The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Attorneys' Fees — Standards for Review of Request for Court Awarded Legal Fees

***Toussie v. County of Suffolk*, 2012 WL 3860760 (E.D.N.Y. Sept. 6, 2012)**

Risk Management Issue: What are a lawyer's duties and responsibilities when entering and recording time charges, and what standards should attorneys expect courts to apply in reviewing requests for the award of reasonable attorney's fees pursuant to 42 U.S.C. § 1988?

The Case: This decision, assessing entitlement to attorneys' fees, is the final chapter in a decade-long litigation saga arising out a series of alleged constitutional and tort violations by defendant county. Plaintiff buyers alleged that their constitutional rights were violated when the county repeatedly denied them the opportunity to purchase parcels of real estate at county surplus auctions. The buyers sought an order of specific performance directing the county to convey the parcels and an award of damages totaling more than $35 million.

After a two-week trial – which followed years of discovery-related litigation, protracted and unsuccessful settlement negotiations, and dispositive motion practice – the jury gave the buyers a pyrrhic victory in the form of a verdict in their favor of $12,500. The buyers moved for attorneys' fees pursuant to 42 U.S.C. § 1988(b) in the amount of $2,794,929.50, arguing that they had satisfied the criterion for reimbursement of attorneys' fees as they were a "prevailing party" in the litigation. The county countered that any award of attorneys' fees would be unreasonable and unjust because: (1) the buyers' recovery was *de minimis*; and (2) the request for fees was "so unreasonable and gross[ly] excessive" that it could not have been made in good faith.

The U.S. District Court for the Eastern District of New York acknowledged that the county's *de minimis* recovery argument presented a close question. Although there was a substantial difference between the judgment recovered and the attorneys' fees sought, because the buyers recovered more than mere nominal damages, and the jury verdict would likely deter similar due process violations by the county in the future, the buyers' success was not so trivial that the only reasonable fee would be no fee at all.

The court nonetheless flatly rejected the buyers' request for attorney fees because the application was so outrageously excessive and unreasonable that it could not possibly have been made in good faith. The court identified seven egregious shortcomings in the attorneys' fee requests that justified the outright denial of any attorney's fee award.

First, the court observed that the buyers' lawyers sought attorney fees for claims on which the buyers did not prevail. The court noted that these fee requests "shock[ed] the conscience," given that counsel affirmatively represented that unrelated fees were excluded, and yet, the fee requests contained numerous extraneous and unrelated billing entries which, the court found, could not have been included by mistake.

Second, the court found that the buyers' lawyers failed to maintain billing records in a manner that would enable the court to distinguish the claims in the billing entries. The court noted that the lawyers' bills were replete with vague and generic entries (such as "research," "summary judgment briefing," and "trial prep"), which prevented the court from being able differentiate and identify the claims that were being worked on in each time entry.

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Third, the court held that the buyers' lawyers failed to segregate their hours spent traveling. More egregiously, they sought full compensation for all travel expenses, despite the court's having previously ordered that only half of travel time would be recoverable. Again, the court found that the lawyers' request for complete travel reimbursement appeared to have been purposeful and in bad faith.

Fourth, the court determined that the buyers' lawyers sought reimbursement of attorneys' fees at rates that were excessive and unreasonable, and disproportionate to the rates being awarded in the jurisdiction. Specifically, while the lawyers sought an award of fees based on hourly rates ranging from $375 to $905 for counsel, and $250 for a paralegal, the range of reimbursement for attorneys' fees in the jurisdiction was generally between $250 and $450 per hour. The court noted that the lawyers failed to provide the requisite evidence that their rates were in line with those prevailing in the community for similar services by lawyers with reasonably comparable skill, experience and reputation.

Fifth, the court observed that the buyers' lawyers sought full reimbursement for billing entries that contained tasks that were redacted and excluded as unrelated to the due process claims. In other words, they had redacted certain unrelated tasks from block billing entries, and yet sought complete reimbursement for the amount of time corresponding to the entire block billing entries.

