Own Up to Mistakes

Insurers must be told of all potential malpractice claims, or coverage may be denied

By Bennett J. Wasserman

In the past term, the Supreme Court maintained a firm approach towards ethics among members of the bench and bar as their activities relate to the public trust. Implicit in at least four decisions was the public policy requiring uncompromised ethical conduct among the members of the bar and bench and the high priority of protecting the public by demanding compliance from attorneys and judges.

In addition, attorneys should promptly acknowledge and report possible malpractice claims when their policy requires it, even when they possess what they feel is a solid defense to any such claim, if for no other reason than to protect the errant lawyers' clients who may be damaged by malpractice. The confidentiality in investigations of judges' misconduct is not absolute, but must yield to a criminal prosecution stemming from the charges that precipitated the investigation of the judge. Law firms and attorneys must continue to abide by the "municipal family" doctrine when they represent public entities, and actively police themselves to prevent actual conflicts of interest. Also, when advising a public entity, an attorney has a common-sense obligation to avoid conflicts and to disqualify himself from the task of providing advice when he is subjected to "competing impulses" that would naturally compromise his independent professional judgment.

Legal Malpractice

One of the most common forms of malpractice — missing a statute of limitations — was the nucleus of *Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A.*, 189 N.J. 436 (2007). This decision underscores the absolute imperative for attorneys to report to their malpractice carrier any inkling they have about possible malpractice claims. The defendant law firm insisted it had a good-faith basis for its alleged failure to file its client's lawsuit before the expiration of a statute of limitations, but because the firm possessed knowledge of the *possibility* that such a claim could be filed and failed to report it to its carrier, it was denied coverage by its carrier and the Court upheld the carrier's denial.

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Nowell Amoroso P.A. represented a plaintiff against whom a tort had been committed by a public entity. The plaintiff claimed that a municipal official who owned a competing nightclub conspired with the municipal police department to harass the plaintiff club by means such as conducting lengthy, repeated inspections at times of peak operation.

Nowell Amoroso filed a complaint on May 23, 1994, which later proved one day too late. Because the municipality failed to answer discovery, its answer and defenses were suppressed, and the plaintiff obtained a $400,000 judgment. Defendant appealed.

In its first decision in the matter, the Appellate Division held that the action arose May 22, 1992, and accordingly, even though its defenses were suppressed, the municipality could argue the statute of limitations (two years for actions under Title 59) was missed. The Appellate Division remanded in 1999 on the question of whether any tortious acts were committed after May 22, 1992. The trial court acknowledged that some had, but denied that either causation or damages could be found for those acts, and dismissed the case as untimely.

The plaintiff appealed, arguing that the case was remanded for a narrow review, and further, the plaintiff had proven tortious acts were committed after May 22, 1992. On its second review of the case, the Appellate Division affirmed the lower court in an unpublished opinion dated July 12, 2002. Plaintiff later appealed this decision as well, but was denied certification.

On July 15, 2002, the firm applied to Liberty Surplus Insurance for a "claims made and reported" malpractice policy. One of the questions in the policy application was whether the firm or its lawyers had "knowledge of any circumstance, act, error or omission" that could result in a malpractice claim. Nowell Amoroso answered no.

The client then filed a malpractice claim, and Nowell Amoroso reported the claim.

Liberty denied coverage on the basis of Nowell Amoroso having known of the potential for a claim, and then proceeded to file a declaratory judgment action. The firm moved for summary judgment in its favor, and Liberty responded with a cross motion of its own. In response to the cross-motion, the firm's attorneys filed certifications that stated they "did not have knowledge of, or a reasonable basis to believe that any circumstance, act, error or omission ... could or would result in a professional liability claim ... " Liberty's motion for summary judgment denying coverage was granted by the trial court.

The law firm appealed. The Appellate Division affirmed the trial court, and Nowell Amoroso appealed to the Supreme Court.

The Supreme Court ruled that after all the indications that the firm missed the statute of limitations, including trial and appellate rulings, "the trial court would have to ignore reality to conclude that Nowell Amoroso did not have knowledge that a claim might be filed." The Court suggested that planning to appeal the statute of limitations ruling to the Supreme Court did not insulate Nowell Amoroso from the reasonable expectation that a malpractice claim existed. The firm was retained more than one year before they filed suit, and they never provided any explanation for the delay.

