TADC ETHICS AND PROFESSIONALISM NEWSLETTER

Fall 2008 Edition

Editors:[1]
George B. Butts, DLA Piper LLP (US); Austin
Kathy J. Owen,[2] DLA Piper LLP (US); Dallas
www.dlapiper.com

INTRODUCTION

This newsletter seeks to bring you information about topics of interest regarding ethics and professionalism. There is no Ethics Opinion Update in this newsletter as no opinions have been released by the Professional Ethics Committee for the State Bar of Texas since our Fall 2007 newsletter.

The Case Law Updates summarize cases of interest. There are numerous cases involving legal ethics and malpractice, making it unfeasible to report about all the potentially relevant cases.

I.

TEXAS CASE LAW UPDATES

***Unauthorized Practice of Law Comm. v. Am. Home Assurance Co., Inc.,* No. 04-0138, 2008 WL 821034 (Tex. Mar. 28, 2008).**

In a case of great significance to TADC members, the Texas Supreme Court thwarted a ten-year effort by the Unauthorized Practice of Law Committee to stop the clearly conflict threatened practice of insurance companies defending their insureds by use of staff counsel. In *Unauthorized Practice of Law Committee v. American Home Assurance, Company, Inc.,* No. 04-0138, 2008 WL 821034 (Tex. Mar. 28, 2008), Justice Hecht, writing for the majority, concluded that liability insurance companies may use staff attorneys, including insurer paid attorneys in "captive firms," to defend a claim against an insured if the interest of the insurer and the insured are congruent, but not otherwise. The court further held that staff attorneys must fully disclose their affiliation with the insurer to the insured.

Professor William Dorsaneo, who represented Travelers Indemnity Company in the case, explained the court's ruling by saying: "The court was unwilling to assume that staff counsel would be unethical or that the insurer would compromise the staff counsel's ethical responsibilities."[3]

Justice Phil Johnson, a former insurance defense lawyer himself, wrote in dissent that the issue is one of statutory construction.

> "Is an insurance corporation's defense of its insureds by the use of staff attorneys the practice of law as defined by the State Bar Act . . . . The Court holds that under certain circumstances it is not. I disagree."

Justice Paul Green joined in Justice Johnson's dissent.

While the insurance carriers won this specific issue before the Supreme Court, it should be noted that the Court's ruling was limited in that it approves the use of staff counsel only in those circumstances where the interests of the insurer and the insured are "congruent". As any defense lawyer knows, there are many instances in which the interests of the insurer and insured are not aligned. This case is certain to give rise to future cases to determine where congruence becomes conflict of interests.

***Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp.*, 232 S.W.3d 883 (Tex. App.—Dallas 2007, pet. granted).**

National Development and Research Corporation ("NDR") retained Akin, Gump, Strauss, Hauer &

---

[1] The editors would like to thank Jennifer McLoughlin, Doug Sweet and David Alexander of DLA Piper LLP (US) for their contributions to researching and writing this newsletter.

[2] Kathy Owen is a member of the Board of Disciplinary Appeals appointed by the Supreme Court of Texas. Any opinions herein are those of Kathy Owen in an individual capacity and do not reflect any opinion of the Board of Disciplinary Appeals.

[3] *Congruent Interests: Texas Supreme Court OKs Insurers' Use of Staff Counsel To Defend Policyholders,* TEXAS LAWYER, Apr. 7, 2008, *available at* http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1207305778643.

Feld, L.L.P. ("Akin Gump") to represent it in disputes with Panda Energy Corporation and its affiliates ("Panda"). The trial court entered final judgment in favor of Panda, this court affirmed, and the Texas Supreme Court denied review. NDR then sued Akin Gump for legal malpractice for failure to submit jury questions to support the verdict in the Panda lawsuit. The jury found Akin Gump negligent and awarded NDR damages and attorney's fees. Akin Gump did not appeal the finding of negligence or the award of damages, but alleged entitlement to an offset.

An issue of first impression in Texas is whether damages in a malpractice suit should be reduced by a contingency fee agreement between the parties in the underlying litigation. The court noted that jurisdictions that have considered this issue have disagreed about the propriety of such an offset. Some jurisdictions have held that damages should be reduced by the amount of a contingency fee because not to do so violates the basic tort rule that damages are compensatory only and must not put a plaintiff in a better position than she would have been absent the tort.

However, the court sided with other jurisdictions that have held that damages should not be reduced by a contingency fee because the offset credits the negligent attorney with a fee he failed to earn and rewards his wrongdoing. Further, the reduction fails to fully compensate the plaintiff who has been required to incur new attorney's fees and expenses to recover the judgment it should have won in the trial court.

