PULLMAN &COMLEY

Medical Marijuana, Limited Scope Representation, "Remorse" And The Statute Of Limitations: Connecticut Law Of Lawyering Update (2013-14)

September 22, 2014
David P. Atkins & Marcy Tench Stovall
Connecticut Law Tribune

The headline news in the Connecticut law of lawyering in 2013-14 came not in the form of a decision from our Supreme Court, but in revisions to the Connecticut Rules of Professional Conduct and Rules of Court.

Lawyers and Medical Marijuana

After approval by the Superior Court Rules Committee in June 2014, Connecticut became the third state in the nation (after Colorado and Nevada) to tweak its Professional Conduct rules in light of state statutes – such as Connecticut's 2012 Palliative Use of Marijuana Act – authorizing the sale, use and possession of medical cannabis.

Rule 1.2(d) of the Rules of Professional Conduct prohibits "counsel[ing]" or "assist[ing]" a client to engage in "conduct the lawyer knows is criminal." As Dwight Merriam observed in his land use contribution to the *Law Tribune's* 2013 "Supreme Court Year in Review," those lawyers asked to advise clients entering the regulated medical marijuana trade plainly would face possible disciplinary charges for one obvious reason: notwithstanding legislation in over 30 states now permitting marijuana for medical (or recreational) use, the cultivation, sale and possession of marijuana remain felonies under the *federal* Controlled Substances Act. (The authors' law firm represents one of the successful applicants for a Connecticut license to operate a medical cannabis growing facility, and another client that obtained a license to operate a testing facility for medical cannabis.)

But as of January 1, 2015, Connecticut lawyers may "counsel or assist a client regarding conduct expressly permitted by Connecticut law," notwithstanding a conflicting prohibition in federal law. The rule makers do impose a condition for invoking this safe-harbor provision: the lawyer must "counsel[] the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." In the medical marijuana context, this obviously means affirmatively advising the client that notwithstanding the blessing of its medical marijuana business under state law, the same activities likely are crimes under *federal* law.

PULLMAN & COMLEY

Medical Marijuana, Limited Scope Representation, "Remorse" And The Statute Of Limitations: Connecticut Law Of Lawyering Update (2013-14)

Limited Scope Appearances in Family Law Matters

In another significant area of the law of lawyering, in January 2014, the Connecticut judges launched the long anticipated program authorizing the filing of "limited scope" Appearances on behalf of litigants in family cases. By doing so, the Connecticut courts tentatively have adopted the concept of "unbundled" legal services. The idea is that a litigant in a dissolution or custody dispute who has been acting *pro se* may engage counsel not for the entire case, but for a discrete task or for "a specific event or proceeding." In amending the Appearance provisions of Practice Book Sections 3-3(b), 3-8(b) and 3-9(c), the judges now authorize the filing of a preprinted "Limited Appearance" (JD-CL-121, new as of January 2014). The form itself sets out a menu of the specific court "events or proceedings" to which the filing attorney intends to "limit" his or her work on the client's behalf.

Significantly, the amended rules of practice permit the attorney to bow out of the case - and do so without first seeking leave of the court or the client - merely by filing a "Certificate of Completion of Limited Appearance." (JD-CL-122) In amending Practice Book §3-8(b), the judges have adopted one express restriction to any limited Appearance: it must be task related and "may not be limited to a particular length of time or the exhaustion of a fee."

The Practice Book changes respond to the judges' concern over the dramatic increase in recent years in the number of family cases in Connecticut in which at least one of the litigants is self-represented. According to a July, 2014 news article in the *Law Tribune,* "as many as 80 percent of all family law cases" may fall into that category.

Now on to recent Connecticut Supreme Court decisions addressing the law of lawyering.

What Is Sufficient "Remorse" for a Connecticut Lawyer Seeking Reinstatement of a Suspended Law License?

In *Statewide Grievance Committee v. Ganim,* 311 Conn. 430 (2014), the Court, in the case of former Bridgeport Mayor Joe Ganim, addressed questions about applications for reinstatement by attorneys whose law licenses have been suspended following a criminal conviction: (1) what deference, if any, should the courts afford to the recommendation of a local Standing Committee on Bar Admissions; and (2) what level of remorse is sufficient to establish the applicant's "present moral fitness" for restoring his law license?

