought a federal action against both the school district and Foley & Lardner alleging violations of federal Racketeer Influenced and Corrupt Organizations Act (RICO), 42 U.S.C. § 1983, and state common law claims, including spoliation of evidence, fraud and *prima facie* tort. Kearney's claims were all based on the allegation that defendants had improperly withheld the results of a percolation test which would have increased the value of Kearney's condemned land at the valuation trial. Specifically, Kearney alleged that Foley & Lardner agreed to disclose the testing report as a condition of her consent to the test; the district's expert completed the test, which was not favorable to the district, but did not prepare a formal report; the district produced no test results in discovery despite documents and testimony that suggested that testing had been done; and a lawyer from Foley & Lardner at trial had said that no new percolation testing had been performed.

The district court granted motions to strike plaintiff's state law claims under California's anti-SLAPP statute and to dismiss her federal claims under the Noerr-Pennington doctrine. Kearney appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the state law claims, and vacated the dismissal of and remanded the federal claims. The appeals court affirmed the dismissal of the state common law claims because the spoliation allegations failed to state a claim, and the other claims were barred by California's litigation privilege. The court vacated the dismissal of Kearney's federal statutory claims because the allegations in the complaint, taken as true for purposes of the motion to dismiss, fell within the "sham" exception to Noerr-Pennington.

The Noerr-Pennington doctrine derives from the First Amendment and generally immunizes from statutory liability conduct that involves petitioning the government for redress. The court held that such petitioning immunity applied to the school district because,

#### 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](http://www.lawyringlaw.com)

# HINSHAW

& CULBERTSON LLP

by suing to exercise the right of eminent domain over Kearney's property, the school district was acting on behalf of the people. The court also held that the immunity extends to both the school district's agents (*i.e.*, Foley & Lardner) and to conduct incidental to the petitioning activity (*i.e.*, allegedly withholding the results of the percolation test during discovery in the litigation).

However, Noerr-Pennington immunity will not be granted when, *inter alia*, the petitioning party makes an intentional misrepresentation to the court that deprives the litigation of legitimacy, one of three so-called "sham" exceptions to the doctrine. The court held that the suppression of evidence alleged by Kearney would constitute such an intentional misrepresentation, and that the exception thus applied. The court accordingly vacated the dismissal and remanded Kearney's federal claims.

Nevertheless, the Ninth Circuit also affirmed the district court's ruling granting defendants' anti-SLAPP motion to strike plaintiff's state law claims. The anti-SLAPP statute, much like Noerr-Pennington, is designed to protect petitioning and free speech that is connected with a public issue from meritless and harassing claims. To overcome an anti-SLAPP motion, a plaintiff who had exercised such rights nonetheless must establish a probability of prevailing on the merits. The court held Kearney had not met this burden for her spoliation of evidence claim because of the narrow scope of this tort. Notably, this section of the opinion was amended. The court, in a prior opinion, held that Kearney's spoliation claim could go forward. Upon further review, the court concluded that Kearney had merely alleged that defendants failed to commit the percolation test to writing rather than the required allegation of failure to preserve or of destruction of evidence. The effects of a narrow rendering of the spoliation tort, the court noted, were mitigated by the existence of other deterrents to the alleged conduct, including potential criminal and ethical sanctions, as well as the potential for civil liability under federal law in this particular case.

This opinion suggests that narrowing of the reach of the spoliation tort may be an inevitable incident of the recognition that other provisions in the law and effective regulation of lawyers' professional conduct provide adequate deterrents and alternative remedies for the alleged wrongful conduct. This also is in keeping with the generally expansive scope of protection for the litigation process contained in both the Noerr-Pennington doctrine and state anti-SLAPP statutes, coupled with a recognition that both Noerr-Pennington and anti-SLAPP statutes also contain safety valves to permit liability for certain alleged misconduct. At the end of the day, the Ninth Circuit's opinion demonstrates that in addition to sanctions for discovery misconduct, there remains a range of potential post-hoc ethical sanctions and civil or criminal liability for misconduct that should deter and can hold lawyers accountable for allegations of discovery misconduct.

## Fees / Fee Agreements

### Discharged Firm May Still Collect Contingency Fee

*DeLapaz v. Selectbuild Construction, Inc.*, 394 Ill. App. 3d 969, 917 N.E.2d 93 (1st Dist. 2009)

In summary, a lawyer did much of the work on a contingency fee matter prior to his employment being terminated by his law firm, and took the client's case with him and settled it shortly thereafter. It was within the trial court's discretion to award the original law firm the contingency fee, less the amount of a *quantum meruit* payment to the lawyer for the value of the work after the discharge.

