A Potpourri of Legal Ethics Developments

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Capital Error

Facts:
- Three young men enjoying beer, pool and cruising in a Camaro in Alabama
- Dropped Cory Maples off at his family’s mobile home
- Cory shoots and kills the other two men, took the Camaro and fled
- Jury found Maples guilty and penalty was death
Facts:

- Two Sullivan & Cromwell associates agree to represent Maples pro bono in post-conviction proceedings.
- Both leave firm while petition pending.
- Court denies petition and clerk mails to S&C.
- S&C mailroom returns envelopes to Court unopened.
- No appeal is filed.
Capital Error

  - Supreme Court granted cert
  - 7-2
  - Mailroom mistake and other facts established requisite “cause” to set aside the procedural default
Capital Error

- Departing Lawyer Checklist
  - Transition Interview with status of all matters
  - Notice to clients of departure
  - Reassign all matters
  - Alert mailroom/secretary/paralegal to forward paper mail to designee
  - Set procedure for reviewing incoming mail and email
  - Verify substitution of counsel in all litigation/counsel of record matters
Checklists

- A Quality Improvement, Risk Reduction Strategy
- “Just ticking boxes is not the ultimate goal here. Embracing a culture of teamwork and discipline is.” Atul Gawande, M.D., *The Checklist Manifesto, How to Get Things Right* (2009)
Checklists

- Lessons from many fields
  - Aviation
  - Medicine
  - Construction

- Benefits
  - Reduce mistakes
  - Enhance communication
  - Empowers team members
Checklists

- Law
  - Procedural
    - New hires and laterals
    - Insulation walls
    - Litigation holds
    - Project management
  - Substantive Practice Area
  - Project Planning
Checklists

- A Process, Not an Answer
  - Does this checklist help with this problem?

- Communication

- Empowerment

- Sweat the small stuff
Patent Infringement Claims

- *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314 (Fed. Cir. 2011)
  - Patent holding company
  - Principal business is enforcing patents
  - Filed > 100 suits
  - Sought quick nuisance settlements $25K - $75K
  - Defendants quickly settled to avoid much greater defense costs
Patent Infringement Claims

- **Eon-Net LP v. Flagstar Bancorp**
  - Flagstar fought back
  - Uncovered Eon-Net practice
  -Filed for R. 11 Sanctions
  - Fed. Circ. affirmed sanctions of $150,000 based on legally baseless infringement allegations and no reasonable pre-suit investigation
  - Affirmed $500,000 in attorneys’ fees and costs for “exceptional” abusive discovery and misconduct under 35 USC Sec. 285
“Fair Use” Copyright Issues

- US Patent and Trademark Office Rule 56
  - Patent applications must include all prior art references applicable to patentability
  - Failure to include all prior art references can render patents unenforceable and expose patent attorneys to sanctions for ethics violations
  - Common long-term practice has been to copy and submit articles from scientific, professional and medical journals
“Fair Use” Copyright Issues

- Publishers now suing for copyright infringement, damages and injunctions
- Issue is “Fair Use”
- Copyright Act Sec. 107
  - Purpose of copying
  - Nature of work
  - Percentage of work copied
  - Effect on market
“Fair Use” Copyright Issues

- PTO General Counsel Memo finds Fair Use
  - Applicants legally required to submit articles
  - Articles submitted for factual, not expressive content
  - Little effect on market because articles typically obtained from licensed databases that have paid for them
“Fair Use” Copyright Issues

- Unclear whether Courts will defer to PTO GC
  - Opinion outside agency expertise
  - Law firms copy articles for commercial purposes
  - PTO does not require submission of unlicensed articles
  - Even if article submitted to PTO is fair use, copy for client file may not be

- Legal theory may expand to lawyers generally submitting articles to courts or agencies
“Fair Use” Copyright Issues

- Why now?
  - Publishers previously unaware of practice?
  - Publishers seeking new revenue stream to counter widespread online article availability?
    - >500,000 patent applications annually
  - Applications can be searched electronically for articles so finding violations is easier?
  - Plaintiffs’ bar influence?
“Fair Use” Copyright Issues

● Take Home

● Watch developments in this area of law

● Pay attention to sources of articles being provided to PTO, courts and agencies
Unintentional Disclosures of Confidential Transaction Info

- Private company acquiring another private company
  - Acquirer wants a new sub as acquisition vehicle
  - Does not care about name because name will change
  - Junior attorney looks at acquisition naming conventions
  - Files cert. of inc. in Delaware under “[Client][Target] Acquisition Co.”
  - Business reporter trolls SOS website and blogs
Unintentional Disclosures of Confidential Transaction Info

- Private company acquiring target requiring pre-merger notification under Hart-Scott-Rodino Antitrust Improvements Act (HSR)
  - Wants transaction confidential after closing
  - Wants closing ASAP
  - Attorney files HSR (not generally available to public)
  - Attorney checks early termination of HSR Holding Period
  - FTC publishes early terminations almost daily
  - News media reports
Unintentional Disclosures of Confidential Transaction Info