Sixth, the court observed a significant discrepancy between the lawyers' respective affidavits and the actual amount of time worked as evidenced by the provided billing records.

Finally, the court concluded that the buyers' lawyers sought to recover fees that the court had previously determined were unreasonable and excessive.

In sum, the court held that the lawyers' conduct simply should not and would not be tolerated. Accordingly, the buyers' motion for attorneys' fees was denied in its entirety.

Risk Management Solution: The lessons of this case go far beyond the realm of court-ordered legal fees. Whether lawyers are seeking fees from a client directly, or from a court, they owe a continuing fiduciary duty to insure that all time entries are accurate. Where clients are paying directly, the rates to be charged – if the matter is to be billed on a time charge basis – must be clearly explained in the engagement letter. All entries must be contemporaneous and sufficiently detailed to enable the reviewer – whether client or court – to determine precisely what services were performed, and when. Unless a client has agreed to "block billing" (aggregating multiple discrete tasks in one time entry), that approach is likely to lead to disputes and to sour the relationship. It ultimately may also deprive the lawyers of the ability or right to collect the fees they are seeking. While this case represents an extreme example of the consequences of not following proper time recording and billing practices, it serves wider notice of the need for firms to supervise, on an ongoing basis, compliance with their billing policies and procedures.

Document and File Retention — Obligations With Respect to Missing Clients

Nebraska Ethics Advisory Opinion for Lawyers, No. 12-07

Risk Management Issue: How long must lawyers and law firms retain client documents and files? What should attorneys do to avoid the problem that clients cannot be located when the time comes for the disposition of their files? What investigation must be undertaken to locate missing clients prior to destruction of their documents and files?

The Opinion: The Nebraska Ethics Advisory Board issued this opinion regarding the appropriate handling of a lawyer's law files after he died. The opinion was requested by an attorney who had been appointed trustee for the protection of another lawyer's clients after that lawyer died. Some of the deceased lawyer's files contained original documentation. Many files did not contain adequate information to enable the clients to be contacted and informed that the attorney had died. Given the inability to contact many of the clients, the trustee sought guidance as to what should be done with the client files.

The applicable professional conduct rule, based upon Nebraska's Rules of Professional Conduct (which track the ABA Model Rules) is Rule 1.15(a). It provides that "property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation." Accordingly, the trustee would be permitted to dispose of the files after five years, assuming that the sole practitioner's representation of those clients ended when he died. In the meantime, the opinion suggested that the trustee should take steps to try to locate clients using social media, Google, public notices (in newspapers), and perhaps in the case of files with important or valuable materials, by hiring a private investigator.

In deciding whether to retain or destroy a file, the advisory opinion suggested several factors to consider including: (1) whether the file includes original documentation; (2) whether the file includes information which may be necessary in the assertion or defense of the client's position for any matter in which the statute of limitations has not expired; (3) the client's reasonable expectations; and (4) the potential relevance of particular matters to some future event (such as a will).

Comment: Not every state has a five-year rule (New York, for instance requires financial documents – broadly defined – to be held for seven years from the end of representation). However, every state does have in place ethical requirements with respect to the handling and destruction of client documents and files. This opinion is useful because it addresses the problem of what to do when the client goes missing, and what steps are required to avoid that problem.

Risk Management Implications: First, it is important for attorneys to identify (in writing) when a particular representation ends so that the lawyers (or a future trustee) can establish with certainty when the clock starts to run regarding the time for disposal of the file. This may also start the clocking ticking for the statute of limitations in a future potential malpractice claim. Some firms do this by clear language in the original engagement letter, in addition to sending "closing" letters when the engagement is concluded.

Second, it is important for attorneys to obtain sufficient information at the time of engagement — including for individual clients such information as social security numbers and the names and addresses of family members — and to maintain such information throughout the engagement. Again, some firms include an explicit obligation on the part of clients to notify the lawyer or firm if any information relating to their location changes. Even apart from lawyers' duties to keep clients regularly informed of the progress of their matters under states' equivalent of Model Rule of Professional Conduct 1.4, the need to keep this information current constitutes an additional reason why regular contact with clients matters.