On the first question, the Court, in an opinion penned by Chief Justice Rogers, rejected Ganim's argument that the trial court (the special three-judge panel required for bar reinstatement applications) should have deferred to the Standing Committee, which had recommended the court grant Ganim's reinstatement request. The Court, noting that the function of the Standing Committee is limited to making a "recommendation" to the three judge court, held that "[i]t is the court, and not the bar, or a committee which takes the final and decision action on attorney admission."

Medical Marijuana, Limited Scope Representation, "Remorse" And The Statute Of Limitations: Connecticut Law Of Lawyering Update (2013-14)

With respect to the substantive standards governing re-admission to the bar following a criminal conviction, the Court pointed to what it said was the lack of evidence of Ganim's actual acceptance of responsibility for his criminal conduct. Indeed it was the Court's conclusion that Ganim had not demonstrated genuine "remorse" that was the primary obstacle to Ganim returning to law practice. As the Court explained, Ganim "did not admit his transgressions, explain how they had occurred, express contrition therefor, or assure the standing committee that he had changed and would not reoffend."

In addition, the Court adopted a type of "sliding scale" analysis for addressing a reinstatement applicant's present moral fitness: the more serious the underlying criminal conduct the "more time required to meet the burden of moral trustworthiness" as well as "the need for greater proof of moral character and trustworthiness."

The Court therefore affirmed the three-judge panel's rejection of Ganim's reinstatement application. Ganim – whose license essentially was suspended for the length of his 9 year sentence – had requested permission to file his reinstatement application *prior to* completing his three year period of post-prison supervised release. The Court, in effect, deemed the application to have been filed too early to make a determination of whether his "exemplary behavior [has] persist[ed] for a sufficient period of time to offset his transgressions." Without defining exactly how the Standing Committees or three-judge courts should determine what is a "sufficient period of time," the Court implied that in Connecticut – which unlike other states does not authorize *permanent* disbarment – there may come a time in which even a rejected readmission applicant "may once again be entrusted with the practice of law."

<u>In Claims Against Fiduciaries, Can the Statute of Limitations Be Tolled Indefinitely?</u>

This past year saw two significant decisions from the Court addressing the application of the tort law statute of limitations to professional liability claims.

In *Flannery v. Singer Asset Finance Co., LLC*, 312 Conn. 286 (2014), the Court provided a perfect illustration of how important it is for a law firm to have in place a mechanism for clearly marking the end of the representation. In a split decision, (with the majority opinion authored by Chief Justice Rogers) the Court affirmed summary judgment in favor of a defendant on statute of limitations grounds. It did so principally on the basis of language in a law firm's engagement agreement that prospectively identified the events that would be deemed to end the representation.

The defendant was not a lawyer or law firm, but it was accused of aiding and abetting the misconduct of a lawyer and law firm. Therefore, the limitations period applicable to the claim against the law firm was deemed applicable to the non-law firm defendant. Luckily for the defendant, the terms of the law firm's engagement agreement with the plaintiff made it easy for the Court to determine the precise date on which the representation ended, and, therefore, the day the limitations period began to run.

PULLMAN &COMLEY

Medical Marijuana, Limited Scope Representation, "Remorse" And The Statute Of Limitations: Connecticut Law Of Lawyering Update (2013-14)

In 1988, plaintiff Flannery won $3 million in the Iowa state lottery, to be paid in twenty annual installments of $150,000. In 1999, he sold his remaining installment payments to the defendant, accepting a discounted lump sum payment of $868,500 for the $1.2 million in remaining payments

The attorney Flannery retained for the transaction advised him that the sale proceeds were taxable at the capital gains rate, not as ordinary income. Time passed, and in 2002, when the IRS assessed substantial additional taxes, Flannery learned that the advice the lawyer had given him was incorrect. In 2005, Flannery sued the attorney, his firm and the defendant, claiming, among other things, that the defendant had aided and abetted law firm's breach of its fiduciary duty of loyalty to the client.

The trial court granted summary judgment for the defendant on the ground that the aiding and abetting claim was time barred (the lawyer and law firm having already gotten out of the case). Any breach of fiduciary duty owed by the law firm to the plaintiff "ceased to exist" when the law firm sent its final bill in September 1999, well over three years prior to the commencement of the action.