The court concluded that Akin Gump could not prevail in its appeal because the trial court jury found that Akin Gump did not render any compensable services to NDR in the lawsuit and thus did not earn its contingency fee. Due to Akin Gump's negligence, NDR did not prevail in its lawsuit and NDR was required to pay two sets of attorneys to be put in the same position it would have been in absent Akin Gump's malpractice. The court held that the judgment should not be offset by any contingency fee agreement in the underlying lawsuit.

***Murphy v. Gruber*, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied).**

Karen Brock Murphy, et al ("Brocks"), appealed the trial court's summary judgment order dismissing their breach of fiduciary duty and fraud claims against G. Michael Gruber, William D. Elliott, and Kane, Russell, Coleman & Logan, P.C. ("Lawyers"). The Brocks contend that the Lawyers represented them with divided loyalties, failed to inform them of material facts and failed to make a full and fair disclosure of a proposed settlement. The Lawyers moved for summary judgment on the breach of fiduciary duty claim asserting that the Brocks' claims constituted one claim for legal malpractice and the statute of limitations on that claim had expired, and the trial court granted the Lawyers' motion on that basis. The Lawyers filed a second motion for summary judgment on the Brocks' fraud claim, which motion was also granted by the trial court.

The Brocks' appeal contended the trial court erred when it concluded their breach of fiduciary duty and fraud claims are really impermissibly fractured professional negligence claims barred by the two-year statute of limitations that applies to professional negligence claims. The court recognized the lack of clarity in this area of the law and the different results reached by Texas courts.

The court concluded that the allegations in this case complain about the quality of the representation, specifically, the Lawyers' failure to properly advise, inform and communicate with the Brocks about the case, which are claims of professional negligence. The Brocks' breach of fiduciary duty claim alleges self-dealing by the Lawyers, but the Brocks do not allege the Lawyers deceived them, pursued their own pecuniary interests over the Brocks' interests, or obtained any improper benefit by continuing to represent both clients. Further, the fraud claim did not identify any allegations of conduct constituting fraud, such as fraudulently lengthening the duration and increasing the scope of litigation to increase billings or billing for work that was never performed. As a result, the court concluded that the trial court did not err by concluding these claims are claims for legal malpractice and affirmed the trial court's judgment.

***Trousdale v. Henry*, No. 14-06-00848-CV, 2008 WL 2520799 (Tex. App.—Houston [14th Dist.], June 24, 2008, no pet. h.).**

Lenieta Wylene Trousdale retained Bell and Henry, L.L.P. following her father's death to represent her and the estate of her father in two lawsuits filed in Liberty County, Texas. The two lawsuits were dismissed for want of prosecution and Trousdale asserts that appellees never informed her of the status of either lawsuit or that either lawsuit had been dismissed. Trousdale sued appellees for legal malpractice and breach of fiduciary duties. The trial court granted appellees' motion for summary

judgment and dismissed Trousdale's claims with prejudice. Trousdale appealed.

Trousdale alleged that appellees knew and failed to disclose that her cases had been dismissed for want of prosecution, continued to bill and collect fees from her, and refused to return her file. She claimed that these actions constituted breach of fiduciary duty, which would be subject to a four-year statute of limitations, rather than legal malpractice claims, which would be subject to a two-year statute of limitations.

The Court agreed that Trousdale's breach of fiduciary claims were separate and independent from her legal malpractice claims and that they were timely filed. The Court reversed that portion of the trial court's grant of summary judgment.

The dissent from the majority holding argued that Trousdale's claim of legal malpractice encompassed her claim of fiduciary duty. The dissent concluded that the facts collectively demonstrated that Trousdale lost her underlying claims through appellees' professional negligence and that such claims should be time-barred.

NOTE: Cases such as *Murphy v. Gruber* and *Trousdale v. Henry* hinge on their respective facts as much as on the analysis of the law.

***O'Donnell v. Smith,* 234 S.W.3d 135 (Tex. App.—San Antonio 2007, pet. granted).**

In holding that a legal malpractice lawsuit, outside the estate-planning context, can survive a deceased client, the Texas Appellate Court extended the reach of a Texas Supreme Court holding from 2006. The Texas Supreme Court's opinion in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.,* 192 S.W.3d 780 (Tex. 2006), rejected a legal bar prohibiting an estate's personal representative from maintaining a legal malpractice claim. Recognizing that an estate personal representative "stands in the shoes of a decedent," the Court found the requisite privity between the estate representative and the estate-planning attorney in order to bring a claim for estate-planning malpractice. The *O'Donnell* Court broadened the application of this holding to all legal malpractice claims alleging pure economic loss to a decedent's estate.