Finally, for solo practitioners, it is critical that they have some sort of plan in place in the event that they die or become incapacitated. Solo practitioners of all ages need to select and identify another lawyer who has agreed to contact clients to let them know in the event that their attorney can no longer represent their interests and, if the clients so elect, to discharge the lawyer's duties to complete the clients' matters.

Attorney-Client Relationship — Limiting the Scope of the Representation — Identification of the Client — Representing Corporations and (or) Their Constituents

***Mark Kirschner v. K&L Gates LLP, Sanford Ferguson, Pascarella & Wiker, LLP, and Carl A. Wiker*, 2012 Pa. Super. 102, 46 A.3d 737 (Pa. Super. Ct. 2012)**

Risk Management Issue: When does representation of a corporate constituent also entail representation of the corporation? What can law firms do to limit the scope of representation and avoid the establishment of an attorney-client relationship in a corporate family context?

The Case: The case arises out of the bankruptcy of a corporation and the fraudulent activities of the corporation's founder and senior managers. During a quarterly review of the corporation's financial statements, three senior officers revealed they had suspicions of fraudulent activity by the company's founder. Those three officers resigned shortly thereafter. The corporation's board of directors agreed to investigate the reasons for the resignations and created a special committee to investigate and report to the board. The special committee hired a law firm to

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investigate the alleged fraudulent activity by the founder and senior managers. The law firm hired a financial consulting company to help its investigation.

Upon conclusion of the law firm's investigation, the law firm reported that there was no fraud. Relying on the report, the corporation, through its founder, sought to build a production facility and to offer an initial public offering. A minority of the shareholders opposed these actions and the dispute was resolved in court. The court appointed a custodian to be in charge of the corporation's management and operations. Within days, the custodian uncovered substantial fraud within the company.

Thereafter the corporation went into bankruptcy. The bankruptcy trustee sued the law firm for professional negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, and vicarious liability (for the financial consulting company's conduct) arising out of the failure to find the fraud. The trial court dismissed the trustee's claims, determining that there was no attorney-client relationship or contractual relationship between the law firm and the corporation.

On appeal, the Pennsylvania Superior Court determined that the allegations in the trustee's amended complaint demonstrated an attorney-client relationship and a contractual relationship between the law firm and the corporation. The court rejected the law firm's argument that because the retention letter between the law firm and the corporation stated that the law firm would act as counsel for the special committee, it was not representing the corporation.

The court based this conclusion, first, on its interpretation of Delaware law, where the corporation was incorporated, finding that in Delaware a committee created by a board acts on behalf of the corporation's shareholders and the corporation. The corporation's board had authorized the special committee to conduct an investigation "on behalf of the company." When the special committee hired the law firm to investigate the alleged fraudulent activities in the company, the actions of the special committee were for the benefit of the corporation's shareholders and the corporation itself. Thus, when the law firm undertook to find the fraud and advised the special committee about its findings, those services and the legal advice were essentially being given to the corporate entity.

The court also determined that the law firm's actions during its representation of the corporation established that the law firm was aware its representation extended to the corporate entity, or at the very least that it represented more than just the special committee. The law firm forwarded its findings and recommendations to the corporation's founder, who was not on the special committee. After submitting the report to the special committee, the law firm also sent the report to the board. The court held that these actions established that the firm was representing the corporation, and not just the special committee.

Risk Management Solution: This case shows that in the corporate arena even an engagement letter that clearly identifies who is the client may not be sufficient to avoid liability to others than the identified client. Because some states (*e.g.*, Delaware) do not allow a law firm to represent a corporation's board/committee independent from the corporation itself, when a corporation's board/committee retains a law firm, the law firm should refer to the applicable state law to determine if an attorney-client relationship also forms with the corporation. Whether an explicit waiver from the corporation that expressly approved the limited engagement by the committee would have worked is not resolved. It might be worth trying, but if it is attempted, the second lesson in this case is that even a clear limitation on the identity of the client can be undone if the firm subsequently acts in ways that are inconsistent at the time of engagement.

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