Plaintiff, Rafael DeLapaz, hired law firm Touhy & Touhy, Ltd. (Touhy) on a contingency fee basis to bring a negligence action. DeLapaz was referred to Touhy lawyer James Zouras, who ultimately performed essentially all of the attorney work on the DeLapaz matter. Touhy then terminated Zouras' employment. Zouras started a new firm and took the DeLapaz matter with him. Shortly thereafter, the matter settled and Touhy and Zouras both sought the right to be paid the contingency fee. The trial court awarded Touhy its contingency fee and allocated a small portion of the fee to Zouras' new firm on a *quantum meruit* basis. Zouras appealed, arguing that the trial court's award was an abuse of its discretion.

The Illinois First District Appellate Court affirmed, noting that the trial court's award was supported by Illinois case law, and was thus not an abuse of discretion. The appellate court first cited the general rule that a discharged attorney (*i.e.*, Touhy) normally is not entitled to the original contract contingency fee, which terminates upon discharge, but is entitled to be paid on a *quantum meruit* basis for services rendered prior to the discharge. The appellate court, however, relied on an established exception recognized by the Illinois courts, which holds that a discharged firm is entitled to its contract fee and the successor counsel merely entitled to a fee based on *quantum meruit* in cases generally like this one in which the case settled before most of the work normally required was done, and the overwhelming majority of that work was done at the original firm. Also significant to the court was the fact that Zouras' new firm did not have a written fee agreement with DeLapaz.

This opinion reflects the broad discretion that Illinois courts have in allocating fees between former and successor counsel, and recognizes that the relative contributions of the original and successor attorneys does matter. The opinion suggests that it would be

best practice for the successor attorney to have a new written fee agreement with the client. Such an agreement would presumably strengthen the successor attorney's position vis-à-vis prior counsel. It ideally should include client consent to a shared fee as required under the ethics rules in many jurisdictions.

## Conflicts

### **New Jersey Supreme Court Sets Clear Conditions That Would Allow a Company to Pay Attorney Fees for Employees Who Are Targets and Potential Witnesses in a Grand Jury Proceeding**

*In re State Grand Jury Investigation*, 200 N.J. 481, 983 A.2d 1097 (N.J. 2009)

---

In summary, the New Jersey Supreme Court held that the corporate target of a grand jury investigation may ethically pay for legal representation of employees who are targets and potential grand jury witnesses, provided six conditions are met.

During a grand jury investigation of a company that required testimony from the organization's employees, the company unilaterally selected and paid for lawyers to represent each of the employees. Some of the employees were also targets of the investigation. The company told the employees that if they did not accept the appointed lawyer, the employees could choose to pay for their own counsel. The company also told the employees that it reserved the right to stop paying for representation at any time. The state moved to disqualify the employees' counsel, contending that this arrangement violated multiple Rules of Professional Conduct (RPCs). The trial court denied the motion, but modified the arrangement to further protect the employees' interests. The New Jersey Supreme Court affirmed.

The state first argued that a *per se* conflict exists when the target of a grand jury proceeding retains counsel for the target's employees who are potential grand jury witnesses. The high court noted the appeal of this argument and cited precedent that appeared to directly support the state's position, but those cases preceded New Jersey's adoption of the RPCs. Citing RPCs 1.7(a)(2), 1.8(f) and 5.4(c), and seeking to synthesize those related provisions, the Court came up with six conditions that must be met in third-party payer arrangements. Although the Court approved the company's arrangement as modified by the trial court, it noted that the arrangement did not perfectly comply with some of the following six conditions:

1. The client must give informed consent to the arrangement
2. The third-party payer is prohibited from in any way directing, regulating or interfering with the lawyer's professional judgment
3. There cannot be a current attorney-client relationship between the lawyer and the third-party payer
4. The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation, including careful redaction of billing information
5. The third-party payer must timely pay for the representation, consistent with how it pays its own counsel
6. Once the third-party payer commits to pay for representation, it cannot cease paying for representation without leave of court and prior written notice to the attorney and client

The Court held that the company's arrangement did not meet the informed consent requirement because the company unilaterally selected counsel in a "take it or leave it" manner. However, the Court chose to approve the underlying arrangement because the employees had certified to the trial court that they were satisfied with their counsel. The arrangement generally complied with the second condition, but the Court opined that future retention letters should use the specific language in condition two.