Thomas O'Donnell, as executor of a decedent's estate, brought a legal malpractice action on behalf of the estate against Paul H. Smith, Jack Guenther, and Cox & Smith, Inc. (collectively "Cox & Smith"), who provided tax advice with respect to the estate of the decedent's wife, which was later subsumed into the decedent's estate. O'Donnell alleged that Cox & Smith's advice resulted in the decedent's estate being underfunded, which led to litigation with the estate beneficiaries. In refuting the O'Donnell's standing to bring the lawsuit, Cox & Smith argued that the *Belt* opinion was limited to estate-planning malpractice claims, which was not the case before the *O'Donnell* Court.

Rejecting the argument that the *Belt* opinion only allowed an estate personal representative to bring a claim for estate-planning legal malpractice, the *O'Donnell* Court found the language in the *Belt* case did not expressly prevent an estate representative from bringing other types of malpractice claims. The language of particular significance was that "legal malpractice claims alleging ***pure economic loss*** survive in favor of a deceased client's estate, because such claims are necessarily limited to recovery for property damage." Accordingly, the *O'Donnell* Court permitted O'Donnell's legal malpractice action.

***Lee v. Daniels & Daniels,* No. 04-07-00096-CV, 2008 WL 2037309 (Tex. App.—San Antonio May 14, 2008, pet. filed).**

Daniels & Daniels executed an engagement letter with Keith Cummings, as the client, and Carolyn Lee, as the guarantor. Pursuant to the engagement letter, Cummings and Lee agreed to pay attorney fees in an amount not exceeding $10,000. Due to problems related to its representation of Cummings, Daniels & Daniels successfully moved to withdraw as counsel and proceeded to arbitration to recover its fees associated with representing Cummings and the fees associated with moving to withdraw and arbitrating Cummings and Lee's breach of the fee agreement. An arbitration award in excess of the $10,000 cap was awarded to Daniels & Daniels, which Cummings and Lee challenged.

Reviewing the arbitration award, the Texas Appellate Court affirmed the fees incident to Daniels & Daniels' representation of Cummings and the fees incurred in the arbitration proceedings. The Court, however, declined to uphold the fees incident to Daniels & Daniels' motion to withdraw as Cummings' counsel. The case was remanded to determine the fees associated with the arbitration.

In upholding the fees associated with Daniels & Daniels' representation of Cummings, the Court rejected the argument that the award for attorney fees

was impermissible as an award predicated on undue influence. Cummings and Lee maintained that Daniels & Daniels threatened to withdraw its representation unless Cummings and Lee agreed to a greater fee. The Court noted that "a threat to do what one has a legal right to do is insufficient to create duress." The Court found that Daniels & Daniels had a right to threaten withdrawal unless those fees were paid, and was ultimately owed the additional fees for additional services it provided.

Striking the fees incurred with Daniels & Daniels' motion to withdraw, the Court turned to the Texas Disciplinary Rules of Professional Conduct, wherein the recovery of attorney fees is restricted to legal services performed or rendered on behalf of a client. Reimbursement of the fees spent on Daniels & Daniels' motion to withdraw was facially invalid as an award for fees incurred for the attorneys' own interests. In contrast, the fees incident to the arbitration proceedings were upheld. Recognizing that the Texas Civil Practice and Remedies Code expressly provides for attorney's fees in disputes premised on an oral or written contract, the Court allowed recovery of fees incurred in the dispute over the engagement agreement.

II.

FEDERAL AND OTHER JURISDICTION CASE LAW UPDATES

***Floyd v. Hefner,* 556 F. Supp. 2d 617 (S.D. Tex. 2008).**

Seven Seas, a Houston-based oil and gas company, engaged in a risky endeavor to develop and produce oil from property located in Colombia, South America. The project was later adjusted with a new strategy that called for Seven Seas to drill an exploratory test well that had a projected low success rate. In pursuing the project, Seven Seas was advised on the overall strategy and financial backing by several individuals, including but not limited to, Seven Seas' directors and attorneys. The project ultimately failed.