Nowell Amoroso argued that the summary judgment was premature because discovery was not complete. However, the firm filed for summary judgment first, and Liberty's dispositive motion was responsive; therefore, it was untenable for Nowell Amoroso to argue prematurity.

In addition to the argument that summary judgment was premature, the firm argued that it should have been permitted to supplement the appellate record. At the time of appellate oral argument in the lawsuit with Liberty, the firm had received an expert report it planned to submit in the malpractice action brought by its former clients. The report concluded that the firm did not deviate from the standard of care. However, the Supreme Court highlighted R. 2:5-4, which provides that appellate records shall consist of the papers filed below. The firm made its own decision as to when to file for summary judgment, and if it required that expert report for its summary judgment motion, it should have waited to file the motion. Further, it was unlikely that the report would affect the outcome, given the weight of the evidence that the firm had a reasonable apprehension of a malpractice claim. Thus, the issue in the declaratory judgment action was not whether Nowell Amoroso was guilty of malpractice, but whether the firm knew that that their client might bring such an action — meritorious or not — against them.

The firm further argued that affidavits its members signed created a genuine issue of material fact. Significantly, Liberty, the firm, the Appellate Division and the Supreme Court all agreed that in this case a subjective standard should be applied to determine whether the firm had a reasonable basis to believe that a professional liability claim could arise. However, the affidavits were insufficient to overcome the one-sidedness of the evidence suggesting they should have expected a malpractice claim; "the trial court would have had to ignore reality to conclude that Nowell Amoroso did not have knowledge that a claim might be filed against it when faced with a trial court and two Appellate Decision decisions that Nowell Amoroso had missed the statute of limitations."

The message of this case is crystal clear and suggests more than the obvious lesson that lawyers err on the side of reporting events to their professional liability carriers, even if they may not rise to the level of malpractice. One can argue that one of the primary elements of the lawyer's fiduciary duty is to protect the client. Maintaining malpractice insurance is consistent with upholding that duty since it helps to protect our client from our own professional mistakes which, whether we choose to admit, we all make.

By not having malpractice insurance one minimizes the import of our fiduciary duty. By not reporting our mistakes — even those which we might not admit are mistakes — to our professional liability carrier, not only prejudices our carrier, but, more importantly, damages our clients, who are entitled to have the protection our malpractice insurance affords them. To err might be human, but not to report even a possible claim to our carrier, deprives our client of the protection we are duty bound to provide.

Legal Ethics

The Advisory Committee on Judicial Conduct (ACJC) was established by the Supreme Court and is charged with the responsibility to investigate allegations of misconduct by judges. The attorney general investigates and prosecutes crime, including those committed by judges. But can the confidentiality of the ACJC's investigations yield to the need to prosecute a judge when misconduct becomes the subject of a criminal prosecution?

In *State v. Clark*, 191 N.J. 503 (2007), the Court dealt with a municipal judge that was alleged to have issued a fictitious summons (with help from the chief of police and a detective) that would allow a prison inmate to attend a funeral without police supervision, which was a criminal violation. Both criminal and ethics investigations commenced when this came to light. As a result of the criminal investigation, a grand jury indicted the judge. Prior to trial, the prosecution issued a subpoena ad testificandum to the investigator who conducted the ethics investigation.

The ACJC moved to quash the state's subpoena, arguing that R. 2:15-4's promise of confidentiality encourages participation in the process of routing out judicial misconduct, and the breach of that confidentiality "would have a chilling effect on its investigations," thus depriving it of the flexibility necessary to fulfill its responsibilities.

The trial court granted the ACJC's motion to quash the subpoena, but was reversed on appeal. The Supreme Court affirmed the Appellate Division.

The ACJC argued that the import of the broad confidentiality protection of Rule 2:15-20 is that confidentiality of its investigatory record is the norm. Moreover, the Rule contained no express exception for the release of investigatory information prior to issuance of a formal ethics complaint, notwithstanding a subpoena to testify in a criminal trial. The state, on the other hand, urged the Supreme Court to find that the important interests of criminal justice override the interests of confidentiality in the judicial discipline system once an indictment has issued against a judge and a criminal trial is about to take place.

