CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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The Suing Circle: Lawyers v. Lawyers

I. INTRODUCTION

Lawyers – the "sharks" of the professions. Doctors are encouraged to treat doctors, architects may design for architects and CPAs are engaged to audit the work of other accountants. But lawyers suing other lawyers are "eating their own." They are accused of disloyalty and undermining the profession. By characterizing lawyer v. lawyer suits in such unflattering terms, we disregard the fact that litigation is among the most powerful tools in the lawyer tool box and one that is exclusively available for use by lawyers themselves. Lawyers are charged with protecting both their client's interests and the sanctity of the legal profession as a whole. That responsibility sometimes requires action be taken against another lawyer.

Nevertheless, we should not be so naïve as to believe that all lawyers act with only the purest of motives when suing other lawyers. Whether to gain an improper advantage for their client or to achieve their own venal goals, lawyers increasingly sue other lawyers asserting a variety of theories, such as malpractice, fraud, judicial misrepresentations, disqualification, improper legal fees, fee-sharing disputes, legal employment and discrimination claims, etc. Some of these claims are discussed below.

II. LITIGATION ADVANTAGE

There are a plethora of accusations that one lawyer may use against another in order to gain a tactical advantage in the course of a litigation or transaction. In most cases, the ultimate goal is to distract from the genuine issues in the case, to disqualify the opposing counsel or to so muddy the water that opposing counsel chooses to resign.

Although issues may be aggressively raised regarding opposing counsel's, or the law firm's, prior relationship to the party seeking disqualification or its predecessor or related entities, such claims are still brought within the original litigation. By seeking disqualification on these grounds, lawyers do not thereby become party to the litigation.

However, some lawyer v. lawyer suits serve the purpose of making the adverse lawyer an actual party to litigation in order to obtain leverage in the original matter. Accordingly, a lawyer may seek to implead an opposing lawyer – as a direct defendant, third party, or necessary party – under theories of aiding and abetting or as an accessory in order to make him/her a party in the action. *See e.g.,* Tranen, "*The Risks Lawyers Face from Aiding and Abetting and Civil Conspiracy Claims."* (Aon Advantage, Fall 2012.) Available at *http://www.attorneys-advantage.com/sites/ATTORNEYS/rm/qh/Pages/The-Risks-Lawyers-Face-from-Aiding-and-Abetting-and-Civil-Conspiracy-Claims.aspx*.

A stand-alone spoliation of evidence cause of action may be brought jointly against an adversary and his/her attorney under the proper circumstances. A lawyer may also be sued by his adversary for fraud and deceit in the conduct of litigation. *See e.g.,* New York Judiciary Law § 487. In situations such as these, the lawyers' and law firm's interests may diverge from that of their client. Lawyers may face the Hobson's choice of defending their own interest in ways that are inimical to that of the client. If so, the lawyer would have little choice but to withdraw.

The most common lawyer v. lawyer suit occurs when a lawyer brings a legal malpractice on behalf of their client against the client's prior counsel. While some attorneys refrain from suing other attorneys in these circumstances, there is a growing "plaintiffs' legal malpractice bar" who embrace the opportunity to pursue such claims.

It is a commonly held assumption that a case's value goes up when the focus shifts to the prior lawyer's departure from the standard of care and away from the merit of the underlying claim. The belief is particularly strong if the underlying claim is a tort, such as for personal injury, and there were underlying issues on either liability or damages against the original defendant. At its core is the popular conception that lawyers are so uniformly disliked that jurors will more readily decide the "case within the case" against the lawyer, than decide a difficult liability or damages case against the original defendant. *See,* Kritzer and Vidmar, *"Lawyers on Trial: Juror Hostility to Defendants in Legal Malpractice Trials."* (Hofstra Law Review, Posted on Mar. 8, 2016). Available at *http://www.hofstralawreview.org/2016/03/08/lawyers-on-trial-juror-hostility-to-defendants-in-legal-malpractice-trials/*. However, contrary to this belief, only a small to moderate increase in plaintiff friendly verdicts have been reported in jury trial simulations regarding underlying automobile or premises personal injury claims. There was no statistically significant increase found if the underlying case alleged medical malpractice. *Id.* While interesting, it is noteworthy that the study relied on jury simulations because there were simply not enough jury verdicts for legal malpractice suits to permit statistical analysis.