- Client wants to invest confidentially with promising tech start up
  - Attorney assists client
  - Attorney files Form D Notice of Exempt Offering of Securities with SEC
  - Form Ds now available online
  - Bloggers report the investment
Unintentional Disclosures of Confidential Transaction Info

● Take Home
  ● Government agencies trending toward online access to data
  ● Know what and when info and filings are made public
  ● Avoid dabbling with filings outside area of expertise
Alternative Fees: Flat Fee Agreements

  - July 2008, Firm agreed to represent client in two lawsuits for flat fee of $300,000 plus costs
  - Fee to be paid in installments
  - April 2009, both cases settled, but client had paid only $150,000 plus some costs
  - Firm sued for unpaid fees and remainder of costs and filed MSJ
Alternative Fees: Flat Fee Agreements

- MSJ Denied
  - Court focused on Firm “shall be entitled to the entire $300,000 fee regardless of any change of counsel”
  - Court held this made fee a “non-refundable retainer”
  - Irrelevant that client had not changed counsel and had received all expected services
  - Agreement unenforceable under NY law
Alternative Fees: Flat Fee Agreements

• Take Home
  • Do not take flat fee arrangements casually
  • Fee may need to be modified if firm stops work before work is complete
  • Document factors supporting flat fee
  • Client should state fee agreement is fair, reasonable and not excessive under R. 1.5 factors
Alternative Fees: Flat Fee Agreements

- **Take Home**
  - Consider advising client to obtain independent legal advice concerning fee arrangement
  - Firm should “look back” at fee after completion of services to identify and resolve potential problems
  - Firm should document services to support *in quantum meruit* argument if needed
Internal Investigations

- Wal-Mart Mexican Bribery Allegations
  - Business goal to rapidly expand Mexico operations
  - Sergio Cicero, former Wal-Mart de Mexico real estate department executive/attorney in charge of obtaining construction permits
  - Emails Wal-Mart senior lawyer
Internal Investigations

- Wal-Mart Mexican Bribery Allegations
  - Cicero disclosed campaign of bribery to win market dominance
  - Names, dates and amounts
Internal Investigations

- Wal-Mart Mexican Bribery Allegations
  - Wal-Mart sends internal investigation team led by former FBI special agent
  - Initial investigation finds $24,000,000 in suspect payments
  - Known to Wal-Mart de Mexico’s top execs
  - Efforts to conceal from Wal-Mart HQ in Arkansas
  - “reasonable suspicion to believe that Mexican and USA laws have been violated”
  - Recommended expanded investigation
Internal Investigations

- Wal-Mart Mexican Bribery Allegations
  - Wal-Mart Response
    - Shut down investigation by former FBI agent
    - Wal-Mart CEO criticized investigators as “overly aggressive”
    - Turned investigation over to Wal-Mart de Mexico GC who had been implicated as authorizing bribery
    - GC found no basis for bribery allegations
    - GC blamed former executive who raised allegations
Internal Investigations

- Wal-Mart Mexican Bribery Allegations
  - 2008 Wal-Mart promoted CEO of Wal-Mart de Mexico to vice chairman of Wal-Mart
  - Until April 2012 NYT article, allegations and investigation had never been publicly disclosed
  - Wal-Mart GC critical of not moving forward with expanded investigation and of Wal-Mart de Mexico GC’s finding of no bribery
  - Wal-Mart GC resigned
Internal Investigations

- **Current Status**
  - Wal-Mart investigating its own investigation
  - Mexico and USA investigating Wal-Mart
  - Foreign Corrupt Practices Act violations at issue
  - Civil suits against Wal-Mart by pension fund shareholders
  - AHIBL
Internal Investigations

- **Take Home**
  - Internal investigations must be pristine
  - Subject to government review
  - The greater the risk of internal business or other pressures, the greater the need for an outside investigation
Internal Investigations

● Take Home
  ● Notice to interviewees by investigators
    ● Purpose is to assist counsel in providing legal advice to Company
    ● A/C relationship is with the Company
    ● Interview may be privileged, but it is Company’s privilege
    ● Interviewer may need to disclose information to management
Internal Investigations

**Take Home**

- Exercise great care if employee indicates act or intent to blow whistle with governmental agency
- Can tell employee it is inappropriate to communicate with media
- Can remind employee of carefully constructed confidentiality agreement
Ethical Obligation of Competency

- A lawyer shall provide competent representation to a client. . . . KRPC1.1
  - In-House Counsel expected to know much about some areas and something about many areas
  - Each counsel must find own solution
    - BARBRI materials
    - Internet searches
    - Commercial internet based subscription services like Practical Law Department
    - SFBB Corporate Counsel Education in a “box”
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