ON INEFFECTIVE COUNSEL, AT-WILL EMPLOYMENT, SURVEILLANCE TAPES

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MARCH 13, 2003

This month we discuss decisions of the Court of Appeals addressing ineffective assistance of counsel, at-will employment, and production of surveillance tapes. We also discuss some matters relating to the Court itself.

Court Happenings

The composition of the New York Court of Appeals recently has changed, and may change again in the near future. Governor George E. Pataki appointed Judge Susan Phillips Read to the Court to replace Judge Howard A. Levine, who retired last December and recently joined the Albany law firm of Whiteman, Osterman & Hanna as senior counsel. And with Judge Richard C. Wesley being nominated for the U.S. Court of Appeals for the Second Circuit, the governor may be making another appointment to the Court of Appeals in the not-too-distant future.

Judge Susan P. Read was the presiding judge of the Court of Claims before being elevated to the high court. She has had experience in civil private practice as well, both in firm and corporate settings. The judge, who resides in Rensselaer County with her lawyer husband, is a Republican, as have been Governor Pataki's three prior appointments to the Court of Appeals. With the addition of Judge Read, women occupy four of the seven seats on the Court, making New York the first state to have a high court with a female majority.

On January 13, Chief Judge Judith S. Kaye gave her annual State of the Judiciary address. In it the Chief Judge called for legislative reform in several areas including assigned counsel fees, "Rockefeller" law drug sentencing, opening lawyer and judge disciplinary proceeding to the public, and the court system. In the latter area, Chief Judge Kaye expressed a willingness to exercise her third branch powers to overcome second branch inaction.

Switching Sides

Switching Sides Not Necessarily Ineffective Assistance. As discussed in the column last December, when a criminal defense lawyer's actual or potential conflict of interest is alleged to have constituted ineffective assistance of counsel, the court should determine whether there

was a potential conflict and, if so, the defendant must establish that the conflict "operated on" the conduct of the defense. The unusual facts of a case decided last month, *People v. Abar*, introduced some new factors into the equation.

In 1999, Mr. Abar was arraigned on one set of charges in April and another in August. In the interim, an assistant district attorney involved in the prosecution of the first charges left the district attorney's office to become a public defender, and was appointed to represent defendant. She then negotiated a plea agreement covering both sets of charges, pursuant to which defendant was sentenced to probation. Mr. Abar was later charged with violating the terms of his probation and again represented by the former assistant district attorney. He pleaded guilty and was incarcerated. Mr. Abar pro se filed a motion to vacate his conviction based upon ineffective assistance.

This fact pattern is the flip side of *People v. Shinkle, 51 N.Y.2d 417 (1980)*. There, the defendant's lawyer joined to the district attorney's office, although he took no part in the prosecution of his former client and no prejudice to the defendant was shown. Due to the "risk" of prejudice, "opportunity" for abuse of client confidences and "the unmistakable appearance of impropriety," the Court of Appeals vacated the conviction. The obvious distinction between *Abar* and *Shinkle*, however, is that in the former case the lawyer who changed sides had not obtained client confidences before doing so.

In *Abar*, the Court chided counsel for having accepted the appointment, observing that New York's disciplinary rules and ABA standards "wisely caution against such potential conflicts." However, a 6-1 majority ruled in an opinion by Judge Victorio A. Graffeo, that there was no need to vacate the conviction because Mr. Abar had not proven counsel's conflict had operated on his defense.

Judge George Bundy Smith in dissent argued that no showing of an effect upon the defense should be required in this situation where, like *People v. Shinkle,* the appearance of impropriety was consequential and the conflict was actual. Moreover, the trial court had not made the "searching inquiry" required to determine whether a defendant understands the "danger and disadvantages" of waiving his right to conflict-free counsel.[1]

Judge Smith advocated a per se rule for cases involving *Abar's* fact pattern due to the violation of (1) both New York and ABA ethical provisions, and (2) Judiciary Law §493, which proscribes any ADA who "prosecuted or in any manner aided" the prosecution of a matter from thereafter "directly or indirectly . . . tak[ing] any part in, the defense thereof . . . ."

The majority had declined to address the judiciary law issue on the bases that it had not been preserved by *Abar*, and the lawyer involved did not have an opportunity to address the issue in the courts below. The dissent argued, however, that "[w]here the whole proceeding is flawed because it violates the Judiciary Law, no preservation is required" and that because counsel was

not being prosecuted there was no need for her to be heard on the issue. Judge Smith clarified in a footnote that it was not his view that the lawyer had "intentionally" violated or was guilty under the Judiciary Law.

At-Will Termination

In her first opinion since joining the Court, Judge Susan Phillips Read concluded for the majority (with Chief Judge Judith S. Kaye taking no part) that the facts in *Horn v. The New York Times* did not justify the expansion to doctors of the narrow exception to the at-will employment doctrine for lawyers adopted by the Court in *Wieder v. Skala, 80 NY2d 628 (1992)*. Judge George Bundy Smith provided another vigorous dissent that urged affirmance of the order of the Appellate Division, First Department, which had sustained (3-2) Ms. Horn's cause of action for breach of an implied contract. Judge Read's opinion presents a comprehensive view of the law of New York on at-will employment and, nothing less was required in this case, which, as aptly described in the Appellate Division dissent (Justice Richard A. Wallach), presented a claim that "strikes a sympathetic, and even seductive, chord."