Regarding the fourth condition, the company's arrangement did not expressly prohibit counsel from sharing confidential information with the company, but the trial court had imposed additional restrictions. Namely, all billings sent to the company had to have any "detail information" redacted. Based on the trial court's modification, the Court held that this aspect of the arrangement complied with the fourth condition. The Court noted that future retention letters should expressly prohibit lawyers from disclosing the substance of the representation to the third-party payer. Finally, the Court held that leave of court was required before the company could discontinue payment.

This opinion laid out conditions for creating an ethical third-party payer arrangement between a company and its employees in a grand jury investigation. It made clear the importance of the terms of the retention agreement and recognized the authority of a trial judge to modify the terms of a retention agreement to make it conform to the requirements of the RPCs. The Court also clarified that these steps apply regardless of whether the third-party payer itself is the target of a grand jury proceeding.

## Duty

### Attorney Owes Duty to Children in Wrongful Death Action

*Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010)

A Nebraska lawyer was hired to prosecute a wrongful death action on behalf of a mother and her two minor children, but the complaint was not served timely. The mother consequently filed legal malpractice claims against the lawyer on behalf of herself, the two children, and the estate of the subject deceased. The lawyer raised the two-year statute of limitations as a defense, and the mother dismissed her claim. The trial court ruled that the estate's claim was time-barred. Although tolled by their minority, the children's claim was rejected based on lack of standing to sue because under the wrongful death statute, the action could not have been brought in their name.

The Nebraska Supreme Court agreed that there was no attorney-client relationship between the lawyer and the minor children, but concluded that there was a duty to the children based on the balancing test applied to non-client beneficiaries. The only purpose of the lawyer's retention was to pursue the claim for the heirs' benefit, although the statute required that the action be brought in the name of the personal representative. Thus, the duty to the children was consistent with the duty to the mother and presented no conflicts. The Court stated: "under Nebraska's wrongful death statute, there could be no other purpose to Stern's representation . . . The very nature of a wrongful death action is such that a term is implied, in every agreement between and attorney and a personal representative, that the agreement is formed with the intent to benefit the statutory beneficiaries of the action."

## Statute of Limitations / Repose

### Statutes of Repose Do Not Shorten Bankruptcy Trustee's Period to Pursue Legal Malpractice

*Stanley v. Trinchar*d, 579 F.3d 515, 51 Bankr. Ct. Dec. 278 (5th Cir. 2009)

In summary, bankruptcy trustees who wish to pursue causes of action on behalf of debtors' estates are not governed by a state's shorter statute of repose, but rather by the federal bankruptcy law's two-year period. Bankruptcy trustee Stanley (Trustee) brought a legal malpractice claim on behalf of a bankruptcy debtor's estate against a law firm, Trinchar'd & Trinchar'd LLC, 13 months after the debtor knew or should have known of his legal injury. The district court granted Trinchar'd & Trinchar'd's motion for summary judgment because the Trustee's claim was barred by Louisiana's one-year preemptive period, which is the civil law equivalent of a statute of repose in a common law jurisdiction.

Section 108(a) of the U.S. Bankruptcy Code allows a trustee to commence an action on behalf of a debtor's estate within the period allowed by state law for such an action, or within two years after the order for relief, whichever is later. Louisiana law allows a party to bring an action for legal malpractice under two statutes: a statute of limitations and a period of preemption. The former is a period in which an action may be commenced, while the latter represents the lifespan of a substantive right. On the Trustee's appeal, the question before the court was whether Louisiana's one-year preemptive statute was exempt from Section 108 because of its status as a statute of repose.

The trustee argued that the time period established under Section 108(a) of the Bankruptcy Code preempted all time period limitations under state law, not just statutes of limitation. Trinchar'd & Trinchar'd argued, however, that Section 108(a) was limited to statutes of limitations and that if it were otherwise, the Bankruptcy Code would impermissibly resurrect substantive rights otherwise extinguished by state law.

The U.S. Court of Appeals for the Fifth Circuit agreed with the Trustee and reversed. The court noted that the purpose of the Code is to afford trustees extra time to assess and pursue the estate's assets. Further, Congress drew no distinction between the state periods of limitation and repose governing time limits for filing suit. Thus, the Fifth Circuit held that Section § 108(a) of the Bankruptcy Code extends Louisiana's legal malpractice preemption period.

This opinion addresses a matter of first impression on appeal, and lawyers and insurers in matters with statutes of repose that would expire during the two-year bankruptcy limitations period should take note of the holding. Although statutes of repose, such as Louisiana's preemptory period, are generally not subject to extension, this opinion creates a substantial exception to that rule.

---

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