An involuntary bankruptcy petition under Chapter 7 was filed against Seven Seas. Seven Seas later converted the petition into a reorganization under Chapter 11. Ben Floyd, as the appointed Trustee for Seven Seas, filed several Adversary Complaints against various parties, including Seven Seas' in-house counsel and outside counsel. The claims asserted against the attorneys included, but were not limited to: intentional breach of fiduciary duty, negligent breach of fiduciary duty; and a claim for negligence/malpractice. The attorneys' summary judgment refuting the claims was granted in part and denied in part.

Before the Court was the issue of whether an allegation of conflict-of-interest gives rise to a claim of negligence or breach of fiduciary duty. Underlying the claims were several allegations that Seven Seas' attorneys: (1) failed to inform Seven Seas of conflicts of interests; (2) provided legal representation and advice while such conflicts existed; and (3) failed to withdraw from representation when certain conflicts likely or did impair their judgment. Recognizing that the claims of conflict-of-interest were premised on the Seven Seas' attorneys allegedly obtaining an improper benefit, the *Floyd* court determined that the allegations gave rise to a claim of fiduciary duty.

Floyd substantiated a portion of the negligence claim on the attorneys' alleged conflict of interest, which the attorneys argued was impermissible as a negligence claim fractured into both a negligence and fiduciary duty claim. An established doctrine of Texas law provides that a party cannot dissect a negligence claim into separate claims. Notwithstanding that doctrine, the Court summarily dismissed the attorneys' argument, holding that a claim for negligence and a claim for breach of fiduciary duty, both predicated on allegations of conflict-of-interest, may both be presented as alternative theories of recovery.

***Jacobsen v. Oliver*, 555 F. Supp. 2d 72 (D.D.C. 2008).**

Plaintiff David Jacobsen spent almost two years as a hostage in the Islamic Republic of Iran. After his release, he retained counsel to help him sue Iran for damages. Jacobsen entered into a retention agreement wherein he promised to pay his law firm 35% of any recovery that he obtained in the litigation. After years of legal wrangling and the passage of legislation aimed at permitting citizens to sue state sponsors of terrorism, Jacobsen won a $9 million default judgment. He then terminated his lawyers.

In a subsequent suit between Jacobsen and his former lawyers, Jacobsen argued that two provisions of the retention agreement rendered it unenforceable. The agreement included: (1) a clause requiring him to obtain his lawyers' consent before accepting a settlement offer, and (2) a clause requiring him to pay

all fees and costs before discharging his lawyers. The trial court entered summary judgment in favor of the law firm. It agreed with Jacobsen's assertion that these two provisions of the retention agreement are contrary to the D.C. Rules of Professional Conduct. Nevertheless, the court found no evidence that the firm had attempted to enforce either provision. Iran never made a settlement offer of any kind to Jacobsen, and when Jacobsen terminated his counsel, they did not refuse to withdraw until they received their fees and costs.

The court held that a legal retention agreement is interpreted like any other contract. When provisions that are non-essential to the parties' bargain are contrary to law, those provisions can be severed and the courts can enforce the balance of the agreement. Because Jacobsen could not show that his former lawyers breached the contract or violated their fiduciary duties, the law firm was entitled to collect 35% of his recovery.

***Jenifer v. Fleming, Ingram & Floyd, P.C.*, 552 F. Supp. 2d 1370 (S.D. Ga. 2008).**

Plaintiff Wendell Jenifer hired the law firm of Fleming, Ingram & Floyd, P.C. to represent him in connection with a slip-and-fall injury that he suffered at the Sunset Inn. The Firm's principal, John Fleming, assigned the case to his young associate and nephew, Bill Fleming. Bill filed suit against Sunset Inn, Inc. on the eve of the expiration of the statute of limitations.

The defendant moved for summary judgment on grounds that the entity "Sunset Inn, Inc." was not the owner of the Sunset Inn. It asserted that the real party in interest was Hotel Ventures of Augusta, Inc., and that the statute of limitations barred Jenifer from filing suit against the proper entity. At about the same time, the Fleming firm learned that Bill had allowed statutes of limitations to expire in 12 other cases, and was facing as many as 23 claims of legal malpractice. As a consequence of these revelations, Bill resigned from the law firm. Thereafter, he continued to work on Jenifer's case and represented him in connection with the summary judgment.

Ultimately, the trial court entered summary judgment against Jenifer under the "superior knowledge" doctrine, without reaching the issue of limitations. Bill had neglected to address the "superior knowledge" issue in his summary judgment briefing, despite Jenifer's evidence that the doctrine was inapplicable in the circumstances of his case. Jenifer sued Bill and the firm for malpractice.