The Court recognized that the interests of criminal justice override the interests of confidentiality in judicial discipline, and further, that the promise of confidentiality is not absolute. For example, R. 2:15-20 provides for situations in which investigatory information can be revealed (though none were applicable to this case). The Court refused to "rigidly interpret" the Rules' confidentiality shield and its protection to innocent reputations, given the "criminal trial of publicly indicted judge." At the base of the decision is the Court's concern for the legitimate need for confidentiality during the process of investigating complaints of misconduct against judges because most turn out to be unfounded, even frivolous allegations. But when the acts investigated amount to potential criminal conduct, the "concern about 'reputational injuries' evaporates once a grand jury has handed up an indictment." In such circumstances, "our concern for a judge's reputation has been overridden by the very public, criminal charges preferred against [the judge] for the same conduct."

The Court ruled that when the allegations against a judge warrant criminal charges, the need for confidentiality in the discipline process must yield where the crime for which the judge stands indicted arises from the very misconduct which the ACJC investigated.

Many firms that represent public entities in some capacity will be confronted with requests for unrelated representation before those same public entities. Is there an inherent conflict in representing a municipality as, for instance, bond counsel, but also representing a private client before an agency of the same municipality, such as the municipal court? The Supreme Court acknowledged that the "appearance of impropriety" standard is no longer valid and declined to rule that such a situation presents a per se violation of RPC. 1.8(k) (conflicts of interest for public entity counsel.) Nonetheless, in *In re Supreme Court Advisory Committee on Professional Ethics Opinion No. 697*, 188 N.J. 549 (2006), the Court cautioned law firms treading this ground and concluded that "joint representations of both public and private entities 'that were banned under the appearance [of impropriety] doctrine should now be evaluated under both RPC 1.7 and RPC 1.8(k).'"

Wilentz, Goldman & Spitzer requested an advisory opinion from the Advisory Committee on Professional Ethics (ACPE) on the following questions:

Is a law firm per se precluded from serving simultaneously as bond counsel for the governing body of a municipality and representing a private client before one of the boards or agencies (including the municipal court) of the municipality?

Is a law firm per se precluded from serving simultaneously as special litigation counsel for the governing body of a municipality and representing a private client before one of the boards or agencies (including the municipal court) of the municipality, assuming it has received no nonpublic information from that board or agency that is not specifically related to the discrete litigation in question?

The ACPE, which interpreted Wilentz's request as requesting *permission* to engage in either of the above forms of representation, stated in Opinion 697 that a law firm is per se precluded from representing a municipality and private clients before or against that municipality or its agencies. It based its decision on R. 1.7(a), which precludes concurrent representation which involve conflicts of interest.

Wilentz sought review from the Supreme Court. Recognizing that the question posed by Wilentz was much narrower than the one answered by the ACPE, the Court reversed the ACPE and held that a firm or lawyer is not *necessarily* precluded from serving as zoning board attorney and also representing a client before the municipal court, although any possible overlap will be examined to determine if the lawyer is able to supply independent advice to each.

In 2002, the Pollock Commission suggested revisions to New Jersey's RPCs based on the Model rules from the ABA. Subsequent to the Commission's recommendation, in 2003, RPC 1.7(c) was deleted. RPC 1.8(k) was adopted, which provides that a lawyer who is employed by a public entity in any capacity must avoid representation of another client that would present a substantial risk of limitation on the lawyer's ability to provide independent advice or diligent and competent representation to both the public entity and the client.

Prior to the adoption of 1.8(k), public entity lawyers had to avoid even the mere appearance of conflict, which essentially operated to bar municipal attorneys from any side representation involving the municipality. Thus, the "appearance of impropriety" doctrine was jettisoned in favor of an "actual conflict" doctrine for municipal attorneys.