Those of us involved in legal malpractice defense (as insurers or counsel) are well-aware of the real world dynamics that influence claim resolution while defending lawyers. There are many factors beyond potential juror bias that favor settlement over trial. First, no matter how experienced the defendant attorney may be in litigation, the malpractice claim is personal. As such, the claim becomes fraught with both professional and personal outrage when the

successor plaintiff attorney accuses him/her of malpractice or other malfeasance, or conducts aggressive discovery or depositions. Also, often the expense of defending a legal malpractice case through trial quickly exceeds the value of the case, especially when you factor in the time away from the defendant lawyer's practice. Conversely, the adverse attorney is usually representing the malpractice plaintiff for an hourly fee as opposed a contingency fee, (some for the first time in the case of personal injury attorneys.) Additionally, although some lawyers take a highly defensive posture, many lawyer defendants also fear the possible reputational harm a malpractice claim can have among his/her peers or in the courthouse in which they practice on a daily basis. Often the resolution of the claim, including questions of "when" and "how much" depend as much on the personal relationship between the plaintiff's new and old counsel as the perceived value of the underlying claim.

III. FRENEMIES

Lawyer v. lawyer suits are not limited to those brought by adversaries. Suits abound between lawyers that were once united in interested but, for a variety of reasons, become competitors for clients and the fees that they generate. These disputes concerning clients and fees generally arise in two circumstances. In the first, a firm may experience a nasty split up that leads to a messy and oftentimes public divorce. *See e.g., "Southern Discomfort: Lawyers Suing Lawyers: How the heavyweight Southern Carolina firm Ness Motley choked on too much tobacco money."* (Bloomberg, Feb.17,2003). *Available at: htttp://www.bloomberg.com/news/articles/2003-02-16/southern-discomfort-lawyers-suing-lawyers."*

Partners may bicker about which of the successor entities may continue representing specific clients or conversely, who will be burdened by the responsibility of providing representation to a deadbeat. As in a marital dissolution, law partners may argue about distribution of both present account receivables and future fees, such as contingent fees, task based fees, flat fee arrangements and other fees that the firm may be entitled to receive in the future due, at least in part, on the firm's work in the past. Outstanding debts and contingent liabilities must likewise be accounted for. In the overwrought environment of law firm dissolution, lawyers may forget that it is their clients, not the lawyers, who chose counsel and whose interests must be protected throughout the break up. Even worse, the firm's internal fights often become tabloid-like fodder for the legal community at large. *See e.g.,* Simmons, "*Napoli, Bern Firms Told to Stop Soliciting Each Other's Clients."* (New York Law Journal, Feb. 11, 2016). Available at h*ttp://www.newyorklawjournal.com/id=1202749430821?keywords=napoli+bern&publication=New+York+Law+Journal.*

Lawyer v. lawyer client and fee disputes also arise between affiliated or aligned counsel from different firms. Attorneys may, for example, refer a matter to another with greater expertise in the substantive area or whose location is more favorable for the litigation. It is likewise common for plaintiffs in class actions and other multi-party litigations to be represented by multiple attorneys, often by appointment of the Court.

Generally speaking, attorneys' referral agreements will be enforced to the extent that they comply with each state's rules regarding referral arrangements. (For a recent analysis of the ethical implications of such agreements, see, ABA Formal Opinion No 474, "*Referral Fees and Conflict of Interests*". Apr. 21, 2016. In some states, fee sharing arrangements are enforceable so long as certain criteria are met, such as requiring notice to and consent by the client. (*See e.g.,* California State Bar Rules of Professional Conduct Rule 2-200) Conversely, other states preclude sharing of fees with attorneys from another firm unless the amount of shared fees is proportionate to the amount of actual services performed by the referring attorney on the referred matter. (*See e.g.* New York Rules of Professional Conduct. R. 1.5(g)). As a result, the courts often deal with collateral litigation among lawyers about who should be entitled to the continuing relationship with the client and how the resultant legal fees should be shared.

