NEW YORK COURT OF APPEALS ROUNDUP

CAUTIONARY TALE TO ATTORNEYS ON DUTY TO SAFEGUARD CLIENT FUNDS

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The Court of Appeals recently interpreted the "criminal enterprise" requirement of New York's Organized Crime Control Act and in doing so demonstrated that the state law can be narrower than its federal counterpart, RICO. In another case, the court held that the decision on whether to seek a lesser-included offense charge is a matter of "strategy and tactics" and that therefore the trial court erred in acceding to the defendant's request—against the advice of his counsel—that the jury not be charged on lesser-included offenses. And in an unsigned per curiam opinion, the court upheld Grievance Committee professional misconduct charges against a lawyer arising out of his firm's bookkeeper's theft of client funds. The latter decision stands as an important reminder to lawyers that their duty to safeguard client funds is an ethical one requiring appropriate employee oversight and will be strictly enforced.

Before we discuss these cases, we wish to note the sudden loss from the court of Judge Theodore T. Jones, who died unexpectedly earlier this month. While his service was too brief, Judge Jones' contribution to the court's stature was significant.

We also note that the court has begun making written transcripts of oral arguments before it available through its website,[1] a welcome development for those who study the court, including advocates preparing for argument.

Criminal Enterprise

Like a large number of states, New York has a statute modeled after the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Organized Crime Control Act (OCCA). Unlike the so-called "Little RICO" statutes of many states, however, OCCA does not fully track the federal statute and is not always construed consistently therewith. The differences between the statutes may have accounted for the

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dismissal of the enterprise corruption charges against defendants in *People v. Western Express Int'l*.

Three individuals were indicted under Penal Law §460.20(1)(a), the enterprise corruption portion of OCCA. They were charged with having repeatedly purchased stolen credit card information and using it for fraudulent purposes.

A fourth individual, Vadim Vassilenko, was charged with facilitating transfer of the stolen information via the company he controlled, Western Express International. Western offered services that could be and often were legitimate, such as cashing checks, receiving mail, issuing money orders and exchanging digital currency. Vassilenko estimated that only 5 percent of Western's business was from transactions of the nature in which the other defendants engaged, known as "carding." Vassilenko pursued business from "carders," including by advertising on a website devoted to facilitating illegal carding transactions. However, there was no evidence that Western's customers coordinated with one another or acted in anything other than their own personal interests.

The court, in an opinion by Chief Judge Jonathan Lippman, held (6-1) that the enterprise corruption count of the indictment must be dismissed because no reasonable petit jury could infer from the evidence that defendants' conduct fell within OCCA's definition of a "criminal enterprise."

The court explained that under both federal RICO and OCCA, the prosecution must prove the existence of a criminal enterprise to which a pattern of criminal activity is connected. While RICO case law establishes that an enterprise must have structure, the statute itself does not explicitly impose such requirement.[2] In contrast, a structure requirement is set forth expressly in OCCA, which defines a "criminal enterprise" as including "an ascertainable structure distinct from a pattern of criminal activity."

In applying OCCA to the facts before it, the court of course did not have to resolve whether the charged conduct would, if proven, violate the federal statute, nor did it attempt to do so. But Lippman's opinion for the majority made clear that, even where a federal court would consider conduct as violative of RICO, the Court of Appeals will not necessarily find the conduct to be violative of OCCA. OCCA states that it has a comparable purpose to that of RICO but is "tempered by reasonable limitations on its applicability" and, as a result of OCCA's "more rigorous definitions," will not apply to conduct that might be encompassed by the laws of other jurisdictions.[3]

The court found that although each defendant had engaged in a pattern of illegal activity, the defendants together did not constitute a "distinct criminal enterprise—a 'group of persons' seeking a 'common purpose' and associated in an ascertainable

structured entity." It therefore held that an essential element of the enterprise corruption charge was absent.

Judge Eugene Pigott Jr. was the lone dissenter. His opinion expressed concern that criminal organizations operating on the Internet operate differently than traditional organized crime, and that the Legislature's attempt to craft a statute flexible enough to address evolving forms of organized criminal activity was being thwarted by the majority's overly narrow interpretation of "enterprise." Pigott considered the facts set forth in the indictment to, if proven, satisfy New York's "ascertainable structure" requirement.

Lesser-Included Offense

The defendant in *People v. Colville* fought with two other men. He stabbed and killed one of them, for which he was charged with second-degree murder, and sliced open the lip of the other, for which he was charged with second-degree assault. Following the close of the evidence, the trial judge announced his intention to give the jury a justification charge with respect to the murder count, as defense counsel had requested.

Defense counsel also requested that on the murder count the jury be charged as to the lesser-included offenses of first- and second-degree manslaughter. The prosecutor, who initially opposed either lesser charge, later "acquiesced" in the court charging the jury on first-degree manslaughter. The court agreed that both manslaughter charges were appropriate and prepared a verdict sheet that included them.

