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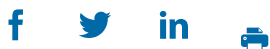
TOP STORY

Breach of Duty Results in Forfeiture of \$7.5 Million Contingency Fee

Lawyer's ex parte communication with court clerk about jury note voids fees

By Erik A. Christiansen

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An attorney who violated the rules of professional conduct by engaging in improper ex parte communications with a judicial clerk during trial was denied a \$7.5 million contingency fee on a \$25 million settlement. A state court of appeals held that the attorney's breach of his ethical obligations precluded recovery of the fee. Counsel also could not recover under an alternative quantum meruit theory because the attorney did not submit a fee declaration detailing his billable time.



While the jury deliberated, a judicial clerk secretly informed plaintiffs' counsel about a jury note indicating intent to find for the defense

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Lawyers Cannot Engage in Ex Parte Communications with Court Employees

In [Vandenberg v. RQM, LLC](#), the [Illinois Appellate Court](#) held that counsel's ex parte communications violated the rules of professional conduct and breached his fiduciary duties to his clients. While the jury deliberated, defense counsel made a \$25 million settlement offer. While the offer was pending, a judicial clerk secretly informed plaintiffs' counsel about a jury note implying the jury was not going to find liability. Defense counsel was not timely told about the note. Armed with the ex parte information, plaintiffs' counsel quickly accepted the defendant's \$25 million offer. Defense counsel later learned about the note from the court, but given the

prior accepted settlement, the case was dismissed. After dismissal, defense counsel requested that the jury be permitted to deliberate to verdict. The jury reached a verdict in favor of the defendant.



Post-trial, defense counsel discovered the clerk's ex parte call and moved to set aside the settlement, which the court granted. The plaintiffs then fired their trial counsel and retained new counsel, who filed a motion to enforce the settlement. A second assigned judge reviewed the settlement entered on the record after disclosure of the note and held that the "parties freely settled this case after full disclosure of all material information concerning the content and time of publishing the jury note." The court then reinstated the settlement agreement.

After reinstatement, the plaintiffs moved to adjudicate prior counsel's fees and expenses. The court granted the motion and held that prior counsel was not entitled to any fee.

Quantum Meruit Does Not Merit Reversal of Sanction

On appeal, the *Vandenberg* court first turned to the applicability of the doctrine of quantum meruit. The court held that, while "relatively uncommon," the judge did not abuse his discretion when granting no fees to the plaintiff's prior counsel, especially because counsel had "repeatedly breached its duty."

The appellate court noted that it was not holding that "an attorney discharged for cause may never recover quantum meruit fees." Instead, in this case, the fact that plaintiffs had "clear cause" for terminating their counsel "was certainly a factor that the circuit court was entitled to consider in awarding quantum meruit fees."

Written Attorney Fee Agreement Provides Alternative Grounds to Affirm

The court of appeals also proceeded to examine the plaintiffs' written fee agreement with prior counsel. While the fee agreement provided for payment of an hourly rate should the attorney withdraw, the plaintiffs' prior counsel "failed to provide any evidence of how much time it spent working on this case." Faced with its own failure to provide evidence of the time spent by counsel, plaintiffs' prior counsel "suggested, for the first time at oral argument, that we should remand to give the firm an opportunity to document its hours in this case."

The appellate court denied the appeal and held that the "firm had ample opportunity to provide this information to the circuit court in support of its fee request and chose not to."

Section of Litigation Leaders Agree with Decision

"The court got it right," opines [John M. Barkett](#), Miami, FL, cochair of the [ABA Section of Litigation's Ethics & Professionalism Committee](#). "These guys were doomed either way. The lawyer obviously should not have talked to the clerk."

“The die was cast at the trial court level. The decision, in fact, was restrained, all things considered. The court let the egregious facts speak for themselves. The misconduct here could fill volumes more,” agrees [Laura K. Lin](#), San Francisco, CA, cochair of the Section of Litigation’s Ethics & Professionalism Committee.

Section leaders believe that there are a number of lessons to be learned from the opinion. First, “the lawyer should not have wasted any time when it came to the settlement. There is an obligation to be diligent. The lawyer should have talked to the client right away about the settlement offer,” counsels Barkett.

“The lessons are bountiful,” agrees Lin. “Do not engage in improper ex parte communications with the court, do not withhold nonprivileged information from opposing counsel, and disclose any potential conflicts to clients immediately,” she warns.

Section leaders agree that plaintiffs’ counsel could have avoided a complete loss of fees by tracking time. “Most courts will reward a lawyer’s efforts in quantum meruit, but the burden is on the party to demonstrate the value of their services,” notes Barkett.

“Plaintiffs’ counsel could have prepared appropriate time records, but those should not be submitted for the first time on appeal,” states Lin. “As an additional practical tip, this opinion suggests that attorneys working on contingency should include a provision, as these plaintiffs’ counsel did, expressly contemplating how fees should be paid even in the event of a termination for cause,” she counsels.

In the final analysis, “this precedent grants courts broad and considerable discretion to fashion an appropriate fee award—including down to nothing—following a client’s termination of their counsel,” continues Lin. “Breaches of fiduciary duty by an attorney may qualify as ‘unclean hands’ sufficient to bar any fee award, even following years of work and a successfully litigated trial. That’s a harsh outcome, but a just one,” she concludes.

[Erik A. Christiansen](#) is an associate editor for Litigation News.

Hashtags: #LawyerSanctions #ContingencyFees #Ethics #AttorneyFees

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- Robert Denny, “[Severe Attorney Sanction Imposed For Asking Wrong Question](#),” *Litigation News* (May 19, 2015).
- Geoff A. Gannaway, “[Poll of Potential Jurors Results In Six-Figure Sanction](#),” *Litigation News* (Oct. 3, 2018).

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