Wilentz argued that the ACPE wrongly based its decision on the municipal family doctrine, which was based on the "appearance of impropriety" in the former RPC 1.7(c). The ACPE argued that even though RPC 1.7(c), which codified the "appearance of impropriety" doctrine, was deleted, the doctrine retains its vibrancy. Accordingly, the ACPE's position was that a lawyer who represents any public entity or one of its subsidiary agencies has the whole municipality as his client, and thus cannot represent private clients against or in front of any subsidiary subject to the public entity's budgetary, membership, or decision-making control. The ACPE's argument was that even without the deleted RPC 1.7(c), what remained of RPC 1.7 still prohibited the representation described in Wilentz's inquiry.

The Court was then called on to decide whether such representation was barred by RPC 1.7, which addresses conflicts generally or by RPC 1.8(k), which addresses conflicts for municipal lawyers, or not at all.

In this opinion, the Court reiterated that the "appearance of impropriety" standard no longer retains validity. The proper standard is whether actual conflicts exist. The current RPC 1.7 permits a client to waive the conflict. However, a municipality cannot consent to representation involving a conflict. The inquiry for municipal representation, then, starts and ends at whether an actual conflict exists. The Court delved into RPC 1.8(k), since RPC 1.7 did not adequately address the hypothetical situation at issue nor did it provide an outright bar to the representation.

The Court also clarified that the fact that a subsidiary of a public entity is subject to the public entity's budgetary, membership, or decision-making control does not necessarily give rise to a conflict in dual representation involving a municipality and its subsidiary, because that standard is more applicable to the now-defunct appearance of impropriety doctrine.

Because the "municipal family" doctrine, which recognizes that employees of a municipality and its subsidiaries are "all on the same team," retains some validity after the demise of the appearance of impropriety doctrine, representing a municipality as well as private clients before subordinate boards creates a substantial risk of conflict. But the Court refused to extend an outright, per se ban as the ACPE did.

A firm cannot have one of its attorneys serve as zoning board attorney, and another represent a client before the zoning board. Likewise, an attorney who represents a municipality in a plenary fashion may not represent other clients against or before any subsidiary of the municipality.

But it may be permissible (absent conflict or prohibition from other authority) to represent a municipality and also private clients before or against a *subsidiary* of the municipality. To do so, said the Court,

- the municipal representation must be limited, and not plenary,
- the private client representation must be before a different arm or subsidiary, and
- the attorney must comply with RPC 1.7(a) and RPC 1.8, and decline representation in which he cannot provide independent advice to both the public entity and the private client.

An attorney's membership in the "municipal family" necessarily involves a substantial risk that the attorney cannot provide independent advice to private clients before or against the municipality or its agencies, and thus, the discrete obligation to avoid conflicts remains. The duality of representation will continue to play a central role in determining whether the actual conflict of RPC 1.8(k) is present.

The Court made abundantly clear that its holding was limited, and merely addressed whether an outright, blanket ban was appropriate. Implicit in the decision is the Supreme Court's admonition that law firms and attorneys actively scrutinize the nature of each concurrent representation for which they are engaged so as to assure faithful compliance with RPC 1.8(k) to prevent the "substantial risk" of actual conflict of interest.

The ethical webs in which lawyers can so easily become ensnared at the interface of public service and private gain comes out so clearly in *Thompson v. City of Atlantic City*, 190 N.J. 359 (2007). Ironically, the decision does not mention a single Rule of Professional Conduct. Instead, the common-law conflict-of-interest doctrines as applied to municipal officials and the supplement provided by the Local Government Ethics Law, N.J.S.A. 40A:9-22.1, et seq., provide a fascinating backdrop against which the conduct of local officials and their lawyers are examined.

In *Thompson*, an attorney encumbered with conflicts of interest should have both disqualified himself from advising the city on a settlement of federal litigation in which the mayor was the plaintiff, given the strong conflicts of interest he carried, and disclosed to the city counsel that he had provided a referral to counsel for a party against whose interests he was subsequently hired to advise the city.

Langford ran unsuccessfully for mayor of Atlantic City. He and his campaign treasurer experienced what they felt was political retribution from the incumbent mayor to whom the election was

lost. They approached Ercole, a lawyer, to represent them in a 1983 action. Ercole declined to take the case because his firm did not represent employees. He did, however, refer the two plaintiffs to several other attorneys, one of whom eventually filed the suit for Langford in federal court.

