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LITIGATION REVIEW

Admissibility of Ethics Codes In Legal Malpractice Actions

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The New York Lawyer's Code of Professional Responsibility has an interesting, and at times rather peculiar, relationship with rules and procedures governing civil litigation. For example, even if a lawyer is found to have violated the code in some respect, such a violation does not always result in an adverse consequence in civil litigation.

Indeed, New York courts have held that evidence obtained in violation of a provision of the code is still admissible at trial; attorneys are not always deemed to have forfeited their fees when they have violated the code; and legal malpractice cannot be established solely by proof of a violation of the code.[1]

In fact, the Preliminary Statement to the code explicitly states: "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct."

Recognizing this interesting dynamic between the code and rules of civil litigation, courts throughout the country have grappled with the question whether specific code provisions can be relied on, or even cited, in legal malpractice cases.[2]

Some commentators have argued that it "makes sense" for courts presiding over legal malpractice claims to "accept . . . expert testimony about the Disciplinary Rules and their meaning as 'evidence of' the standards of the community" because "[i]f the Disciplinary Rules are 'mandatory in character' and state the 'minimum level of conduct' expected and required of lawyers, they are the logical starting point for determining the minimum standards of the community."[3] This view, however, has not always been adopted by the courts.

In *Tilton v. Trezza* (NYLJ, April 24, 2006, p. 22, col. 3), Nassau Supreme Court Justice Ira B. Warshawsky (see Profile) of the Commercial Part was presented with defendant's motion in limine to preclude plaintiffs and third-party defendants from having their expert witness on legal ethics testify that the defendant-attorney violated the code to establish a claim of legal malpractice.

In *Tilton*, defendant was accused of committing malpractice in drafting limited liability company operating agreements because he represented multiple parties to those agreements allegedly "without advising them of the possible conflict between them and obtaining their waiver of joint representation," as described in DR 5-105(c) [NYCRR § 1200.24(c)]. The defendant-attorney's clients intended to argue that "based upon the ethical violation of a conflict of interest and as a result of the conflict, [the defendant-attorney] committed malpractice."

In seeking to exclude testimony of his alleged violation of DR 5-105(c), the attorney-defendant argued "that to allow the admission of a claimed ethical violation against an attorney in a case of legal malpractice 'would be tantamount to allowing an expert to testify that a defendant was a criminal based on alleged criminal activity without a conviction being established'" (as no grievance had been filed against the attorney regarding the alleged code violation).

On the other hand, the client argued "that the ethical standard should be presented to the jury and that the expert should be able to opine on it."

In resolving the question before him, Justice Warshawsky first noted that to prove legal malpractice, a plaintiff must establish "(1) the negligence of the attorney, (2) that the negligence was the proximate cause of the loss sustained, and (3) proof of actual damages." He continued that the "act of negligence constitutes malpractice, not any alleged underlying reason, be it code violation or something else."

Justice Warshawsky went on to note that there was no issue that the code "was ever intended to be used in civil litigation to compensate for an injury, nor that it would be the basis for negligence per se," citing, among other things, the excerpt from the Preliminary Statement quoted earlier.

Apparently having neither been cited nor finding a case in New York directly on point, Justice Warshawsky noted an analogous decision of the Appellate Division, Second Department, in which the court ruled that a criminal indictment against a judge based solely upon a violation of the rules of judicial conduct was legally insufficient because the Code of Judicial Conduct could not be enforced by criminal prosecution, citing a similar Court of Appeals decision.[4]

While recognizing that neither this Second Department case, nor the Court of Appeals decision upon which it relied, was controlling on the current issue before the court, Justice Warshawsky nevertheless found the reasoning in these cases applicable in that an ethical code violation was found to be insufficient for a criminal prosecution, agreeing with the defense argument that a code violation "alone cannot be the basis of legal malpractice."

Washington State Case

Justice Warshawsky also found persuasive a 1992 decision of the Supreme Court of

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Washington state, in *Hizey v. Carpenter*, 830 P.2d 646 (1992), a seminal case already cited at least 377 times, in which the court squarely ruled that an expert in a legal malpractice case may not identify specific provisions of the applicable codes of professional responsibility.

After surveying the decisions on both sides of this issue, the Washington court affirmed the trial court's "holding [that] an expert witness may neither explicitly refer to [the applicable codes of professional responsibility] nor may their existence be revealed to the jury via instructions."

It noted that the codes did not "purport to set the standard for civil liability," finding that they were "ill-suited for use in the malpractice arena" and merely "contained standards and phrases which, when relied upon to establish a breach of the legal standard of care, provide only vague guidelines."

The Washington Supreme Court rejected plaintiffs' analogy to statutes or administrative regulations, the violation of which can provide evidence of negligence or, in some jurisdictions, negligence per se. It specifically found this analogy flawed because the lawyers' codes were not a statute or administrative regulation, but, rather, were adopted by the court itself, not the legislature, pursuant to the court's power to regulate the practice of law within the state.

