

News And Developments For New York Lawyers

BY LAZAR EMANUEL

Mandatory CLE For All Lawyers

The Administrative Board of the Courts has announced that mandatory continuing legal education will be required of all New York lawyers. The new rules will take effect on December 31, 1998. The rules will force approximately 110,000 lawyers to complete 24 hours of courses over a two-year period.

The new rules supplement the "Bridge-the-Gap" Program, under which newly admitted lawyers must complete 32 hours of CLE courses during their first two years after admission.

Under the new "veteran lawyer" program, lawyers will be required to certify that they have completed the mandatory 24-hour schedule as part of their biennial registration with the Office of Court Administration.

The Board will accept applications from bar associations, law firms and private companies which wish to conduct the new "veteran lawyer" program. Thus far, the Board has reviewed and approved 60 providers of the "Bridge-the-Gap" program for new lawyers, including the NYSBA, a number of local bar associations, a few large law firms and several commercial enterprises.

Final rules for the "veteran lawyer" program will be announced in September.

Attorney-Client Privilege Survives Client's Death

In an opinion by Chief Justice Rehnquist, the U.S. Supreme Court has upheld the attorney-client privilege in a proceeding initiated by Independent Counsel Starr to obtain statements Vincent Foster made to his attorney shortly before Foster's death.

Foster was Deputy White House Counsel in 1993 when several employees of the White House Travel Office were fired. He met with his attorney to get advice with respect to his possible involvement in congressional investigations of the firings. Nine days after the meeting, Foster committed suicide. His attorney took three pages of notes during their meeting. At Starr's request, a federal grand jury issued subpoenas covering these notes. His lawyer refused to turn them over.

Justice Rehnquist said, "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." He rejected Starr's arguments that the privilege in this case died with the client and reaffirmed the continuing common-law principle that the knowledge that communications will remain confidential after death encourages full and frank discussion with counsel. *Swidler & Berlin v. United States*, 1998 U.S. LEXIS 4214 (June 25, 1998).

Threat To IOLA Accounts

In a case brought by the Washington Legal Foundation against the Texas JOLTA program, the Supreme Court has held that interest on an attorney's IOLTA account belongs to his clients. The Court remanded the case to the 5th Circuit Court of Appeals, which is expected to ask the district court to decide whether the diversion of interest to legal aid is a "taking" of private property.

The decision of the court will affect the New York IOLA program, as well as comparable programs in other states. *Phillips v. Washington Legal Foundation*, ____ U.S. _____. 66 U.S.L.W. 4468 (June 15, 1998).

Lawyer LLP's Are Citizens Of All The States In Which Partners Reside

For purposes of complying with federal diversity jurisdiction requirements, a lawyers' limited liability partnership (LLP) will be treated as a resident of every state in which any partner resides. Southern District Judge Lewis A. Kaplan reached this decision in dismissing an action brought by the liquidation committee of Mudge, Rose.

The firm argued that it was a resident only of New York, in which it was formed, and that it could therefore sue a Maryland resident for unpaid fees. Judge Kaplan found that because some of the firm's partners lived in Maryland, there was no diversity. In order to establish federal diversity jurisdiction, no plaintiff may reside in any state in which any defendant resides. *Mudge Rose Guthrie Alexander & Ferdon v. Pickett*, 1998 U.S. Dist. LEXIS 8907 (S.D.N.Y. June 17, 1998).

Rights To Counsel And Public Hearing Required For Punitive Sanctions

The 2nd Circuit Court of Appeals has decided that a court may not impose punitive sanctions on a lawyer without affording him the right to counsel and a public trial.

Attorney Frank Cohen of Cohen & Cohen was accused of allowing the introduction of false testimony in a contracts case. The lower court imposed a \$10,000 punitive sanction payable to the court, as well as compensatory sanctions payable to the opposition. The Appellate Court compared the punitive sanctions to a criminal proceeding and held that it required the same safeguards: notice; the opportunity to hear and present evidence; a public trial; access to counsel; the presumption of innocence; proof beyond a reasonable doubt; and the privilege against self-incrimination. *Mackler Productions, Inc. v. Cohen*, 1998 U.S. App. LEXIS 13224 (2d Cir. N.Y. June 22, 1998.)

All Members Approve Restatement Of The Law Governing Lawyers

The members of the American Law Institute have approved a Restatement of the Law Governing Lawyers. The Restatement has been in preparation for more than ten years. Professor Charles Wolfram of Cornell Law School acted as chief reporter.

The Restatement will have a large influence on the ABA's Ethics 2000 Project which is considering revisions to the ABA Model Rules of Professional Conduct. Though the Restatement has no legislative impact, it is expected to have extensive influence on the law of Ethics and Professional Responsibility, especially as it concerns suits for lawyer malpractice, lawyer liability to non-clients, conflicts of interest, fee agreements, and the practice of law outside the state of admission.

Court Refuses To Disqualify Firm That Built “Chinese Wall”

Breaking with various state and federal court precedents in New York, the Appellate Division, First Department has allowed a law firm to escape disqualification by building a “Chinese Wall” to keep a newly hired associate away from litigation on which the associate had worked intensively at his former firm.

An associate of the firm representing the plaintiff joined the law firm representing the defendant while the litigation was still pending. The associate had participated in several depositions in the matter, had taken part in strategy discussions, and had frequently talked with the plaintiff. The court found that the defendant’s firm had been careful to erect a “Chinese Wall” between the associate and the litigation. He was instructed not to look at the files; the files were kept in an office far removed from his office; and there was no proof that any confidence had been disclosed to him. The court denied the motion to disqualify. *Kassis et al. v. Teacher’s Insurance & Annuity Assoc.*, 1998 N.Y. App. Div. LEXIS 6968 (1st Dep’t. 1998).

\$75,000 Sanctions Award Affirmed

The Court of Appeals for the D.C. Circuit has refused to set aside \$75,000 in sanctions against the New York law firm of Liddle & Robinson. The sanctions were imposed for “vexatious and dilatory” tactics in a proceeding before the National Association of Securities Dealers involving Kidder Peabody. The law firm had applied for and obtained an ex parte order from a New York State court though it knew that a federal district judge had stayed the litigation and had retained jurisdiction. The sanctions will cover 300 hours of billing by Kidder Peabody’s law firm, Morgan, Lewis & Bockius in responding to the sanctioned conduct. *LaPrade v. Kidder Peabody & Co.*, 1998 U.S. App. LEXIS 13353 (D.C. Cir. June 23, 1998).