

Lawyers' Professional Liability Update - February 2010 Edition

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Disciplinary

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.

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.

***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.

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.

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.

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Related Capabilities

Appellate