In its motion for summary judgment, the Fleming firm alleged that it was not liable for Bill's conduct after he left the firm. The court, however, refused to grant summary judgment in the firm's favor. Despite the firm's assertion that it orally terminated its representation of Jenifer when Bill left, Jenifer testified that he believed the firm continued to act as co-counsel. Jenifer testified that he would not have continued his retention of Bill had he known that Bill was working alone. Most notably, the evidence reflected that the firm failed to send a letter terminating its representation of Jenifer until <u>after</u> the slip-and-fall case was dismissed. The court inferred from the letter that, prior to the date of its execution, the firm was acting as Jenifer's counsel. Jenifer's claims were allowed to proceed to trial.

***Foley & Lardner, L.L.P. v. Aldar Invs., Inc.*, 491 F. Supp. 2d 595 (M.D. La. 2007).**

Foley & Lardner was one of two firms representing Aldar Investments, a mortgage lender, in a civil antitrust suit. At the beginning of the representation Aldar advised Foley that it would be unable to pay the firm's hourly rate. Although Foley estimated that the value of the case was approximately $20 million, the firm declined to accept the case on a contingent-fee arrangement. Instead, Foley and Aldar agreed that Aldar would assign to the firm a second mortgage in certain real property to secure Aldar's payment of legal fees.

Foley's co-counsel, a Louisiana firm, recommended that the firm hire Kenneth Daniels, a real estate lawyer, to assist with the documentation of the mortgage. Soon after Foley retained Daniels, it became apparent that the firm had seriously misjudged the value of the case. The true value of Aldar's case was less than the legal fees already incurred by the firm. As soon as Daniels sent drafts of the mortgage documentation to Foley, Foley rushed to record the paperwork with the appropriate parish clerk. Foley recorded the relevant documents without Daniels' knowledge or direct participation.

In Louisiana, possession of an original collateral mortgage is a prerequisite to perfection of the security interest. However, in its haste, Foley had allowed its Louisiana counsel to retain the original mortgage notes. To make matters worse, the promissory note involved in the transaction was a bearer note, which also remained in possession of Foley's co-counsel.

Aware that Foley's security interests were unperfected, Foley's co-counsel then advised Aldar

to cancel Foley's mortgage note. Foley attempted to assert malpractice claims against Daniels for failing to advise it of the necessity of possession of the instruments. The court dismissed the claims against Daniels. It held that the firm knew or certainly should have known these very basic aspects of Louisiana law. Foley's failure to perfect its security interest was attributable to its own mistakes, not to Daniels. On the other hand, Foley was permitted to assert fraud claims against its Louisiana co-counsel. Ultimately, the court entered judgment in Foley's favor, against its co-counsel, in the amount of approximately $850,000.

***Clarendon Am. Ins. Co. v. Hickok*, 257 S.W.3d 43 (Ark. 2007).**

Jay M. Wallace, a Texas-licensed attorney, requested permission to represent Clarendon America Insurance Company in a workers' compensation dispute pending before an Arkansas Administrative Law Judge. The ALJ granted Wallace's request, and his client prevailed. On appeal, the Arkansas Workers' Compensation Commission overturned the ALJ's decision. Wallace sought review of the Commission's decision by the Arkansas Court of Appeals.

Several weeks after appealing the decision, Wallace's opposing counsel filed a motion to dismiss Clarendon's appeal. The opponent argued that Wallace was engaging in the unauthorized practice of law because he was not licensed by the Arkansas bar and, even though he had been allowed to appear before the ALJ, Wallace had failed to file an application for admission *pro hac vice* in the Court of Appeals. Clarendon immediately identified local counsel, who substituted into the case in Wallace's place. The Court of Appeals initially denied the motion to dismiss, and then certified the issue to the Arkansas Supreme Court.

The Arkansas Supreme Court ruled that the case should be dismissed. Arkansas law provides that a pleading filed by an unauthorized party is rendered a nullity. According to the Court, Clarendon's notice of appeal had been ineffective because it had not been filed by Arkansas-licensed counsel (or by counsel admitted to practice *pro hac vice* in the Court of Appeals). Unfortunately, Clarendon could not cure this defect because it did not retain substitute counsel until after the 30-day period for filing the notice of appeal had expired. The Arkansas courts lacked jurisdiction to adjudicate the case.

***In re Fieger*, 887 N.E.2d 87 (Ind. 2008).**

Geoffrey Fieger, a Michigan attorney, filed an application to appear *pro hac vice* in a case pending in an Indiana court. The Indiana court directed Fieger to complete a form that, among other things, required him to disclose whether he had any disciplinary proceedings pending against him in any jurisdiction. Fieger intentionally altered the application so that he could respond that no "formal" disciplinary proceedings were pending against him. Initially, Fieger's application was approved by the trial court.