Nevertheless, the Washington court went on to explain that "experts on an attorney's duty of care may still properly base their opinion . . . on an attorney's failure to conform to an ethics rule. In so testifying, however, the expert must address the breach of the legal duty of care and not simply the supposed breach of the ethics rule."

The Court continued that "such testimony may not be presented in such a way that the jury could conclude it was the ethical violations that were actionable, rather than the breach of the legal duty of care. In practice, this can be achieved by allowing the expert to use language from the [lawyers' codes], but prohibiting explicit reference to them."

The Washington court further instructed: "The expert must testify generally as to ethical requirements, concluding the attorney's violations of the ethical rules constituted a deviation from the legal standard of care."

In adopting the reasoning of *Hizey*, Justice Warshawsky granted the defendant-attorney's motion to preclude "any mention of an alleged ethical code violation by [the defendant], most specifically, that of DR 5-105(c) and related code sections."

He did allow the expert to testify, however, "as to what he or she considers correct ethical conduct under the circumstances of this case, even using the language of the rule [DR 5-105(c)] without citing to specific sections."

Justice Warshawsky added: "Of course, such deviation, if proven, must still be shown to have caused damages and that those damages would not have been caused 'but for' the negligence of the attorney in departing from the legal standard of care."

The decision in *Tilton* appears to be a significant development in the law of legal malpractice in New York, squarely deciding an evidentiary question that to date has not resulted in exhaustive judicial treatment in the New York reported decisions.

As recognized in *Tilton* itself, there are certainly other decisions, most notably in jurisdictions outside New York, explicitly allowing experts in legal malpractice cases to cite and explain ethical code violations as proof of legal malpractice.[5]

Weil Gotshal Example

Even in New York, however, it does appear that in practice, code provisions are not always barred from evidence in legal malpractice cases.

For instance, in the recent legal malpractice case of *Weil Gotshal & Manges v. Fashion Boutique of Short Hills, Inc.*[6] before Manhattan Supreme Court Justice Richard Lowe, the clients asserting a claim of legal malpractice had no problem offering testimony from their expert on specific code provisions and corresponding alleged violations.

According to the clients' expert, Hal R. Lieberman, there was extensive citation of code provisions without objection from opposing counsel. The issue, therefore, appears to be far from settled in New York and is likely to result in appellate review in the near future.

Endnotes:

1. See United States v. Hammad, 858 F.2d 834, 837 (2d Cir. 1988) (a court is not obligated to exclude evidence even if it finds that counsel obtained the evidence by violating ethical rules); Stagg v. New York City Health & Hospital Corp., 162 A.D.2d 595, 556 N.Y.S.2d 779 (2d Dep't 1990) ("even if the matters to which the investigator testified were unethically obtained, they nevertheless would be admissible at trial."); Benjamin v. Koeppel, 85 N.Y.2d 549, 626 N.Y.S.2d 982 (1995) (attorney is entitled to referral fee even without complying with ethical rule, noting that "it ill becomes defendants [attorneys], who are also bound by the Code of Professional Responsibility, to seek to avoid on 'ethical' grounds the obligations of an agreement to which they freely accented and from which they reaped the benefits"); Shapiro v. McNeill, 92 N.Y.2d 91, 677 N.Y.S.2d 48 (1998) (violation of ethical rule governing conduct of attorneys will not, in and of itself, create duty giving rise to cause of action that would not otherwise exist at law).

2. See Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action, 50 A.L.R.5th 301.

3. Simon's New York Code of Professional Responsibility Annotated at 6 (2000).

4. Citing *People v. Garson*, 17 A.D.3d 695 (2d Dep't 2005).

5. See, e.g., Smith v. Haynsworth, Marion, McKay and Geurard, 472 S.E.2d 612 (Sup. Ct. S.C. 1996) ("we concur with the majority of jurisdictions and hold that, in appropriate cases, the [ethics code] may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action. However, we adopt the view taken by the Supreme Court of Georgia . . . [that] in order to relate to the standard of care in a particular case . . . [a code provision] must be intended to protect a person in the plaintiff's position or be addressed to the particular harm."); Mainor v. Nault, 101 P.3d 308 (Sup. Ct. Nev. 2005) ("the district court did not abuse its discretion by allowing [plaintiff's] standard of care expert witnesses to base their opinions upon the Supreme Court rules because the rules served merely as evidence of the standard of care, not as a basis for per se negligence").

6. Recent rulings by Justice Lowe and other testimony in the Weil Gotshal matter were reported in the NYLJ on May 15, 2006, p.1, col. 4, and May 16, 2006, p.1, col. 1. A settlement was reported on May 22, 2005, p.1, col.4.