Contrary to the decisions of the trial court and the Appellate Court, the Supreme Court held that Flannery had adequately pled the continuing course of conduct doctrine in avoidance of the statute of limitations defense. But the Court then turned its attention to whether the doctrine was applicable. Flannery's novel theory was that where a claimant alleges any breach of fiduciary duty, the limitations period *never* ends, or at least does not end until such time as the law firm confesses to the client that its failure of undivided client loyalty tainted the representation.

The Court rejected that argument as inconsistent with the rationale of the continuing course of conduct doctrine – that the limitations period is tolled for so long as the attorney is in a position to correct the harm his wrongful conduct has caused. As applied to the circumstances in the *Flannery* case, this meant that the attorney's alleged breach of his fiduciary duty ended, at the latest, when the lottery proceeds were sold and the attorney relationship ended in 1999. "Accordingly, even if [the lawyer's] continuing course of conduct properly is attributable to the defendant for tolling purposes, the plaintiff's claims against the defendant remain untimely." Notwithstanding the plaintiff's characterization of the underlying conduct, to permit tolling past the end of the representation would have been inconsistent with the strong public policy underlying statutes of limitations: avoiding stale claims.

In the *Flannery* case, the Court could readily determine when law firm's representation of Flannery ended. The engagement agreement between Flannery and the law firm not only identified the agreed-upon scope of representation, it also expressly identified the event that would demarcate the end of the representation. The exact language of the agreement and attached standard terms was as follows:

> The scope of the legal engagement is to represent you in negotiating a lottery sale contract, to help you evaluate the tax and other legal consequences of such a transaction, and to draft or review all the legal

> and court documents needed to execute such a transaction. . . . It is also our policy that the attorney-client relationship will be considered terminated upon our completion of any services that you have retained us to perform. . . . Unless previously terminated, our representation of you with respect to the agreed upon scope of representation will terminate upon sending you our final statement for services rendered.

(The authors' law firm appeared as counsel for Defendant Singer Asset Finance at both the trial and appellate stages of the *Flannery* case.)

May a Dissatisfied Client "Dress Up" a Legal Malpractice Claim as a Breach-of-Contract Claim to Avoid the 3 Year S.O.L?

The Supreme Court addressed another limitations related issue in professional liability cases, one that the lower courts, but not the Supreme Court, previously had tackled: when a client sues its law firm for failing to adequately perform legal services, are the claims necessarily subject to the three year limitations period for tort, or may they fall within the more generous six year limitations period for a contract based claim?

In *Meyers v. Livingston, Adler, Pulda, Meikleijohn & Kelly, P.C.,* 311 Conn. 282 (2014), the client sought damages from her former law firm on the following theories: (1) the firm had breached its duty of loyalty to her by allegedly advancing the interest of a different, but similarly situated, client in "derogation of" her interests; and (2) the firm allegedly had failed to follow her instructions in connection with an agreement to settle the claims in the underlying action the firm had prosecuted on her behalf.

The Supreme Court affirmed the trial court's granting of summary judgment for the defendant law firm on the basis that the claims were time barred. Like the trial court, the Supreme Court rejected the plaintiff's contention that her theories of recovery sounded in contract, rather than in tort thereby permitting the more lenient (six year) limitations period. In doing so the Court, through Justice Zarella, applied a functional test to the wording of the complaint. True, the plaintiff had not included language in her Complaint expressly referring to the defendant law firm's conduct as "negligent" or as "deviating from the applicable standard of professional care and competence." But by the same token, the plaintiff did not allege the law firm had breached any specific provision or promise embodied in the engagement agreement. Moreover, said the Court, the "allegations that the [law firm] breached its duty of undivided loyalty and its duty to follow her wishes and instructions in its prosecution and settlement of the prior lawsuit are consistent with a claim of legal malpractice that relies on violations of the . . . the Rules of Professional Conduct as evidence of a breach of the applicable standard of conduct."

The bottom line: the "fact that the contract [between the client and the law firm] required the [firm] to provide the plaintiff with legal representation and that the plaintiff was dissatisfied with the defendant's performance does not necessarily mean that [a] claim of improper representation sounds in breach of

Medical Marijuana, Limited Scope Representation, "Remorse" And The Statute Of Limitations: Connecticut Law Of Lawyering Update (2013-14)

contact."

Professionals

Marcy Tench Stovall

Practice Areas

Litigation