Fieger neglected to disclose that, at the time he executed the application, he was the subject of a grievance in the State of Michigan. The state bar had alleged that Fieger made threatening remarks on a radio program, directed toward three state appellate court judges. The Michigan Attorney Discipline Board dismissed the grievance shortly before Fieger filed his application to the Indiana bar. However, at the time of the application, the grievance was pending on appeal before the Michigan Supreme Court.

Fieger's opposing counsel filed a motion asking the trial court to rescind his *pro hac vice* admission. In his defense, Fieger relied upon the fact that the Michigan disciplinary proceeding had been dismissed. He argued that the appeal of the dismissed disciplinary charge is not considered a "proceeding" under Michigan's disciplinary rules. All the while, Fieger failed to disclose the additional fact that, soon after Fieger applied for admission in Indiana, he was served with a separate disciplinary complaint in the State of Arizona.

The Indiana Supreme Court found that the Michigan grievance was an active "proceeding" for purposes of the Indiana disciplinary rules. The Court explained that Fieger had no authority to alter the language required in the court's application to either narrow its scope or to create a loophole. Fieger committed a violation of Indiana's disciplinary rules when he attempted to conceal the Michigan appellate proceeding. He committed a second violation when he failed to update the trial court after he was charged in a second disciplinary proceeding in Arizona. As a sanction, the Court barred Fieger from practicing in Indiana for two years.

III.

MISCELLANEOUS UPDATES

Federal Rule of Evidence 502

On September 19, 2008, President Bush signed legislation that adds an important new rule to the Federal Rules of Evidence. FRE 502 is intended to limit the circumstances in which a party's intentional or unintentional disclosure of privileged information operates as a waiver of the attorney-client privilege.

Rule 502(a) addresses the notion of "subject matter waiver," in which the disclosure of one privileged document is construed as a waiver of privilege for all related documents. The new Rule provides that a waiver of privilege over a specific item will only extend to other undisclosed information when: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (c) "they ought in fairness to be considered together." The Advisory Committee explains that the scope of the subject-matter waiver should be limited to only those "unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." As a result of the new Rule, an unintentional disclosure should never result in a subject-matter waiver.

Rule 502(b), in turn, codifies the common-law rule governing inadvertent waiver of privilege. The Rule provides that an unintentional disclosure is not a waiver of privilege with respect to the specific item or information disclosed if: "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."

One of the principal goals of the new Rule is to reduce the ever-increasing expense of discovery involving electronically stored information ("ESI"). Many commentators have suggested that the cost of reviewing ESI for privilege has spiraled out of control. To help curtail these costs, Rule 502(d) encourages federal courts to enter orders approving "claw-back" and "quick peek" discovery arrangements, in order to allow parties to exchange documents prior to completing an exhaustive privilege review. In effect, the court can guarantee to the parties that these arrangements will not result in a privilege waiver. Rule 502(d) provides that a federal court's order preserving the privilege will be enforced in subsequent state and federal litigation. In a similar vein, Rule 502(e) allows litigants to enter into agreements among themselves regarding the preservation of privilege, although these private agreements will not be enforceable against non-parties to the litigation.

The provisions of Rule 502 apply to all proceedings commenced after September 19, 2008 and, "insofar as is just and practicable, in all proceedings pending on such date."[4]

ABA Recommendation 114

In the current legal market, lateral moves between law firms are becoming more and more common. A significant step in joining another firm is analyzing and clearing potential conflicts of interest. The ABA has been looking into measures to relieve the burden for attorneys changing firms.

The American Bar Association's House of Delegates, the policymaking wing of the organization, decided by a vote of 192-191 to postpone voting on a measure that would ease the conflict of interest rules for attorneys moving between private law firms. The proposed rule would allow firms to "screen" incoming lateral hires from its other attorneys and to continue representing clients that may present a conflict of interest with the attorney's former clients.

A late amendment to the proposed rule that would require an attorney's new law firm to inform the former client that a judicial review was available to determine whether the parties had complied with the rule was responsible for the rejection of the measure. The amendment also provided that the attorney's new law firm had the burden of showing that no confidential information was transmitted to the new firm.

The ABA is expected to reconsider a recommendation at its February meeting.

---

[4] The text to the new Rule 502 can be found at www.uscourts.gov/rules/S2450.pdf.