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Settlement pact not violated by disclosure in new lawsuit

Litigation privilege trumps confidentiality clause

By Eric T. Berkman

A law firm did not violate a settlement agreement in a case when it disclosed confidential information during the representation of a new client in a subsequent lawsuit against the same party, a U.S. magistrate judge has ruled.

The defendant law firm had represented a woman in a wrongful discharge suit against the plaintiffs. The parties agreed to a confidentiality provision when the case settled. But when the defendant, while handling a different but similar wrongful discharge case against the plaintiffs, submitted documents to the court that it had obtained through discovery in the first case, the plaintiffs sued the defendant firm, alleging breach of the settlement agreement in that first case.

The defendant firm argued that the plaintiffs' claim was barred by the absolute litigation privilege, which protects an attorney from civil liability for statements made in the course of litigation.

Judge Judith G. Dein agreed.

"[The plaintiffs] contend that '[w]hile the privilege serves a specific purpose — to secure freedom of expression for attorneys in pursuit of their clients' interests — that purpose is subsumed here by an underlying contractual obligation,'" Dein wrote.

"However, Massachusetts courts have not recognized an exception to the litigation privilege for breach of contract claims against an attorney," she continued, recommending that the defendant firm be granted summary judgment. "As the Massachusetts Appeals Court has explained [in its 2009 *Visnick v. Caulfield* decision]: '… To rule otherwise would make the privilege valueless.'"

The 36-page decision is *Kimmel & Silverman, P.C., et al. v. Porro, et al.*, Lawyers Weekly No. 02-505-14. The full text of the ruling can be found at masslawyersweekly.com.

Vincent J. Pisegna

Reaffirmation

Counsel for the defendants, Terrance J. Hamilton of Casner & Edwards in Boston, called the decision "a reaffirmation of the fact that lawyers can aggressively prosecute and/or defend their clients by using almost whatever materials may be available to them."

Had the judge ruled the opposite way, attorneys would have a difficult time leveraging their expertise in certain types of cases, depriving clients of the opportunity to work with the best potential counsel, he said.

"In this particular case, having successfully litigated one case against a particular defendant, it was advantageous for a second client to hire the same lawyer and law firm that would more efficiently be able to prosecute [a similar] case," Hamilton said.

Further, under the professional conduct rules, attorneys are required to represent their clients competently and zealously, he said.

"If you can't use information gained from other cases, it puts your client in a difficult position," Hamilton said. "She has to either stay with a lawyer who she knows may have one hand tied behind his back, or go to another lawyer who, by virtue of lack of experience [with a particular case] isn't going to be able to do as good a job. It winds up being a win/win situation for the other party because now an aggressive, competent lawyer is out of the picture, and they're dealing with someone who may lack the experience to do as well."

But plaintiffs' counsel James S. Singer of Rudolph Friedmann in Boston said the decision sets a dangerous precedent by giving Massachusetts attorneys license to breach contracts with impunity. That creates the potential for significant negative ramifications, he said.

Empowering lawyers to breach confidentiality agreements could hamper the ability of litigants to settle cases, since confidentiality is such an essential element in many settlement agreements, he said.

Additionally, he said, "if attorneys cannot be bound by confidentiality provisions, then attorneys and litigants may hesitate to have discussions where confidential information is revealed, thereby severely hampering the ability to settle cases."

A ruling like *Kimmel* calls the confidentiality of mediation or less formal settlement discussion into question, Singer said.

"If the rationale of the decision were taken to its logical conclusion, any confidential mediation agreement would have no application to attorneys who can, without any repercussions, disclose the confidential information

obtained in the mediation in the pending or subsequent litigation," he said. "Such a result makes no logical sense."

Singer declined to say whether his client plans to appeal.

Vincent J. Pisegna, a civil litigator in Boston who was not involved in the case, agreed that the decision seems to cut against the public policy encouraging settlements, siding instead with policy considerations that favor protection of subsequent disclosure in litigation.