Ms. Horn was employed as the associate director of the medical department of The New York Times. Her responsibilities included providing medical care, treatment and advice to employees of the Times, and making determinations of whether injuries suffered by such employees were work-related and therefore eligible for Workers' Compensation.

Ms. Horn alleged that on frequent occasions the Times' Labor Relations, Legal and Human Resources departments directed her to provide them with confidential medical records of employees without the employees' consent or knowledge, and that Human Resources instructed her to misinform employees concerning their injuries or illnesses in order to reduce the number of Workers' Compensation claims.

Ms. Horn consulted with the state Department of Health and other authorities, who advised that the release of medical records without the patient's consent violated state and federal law, federal regulations and a medical code of ethics. As a result, Ms. Horn refused to comply with the orders issued by the Times. The Times restructured the medical department and Ms. Horn was out of a job. She alleged that the steps taken by the Times were pretextual and designed to get rid of her as a troublemaker.

The complaint, undoubtedly crafted to come within *Weider*, alleged that there was implied in her employment relationship a fundamental understanding that she would conduct her practice at the Times in accordance with the ethical standards of her profession.

In *Weider*, the law firm at which Mr. Weider was employed at-will balked at reporting to the disciplinary authorities the misconduct of another associate in the firm as required by DR 1-103(A) of New York's Code of Professional Responsibility. The firm later dismissed Mr.

Weider. He alleged retaliatory discharge and breach of implied contract. The Court sustained Mr. Weider's contract claim on the basis that the "unique characteristics of the legal profession in respect to this core Disciplinary Rule [1-103(A)] make the relationship of an associate to a law firm employer intrinsically different …" than the relationship of employees to their corporate employers.

The Court declined to find an implied contract in *Horn*. Putting *Weider* aside, the *Horn* opinion is consistent with the Court's prior position in at-will cases that, even where the employee is allegedly terminated in retaliation for conduct that would be deemed protected by public policy, a claim of wrongful termination bottomed upon an implied understanding will not be sustained unless it is consistent with agree-upon terms of an employment agreement. See *Murphy v. American Home Products Corp., 58 NY2d 293 (1983)* (reporting accounting improprieties); *Sabetay v. Sterling Drug, 69 NY2d 329 (1987)* (refusal to participate in improper, unethical and illegal financial activities).

While the majority presented several reasons related to Ms. Horn's unique position at the *Times* for not applying the *Weider* exception, it seems that in the end it is the great reluctance of the Court to change significantly the law in the employment at-will area that, referring to the majority opinion of Judge Hugh R. Jones in *Murphy, supra*, "is best left to the Legislature."

The Dissent

The dissent by Judge Smith hinged on the fact that, as in *Weider*, there was alleged the existence of an unstated, basic agreement in Horn's employment that she would be permitted to perform her professional responsibilities consistent with the ethical practice of medicine. Judge Smith concluded that Ms. Horn's breach of contract claim should not have been thrown out on its face at the motion to dismiss stage given that on such a motion a complaint's allegations are required to be accepted as true.

Surveillance Tapes

The Final Answer. The use in personal injury actions of surveillance tapes that show a plaintiff engaging in physical activities inconsistent with claimed injuries has been one of the important weapons in the modest arsenal of defense counsel. For a time there was an effort to balance the legitimate needs of a plaintiff to be able to see and authenticate such tapes prior to their offer into evidence and adequately prepare an explanation, with a defendant's need to protect the tapes from disclosure prior to taking the plaintiff's testimony so that the testimony could not be tailored to what was shown on the tapes. That time is now over.

The thoughtful and fair compromise that had been hammered out on the anvil of judicial discretion was that such tapes had to be produced before trial to accommodate a plaintiff's needs but, as work product, did not have to be turned over until after the plaintiff had been deposed and

therefore committed to his story. See *DiMichel v. South Buffalo Railway Co., 80 NY2d 184 (1992)*. The Legislature thereafter enacted CPLR 3101(i) to eviscerate the work-product needs test of CPLR 3101(d)(2), so that tapes become producible as an entitlement. The departments of the Appellate Division split over the application of CPLR 3101(i).

Tran v. New Rochelle Hospital Medical Center, a unanimous opinion of the Court (Judge Victoria A. Graffeo taking no part), finally resolves the issue based on the dictates of the Legislature. In *Tran*, the plaintiff sustained an injury to the palm of his hand while working as a chef. He received treatment at a hospital with follow-up care by a doctor. After another injury to his hand plaintiff sued the hospital, doctor and others, claiming they had negligently diagnosed and treated the first injury and that he was unable to work. Mr. Tran learned he had been surreptitiously videotaped working in another restaurant and sought the tapes. The motion judge, over defendants' objection, directed that the tapes be produced before deposition.

The Appellate Division, First Department, unanimously ordered the deposition held before the tapes were turned over, and granted leave to appeal. Unlike the First Department in *Tran*, the Second, Third and Fourth departments had held that discovery of tapes was required "on demand" without regard to the timing of plaintiff's deposition.

Concluding that CPLR 3101(i) "significantly alters *DiMichel*," the Court of Appeals reversed *Tran* so that tapes are now producible, with no limitation as to time.

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[1] Quoting *People v. Slaughter, 78 N.Y.2d 485, 491 (1991)*.