Langford ran for mayor again. He won the election, and Ercole openly served as co-finance chair of the campaign. Ercole was retained by the local political party, and agreed to accept process for Langford during the campaign. After the election, the city council awarded Ercole a $200,000 contract to provide legal services to the city, including advice on settlement of the mayor's lawsuit.

Langford, along with his staff and the city council, vigorously attempted to settle Langford's lawsuit. Langford was himself a former councilman. The effort was replete with conflicts. The new mayor appointed his business administrator to serve as acting mayor when Langford was unable to attend to his duties, including negotiating the city's position on settlement of the lawsuit in which the new mayor was the plaintiff.

The trial judge, according to the city solicitor, had expressed a desire that the case settle for a nominal amount. Additionally, the judge considered putting the case on hold for four years because the city solicitor might have to recommend a settlement to the mayor about a case in which he, the mayor, was the plaintiff. The city solicitor recommended a $300,000 settlement, but the mayor and his co-plaintiff demanded $1million. The solicitor decried the variety of inherent conflicts in the settlement efforts, including the conflict for Ercole, counselor to the city council on the settlement vote. Moreover, the solicitor urged that independent counsel be engaged to resolve the conflicts issues.

Ercole recommended that $1 million was a fair amount, given the potential exposure. The business administrator, as acting mayor, recommended $850,000. The council president, who had already resigned his seat to assume a position in the mayor's office paying double his council salary, agreed with the business administrator and participated as council president in the vote on the settlement.

The city council voted to offer a settlement of $850,000. The plaintiff accepted. The council solicitor argued the settlement was invalid. The city council reconsidered the issue, and voted to uphold the settlement offer. One councilman urged obtaining review by the attorney general, whom he had contacted. The inspector general, whom the attorney general asked to investigate the transactions, requested a delay in disbursing the settlement proceeds. The next day, the business administrator disbursed the settlement proceeds. Then the attorney general's office asked the mayor and his co-plaintiff to agree to escrow the funds they received. They refused.

The attorney general filed suit in state court, and the settlement was invalidated. As to attorney Ercole, the trial court found that he had an inherent conflict, and could not effectively represent the city's settlement interests, since he had secured the $200,000 contract to advise the city by the very man against whose interests he was advising the city. However, the trial court refused to invalidate the settlement approved by a federal court.

The attorney general appealed, and was sustained by the Appellate Division. The mayor and his co-plaintiff appealed to the State Supreme Court.

Justice Barry Albin, writing for a unanimous Court, held in dicta that Ercole should have disqualified himself from advising the city on the settlement of Langford's Sec. 1983 lawsuit, and should have disclosed the referral to the city council, notwithstanding that the city council knew of the many entanglements between Ercole's and Langford's interests, including Ercole having been retained by the local political party to accept election-related service of process for Langford. Moreover, the near impossibility of Ercole to "fight tooth and nail against the mayor's lawsuit" necessarily created a question as to whether Ercole and the mayor's other allies were serving the mayor, or the citizens. The entangling relationships among the mayor and his allies gave the impression that Ercole and others might not exercise objectivity in representing the interests of the city.

When conflict of interest is so clear, a lawyer has a common-sense obligation to disqualify himself from the task of providing unbiased advice. In the end, the client always suffers. Here, the Court affirmed the Appellate Division's decision voiding what would otherwise have been a valid and appropriate settlement of a meritorious civil rights claim.

Conclusion

This past the term the Court has left us with an ongoing reminder that lawyers must always put the interests of their clients ahead of their own. Here are some absolutes: If we think that we may have made a mistake in the representation of our clients, but we may really not be sure, then the first one that we should report it to is our professional liability carrier. If we do, and it turns out that we have indeed made a mistake and the client chooses to sue us, then at least we will have been loyal to our fiduciary duty to protect our client by assuring that the professional liability policy we purchased for our clients' protection remains intact. In the area of legal ethics, the Court continued to insist that the very highest of ethical compliance remains the rule, especially when it comes to assuring the integrity of all branches and levels of government in New Jersey. ■