That could mean that some cases will indeed be harder to settle, said Pisegna, who practices at Krokidas & Bluestein. Nonetheless, he said, courts do disfavor confidentiality agreements, as does the public.

"Whatever happens in connection with a publicly filed lawsuit should be a matter of public record. But for the time being, one clear lesson for lawyers is if you are representing a client in settlement negotiations and confidentiality is important to that client, you'd better make it known to the client that confidentiality [is not absolute]," he advised.

Boston's Richard M. Zielinski, who represents law firms in professional liability cases, said the ruling in *Kimmel* surprised him, since at its core the litigation privilege is intended to protect lawyers from defamation claims based on statements made immediately before or during the course of litigation, as opposed to insulating them from all liability for breach of contract.

"Notwithstanding the decision, I would caution lawyers not to blithely disregard confidentiality provisions in settlement agreements," the Goulston & Storrs partner said.

For starters, Zielinski said, he was unaware of any Massachusetts appellate decisions addressing the precise issue, and courts in other states have come out the other way on the issue.

Plus, in other cases, the Supreme Judicial Court and the Appeals Court have imposed some limit on the scope and application of the litigation privilege, so if presented with an appropriate case, the SJC "might well come out the other way," he said.

Finally, Zielinski pointed out that lawyers can be subject to potential disciplinary action for a wide variety of conduct occurring in the course of litigation, including misuse of confidential information.

CASE: *Kimmel & Silverman, P.C., et al. v. Porro, et al.,* Lawyers Weekly No. 02-505-14

COURT: U.S. District Court

ISSUE: Did a law firm violate a settlement agreement from an earlier case by disclosing confidential information while representing a new client in a subsequent lawsuit against the same party?

DECISION: No

Disclosure

In 2007, Jacqueline Porro, an attorney who formerly worked for plaintiff Kimmel & Silverman, a Pennsylvania law firm that handled cases in Massachusetts, sued the firm for wrongful discharge.

Defendant David P. Angueira, an attorney at the defendant Boston law firm Swartz & Swartz, represented her in the case, which settled in May 2009.

Under the terms of the settlement, the parties and their counsel agreed not to disclose any information regarding the underlying facts leading up to the agreement or about the existence or substance of the settlement agreement itself.

A few months later, another former employee of the plaintiff, Krista Lohr, filed a wrongful discharge suit, retaining the defendants as her counsel.

On Jan. 11, 2011, the defendants, on behalf of Lohr, filed a memorandum in opposition to a motion to dismiss. They also attached as supporting exhibits copies of deposition transcripts and an email chain they had obtained through discovery in the Porro litigation.

The plaintiffs sued the defendants in U.S. District Court, alleging that the disclosure of those materials constituted a breach of contract, bad faith and fraud.

The defendants filed a motion to dismiss, citing the absolute litigation privilege. Judge George A. O'Toole Jr. denied the motion at the time, but stated that additional discovery was needed.

The defendants subsequently moved for judgment on the pleadings before Dein, who initially recommended that the motion be denied but then agreed to review the issue following further discovery.

Absolute privilege

Dein ultimately recommended summary judgment for the defendants, noting that courts elsewhere have ruled that the litigation privilege does not yield to a litigant's obligations under a pre-existing contract.

"This is consistent with the policy underlying the privilege," she said, quoting the Appeals Court's 1981 decision in *Sullivan v. Birmingham*. "[T]he policy supporting the privilege 'would be severely undercut if the absolute privilege were to be regarded as less than a bar to all actions arising out of the "conduct of parties and/or witnesses in connection with a judicial proceeding."'"

In so ruling, Dein rejected the plaintiffs' argument that the policy favoring enforcement of settlement agreements precluded the application of the litigation privilege.

"[T]he plaintiffs have not cited any authority holding that the litigation privilege is outweighed by the need to ensure that a party adheres to its contractual obligations," Dein said, adding that the enforceability of the settlement agreement itself was not even at issue. MLW