It emerged, however, that the defendant himself was opposed to the jury being instructed on any lesser-included offense. Defense counsel stated that he firmly believed as a matter of "trial strategy" that the jury should be instructed on both manslaughter offenses, and that he had discussed his view with his client at length. The trial judge eventually questioned the defendant himself. Defendant was equally firm that, although he understood his lawyer's advice was to the contrary, he did not want the jury to be charged on any lesser-included offense of murder, following which the prosecutor asked the court to include a charge of first-degree manslaughter "to protect the appellate record."

In the end, the verdict sheet was revised to include charges of murder and assault only. To make the record clear, the judge asked defense counsel whether the verdict sheet was consistent with the defense request for those two charges only. Counsel responded: "The defendant, through me, requested 2 charges." The defendant was acquitted of assault but convicted of second-degree murder and sentenced to a term of 22 years to life.

The primary issue on appeal was whether the decision to seek lesser-included offense charges, like decisions on whether to plead guilty, waive a jury, testify and appeal, is "fundamental," and therefore reserved for the accused. The court found that it was not. Instead, the court held, the decision was one of "strategy and tactics," and thus reserved for a defendant's attorney. Judge Susan Phillips Read's decision for the majority pointed out that under the CPL, if a reasonable view of the evidence would support a finding that the defendant committed a lesser offense but not the greater, the trial court either may in its discretion submit a lesser-included offense to the jury but must submit such offense to the jury if requested by either party to do so.

Judges Pigott and Robert Smith joined in Judge Theodore Jones' dissenting opinion. The dissent interpreted defense counsel's comments during his final colloquy with the trial judge as a withdrawal of the request for lesser-included offense charges. In any event, the dissent argued, "[b]ecause a defendant has the most to lose in a criminal proceeding…reason dictates that the defendant shall control his/her own destiny and have the ultimate authority regarding choices he/she makes (even if against the advice of counsel)."

Given that one of the more frequent disagreements between criminal defense counsel and client is whether the client should testify in his or her own defense and that critical decision rests with the defendant, we respectfully submit that there is some logic to permitting a fully informed defendant advised by competent counsel to have the final say on whether to seek lesser-included offense charges.

Safeguarding Client Funds

Matter of Galasso v. Grievance Committee for the Ninth Judicial District provides a cautionary tale for all lawyers. The Court of Appeals affirmed that portion of the Appellate Division's decision confirming the Grievance Committee referee's report sustaining professional misconduct charges against the respondent arising out of theft of client funds by his firm's bookkeeper. It did so despite the fact that respondent was unaware of the theft and had acted appropriately once the theft was uncovered.

Peter Galasso's brother, Anthony, had been employed by the law firm for several years, eventually working his way up to the position of bookkeeper. Anthony engaged in an elaborate scheme to steal client funds that went undetected by either the firm's lawyers or its accountant. First, Anthony altered a bank application to make himself an authorized signator of an escrow account that held client funds. Over a seven-month period, Anthony transferred more than $4 million from the account through approximately 90 electronic transfers to six other law firm accounts from which he made payments to himself and other firm employees, and purchased the firm's office

condominium. Anthony diverted the bank's statements to a post office box and created false statements for firm review.

Anthony also pilfered close to $1 million from the firm's IOLA account at another bank by forging partners' signatures on checks. Respondent's practice was not to review statements from the bank holding the IOLA account, but instead to review monthly financial statements prepared by Anthony regarding the account, which, of course, turned out to be false.

When the fraud came to light, respondent cooperated in the investigation of his brother by the Nassau County District Attorney's Office. The office submitted a letter to the Grievance Committee setting forth its conclusion that no one else at the firm was aware of the scheme and that nothing in the documents Anthony prepared would have raised suspicion. Respondent also attempted to recover the stolen funds in lawsuits he instituted against the two banks.

The Grievance Committee charged respondent with breach of fiduciary duty to pay or deliver escrow funds as a result of failing to safeguard them, failing to supervise a nonlawyer employee, unjust enrichment from use of escrowed funds for his and his firm's benefit and failing to provide appropriate accounts to clients with respect to their funds. After sustaining the charges, the Appellate Division suspended respondent from practice for a period of two years.[4]

The Court of Appeals' per curiam decision characterized as "crystal clear" an attorney's professional obligation to safeguard client funds. This ethical duty, arising out of an attorney's fiduciary relationship with his/her clients, cannot be delegated. Instead, attorneys must carefully supervise accounts with client funds and exercise appropriate oversight over employees.

The court concluded that "although respondent himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his employee to do so." As a result, the professional misconduct charges were held to be well-founded. Given the facts here, the bar is on notice that any employee theft might be taken as ipso facto evidence that a lawyer's supervision was inadequate, setting up a standard close to strict liability. At a minimum, practitioners and law firm must establish strong controls and exercise the utmost care in supervising employees, which is just as it should be.

Endnotes:

1. See www.nycourts.gov/ctapps/OA-Archives.htm.

2. Citing *Boyle v. United States*, 556 U.S. 938, 940-41 (2009).

3. Quoting Penal Law §460.00.

4. Respondent was also charged with one count of failing to timely comply with lawful demands of the Grievance Committee. The Court of Appeals reversed the Appellate Division, finding the charge to be unsupported by the record, and remanded the case. Perhaps the penalty imposed by the Appellate Division will be reconsidered in light of the Court of Appeals' modification of the Appellate Division's order.

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