Lawyers are particularly creative when bringing claims in the context of competing client and fee claims. Obvious theories include breach of contract, quantum meruit, unjust enrichment and breach of fiduciary duty. But the cases often go further and the allegations can become quite ugly. It is, unfortunately, not unusual for lawyers to tack on claims of defamation, breach of the covenant of good faith and fair dealing, champerty, interference with attorney-client relationship, tortious or willful interference with contract, unfair business practices and other claims limited only by the aggrieved attorney's imagination. And many of these lawyer v. lawyer cases are publicly tried in the media, especially if the underlying case is itself of public interest. *See e.g., "John Travolta scandal 'John Doe" lawyers suing each other, not him, for now"*. Available at: *http://www.foxnews.com/entertainment/2012/05/22/john-travolta-scandal-john-doe-lawyers-suing-each-other-not-him-for-now/. See also,* Meier, "*Lawyers Suing G.M. Over Defect Are Now Fighting Each Other"* (New York Times, Feb. 5, 2015). Available at: *http://www.nytimes.com/2016/02/06/business/lawyers-suing-gm-over-defect-are-now-fighting-each-other.html?_r=0/.*

The California Court of Appeals case, *Barnes, Crosby, Fitzgerald &Zeman, LLP v. Ringer,* 212 Cal. App. 4th 172, 151 Cal.Rptr.3d 134 (2012) is an example of a case where fees were sought by referring counsel in the class action setting and discusses many of the issues that arise. In that case, the plaintiff law firm referred a potential class action to the defendants, experienced class action counsel. The parties entered into a written fee-sharing agreement. However, over the course of the class action litigation, the defendant attorney and law firm disavowed the fee-sharing agreement claiming that a prior non-disclosure agreement that the plaintiff law firm had entered with the class action defendant could pose a "risk, however de minimus" that might compromise defendants' ability to continue to represent the class. The defendants claimed that the two class representatives, who had replaced the individual originally referred by the plaintiff law firm, refused to consent to the fee-sharing agreement, thereby rendering the agreement void. For that reason, defendants claimed that the fee sharing agreement was moot and refused to disclose it to the class or the court as required under California law. Moreover, because the plaintiff law firm was not in direct privity with the class, not only did the defendants have sole access to the remaining class members, but the

defendant attorney threatened that any effort by the plaintiff to communicate with the class would be considered tortious interference with defendants' attorney-client relationships.

The trial court concluded that the fee-sharing agreement was rendered "non-existent" because the class action plaintiffs not consented to it in writing. Moreover, the court could not direct notification of the fee-sharing agreement as part of the class notice, because in the absence of consent, the agreement did "not exist." Finally, the court refused to apply equitable estoppel or unjust enrichment to the legal fee issues as the rules at issue were intended to protect the clients and not lawyers who entered into the fee sharing agreement. It noted that, here, there was no attorney-client relationship between the referring law firm and the class plaintiffs and therefore no interest to protect.

The Court of Appeals reversed. The Court agreed that the purpose of the Rules at issue were to protect clients from fee-sharing agreements that would undermine the clients' interests, such as to prevent excessive fees and tactics that would not favor the clients' positions. It likewise agreed that failure to comply with the fee-sharing agreement rules could result in both disciplinary action and avoidance of the agreement. However, under the "unique circumstances" of this case, the Court of Appeals would not permit the defendants to exploit the rules by deliberately refusing to comply with the rules' disclosure and consent requirements and blocking the referring plaintiff law firm from doing so. Accordingly, the Court concluded that the defendant law firm and attorney should be "equitably estopped from wielding rule 2-200 a sword to obtain unjust enrichment." The case sets forth provides an interesting rubric for resolving these kind of lawyer v. lawyer fee suits.

Employment related litigation is another category of lawyer v. lawyer suits that arise between previously aligned attorneys. Lawyers are notoriously unhappy about the practice of law and the quality of their work life. Leaving aside the expected complaints about hours and conditions worked, lawyers, especially women and minorities, sometimes bring suits for employment discrimination against their law firm employers. In the 20th Century, employment suits primarily concerned law firm refusal to even hire women and minorities. Plainly, that is less of an issue in the 21st Century. However, increasingly these cases concern failure to provide equal access and support for assignments, failure to promote associates to partner levels and hostile work environments. An excellent collection of recent cases and statistics on the subject can be found at Levit, "*Lawyers Suing Law Firms: The Limits on Attorney Employee Discrimination Claims and the Prospects for Creating Happy Lawyers"* (Univ. of Pittsburgh Law Review. Vol. 73, pg. 65) (2011)

Although there are many reported cases, it is highly likely that even more go unreported. First, the small size of the "average" law firm in America (often under12 employees) makes them poor targets under some state and federal statutory schemes regarding employment discrimination. Additionally, due to the *sui generis* nature of the inquiry, there may be evidentiary challenges to the claim, such as the need for attorney-client privileged communication in order to bring or defend the claim, the lack of "comparators" for purposes of

disparate treatment claims and the prevalence of arguably enforceable arbitration and mediation provisions in attorney employment contracts.

Nor are employment related claims limited to employment discrimination. For example, there has been significant attention to a suit recently filed against DLA Piper's attorney in a legal malpractice claim against the firm. As part of the defense of the firm, the firm's malpractice attorney disclosed an ex-partner's email to "churn that bill, baby." The partner, who had since left the firm, has filed suit in the Baltimore City Circuit Court alleging that the firm's defense counsel had itself committed malpractice and breach of fiduciary duty by making the ex-partner a scapegoat intended to distract from DLA Piper's allegedly objectionable billing practices. *See,* Simmons, *"Former DLA Piper Partner Alleges Firm's Counsel Maligned Him"* (New York Law Journal, Mar. 29, 2016). Available at *http://www.newyorklawjournal.com/id=1202753422762?Keywords=lawyers +sue+lawyers&publication=New+York+Law+Journal*.

Employment claims of whatever species are potentially harmful to both the firm and the attorney claimant. Individual attorneys may refrain from commencing public suit against their law firm employers, lest they get a reputation as a "trouble maker" in their local legal community. Law firms, on the other hand, may be motivated to quickly and privately resolve even meritless claims rather than become the subject of gossip in their legal community and local, statewide or national legal periodicals.

IV. COVERAGE ISSUES

Whether and under which policy there will be coverage can often be a knotty issue when lawyers sue other lawyers. Generally speaking, coverage will be *sui generis* depending on the nature of the claims asserted and the terms of the specific policies. Some types of claims, such as malpractice or employment discrimination, will easily fall within established categories of coverage and be analyzed in traditional manner. Other claims, such as defamation, libel or tortious interference are not as clear. These types of claims may present questions, such as whether the claim is being asserted concerning conduct in the course of providing legal services or whether a claim, not by a client but the client's adversary's counsel should be covered under a specific professional policy. Another issue that may arise is whether and when a "claim" is asserted for purpose of establishing coverage.

These and other issues are often fact and policy specific.

V. CONCLUSION

It would be foolhardy to think that the trend of lawyers suing lawyers will abate any time soon. Instead, we should anticipate that lawyers will find new opportunities and theories on which to build claims. One particular area that may see a sudden increase concerns the inadvertent exposure of private information provided by one attorney to an adversary or the transmission of malware between adversaries through the exchange of emails and discovery.

Nevertheless, there are both broad reputational and monetary costs to the legal community at large when lawyers engage in *frivolous* litigation against each other. Before instituting a suit against another lawyer, lawyers should be mindful of Abraham Lincoln's advice:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough.[1]

[1] http://www.abrahamlincolnonline.org/lincoln/speeches/quotes.htm