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JUDGES TAKE HARDER LINE AGAINST LAWYER MISCONDUCT

by
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As Federal District Court Judge Loretta A. Preska wrote last summer in *Kensington Int'l Ltd. v. Republic of Congo*, 2007 U.S. Dist. LEXIS 63115, *1 (S.D.N.Y. Aug. 23, 2007), "Civil litigation is not always civil." The high stakes and cost of much litigation today, and the commercialization of the legal profession, have created greater pressure on lawyers to, in the words of lawyers' Model Rules of Professional Conduct, "zealously assert[] the client's position under the rules of the adversary system." When that pressure leads attorneys astray, judges possess the authority under federal statutes, civil procedure rules, and courts' inherent powers, to impose sanctions.[1] Over the past year, federal judges in high-profile litigation have invoked these powers to take action against lawyer misconduct, either imposing sanctions or using their bully pulpit to put the legal profession on notice that judges will protect the public and legal consumers from abuse.

In the *Kensington* case, Kensington, a "financial institution which invests in debt and equity instruments issued by domestic and foreign entities," *id*. at *3, sought to collect on a nearly $57 million judgment against Congo. Kensington subpoenaed a Congolese citizen, Medard Mbemba, who Kensington believed would assist it in locating the whereabouts of the nation's assets. Difficulties in scheduling the time and place of the deposition ensued, and it came to light that an attorney from Congo's counsel of record, Cleary Gottlieb Steen & Hamilton, had contacted Mr. Mbemba directly. As the court noted, this partner had "extensive connections with Congo's political leadership." *Id*. at *5. Mr. Mbemba testified when asked if he felt the Cleary Gottlieb attorney was pressuring him to avoid the deposition, he replied that he was aware of the attorney's connections in Congo and that, "It is not an impression, he told me as such not to go." *Id*.

Judge Preska noted the court's inherent authority to sanction attorneys for bad faith acts. She found that "a mass of evidence" existed that Cleary Gottlieb's actions "were taken with the purpose of preventing Mbemba's deposition," *id*. at *16, and that "Cleary feared Mbemba might reveal damaging information or offer evidence of illegal conduct and thus attempted, in bad faith, to influence Mbemba's testimony or, better still, to avoid the deposition altogether," *id*. at *32. Because Cleary "show[ed] a willingness to operate in the murky area between zealous advocacy and improper conduct, and here it crossed the line," *id*. at *33, Judge Preska imposed monetary sanctions on the firm.

Another recent example where "aggressive representation [gave] way to misconduct," arose from trade secret litigation between rival financial software makers. *Wolters Kluwer v. Scivantage*, 2007 U.S. Dist. LEXIS 88052 (S.D.N.Y. Nov. 29, 2007). Judge Harold Baer issued a 129-page ruling peppered with regret that the standards of civility and professionalism in law have declined as legal representation

[1] *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991). *See also* Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 4 LGL. OPINION LTR. 6 (WASH. LGL. FNDT.), Mar. 25, 1994.

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has been transformed from a profession into a business. Much of the dispute focused on documents submitted under a protective order by the defendant to plaintiffs' counsel Dorsey & Whitney; the use of those documents in a nearly identical suit in a Massachusetts federal court; and the refusal of a now-former Dorsey lawyer to return the documents on order of the court once Wolters Kluwer had voluntarily dismissed the New York-based action. Judge Baer's opinion relates the dispute's particulars in exhaustive detail, after which he concludes that the lead plaintiffs' counsel or Dorsey & Whitney engaged in twenty-two instances of bad faith, sanctionable conduct. Judge Baer declined to financially punish the lead lawyer or Dorsey & Whitney, choosing instead to "impose a public reprimand" and forwarding a copy of his decision to "the Grievance Committee for the Southern District of New York" and to the state court's attorney disciplinary committee. *Id*. at *292.

A third instance in 2007 of a judge invoking his inherent powers involved insurance coverage litigation in the wake of Hurricane Katrina and noted plaintiffs' attorney Richard Scruggs. In an employment contract dispute arising out of a Katrina coverage issue, Federal District Court Judge William Acker ordered that Mr. Scruggs return covertly copied insurance documents he obtained from former employees of the insurance services company plaintiff. Scruggs instead sent them to Mississippi Attorney General Jim Hood. Judge Acker wrote in response that such behavior "is precisely the type of conduct that criminal contempt sanctions were designed to address." *E.A. Renfroe & Co. v. Moran*, Civ. Action No. 06-AR-1752-S (N.D. Ala. June 15, 2007), slip op. at 20. Judge Acker referred the matter to federal prosecutors, and when they declined to bring charges against Scruggs, Judge Acker invoked his authority under Federal Rule of Criminal Procedure 42(a) and appointed two private attorneys as special counsel to prosecute the case. *E.A. Renfroe & Co. v. Moran*, Civ. Action No. 06-AR-1752-S (N.D. Ala. July 26, 2007). In addition to having to defend against this criminal action, Mr. Scruggs was indicted last November on charges that he conspired to bribe a Mississippi state judge. A trial is scheduled for February 25. Donna Leinwand, *Bribery case stemming from Katrina lawsuits makes waves*, USA TODAY at http://www.usatoday.com/news/nation/2007-12-25-Scruggs_N.htm?csp=N009.

One further 2007 decision of note did not directly involve attorney misconduct or the application of sanctions, but the tone and force of the ruling displays how judges can use their bully pulpit to express their disdain with some lawyers' actions. In *In Re Chiron Corp.*, 2007 U.S. Dist. LEXIS 91140 (N.D. Calif. Nov. 30, 2007), Judge Vaughn Walker rejected a class action settlement in a case involving a vaccine company's alleged market misrepresentations. In addition to rejecting the proposed $7.5 million attorneys' fees in a case which "appears to have proceeded almost directly form pleading to settlement with no ruling on the pleading," *id*. at *6, Judge Walker ruled that the settlement was "inconsistent with the interests of absent class members and the class action process itself." *Id*. at *38. The court strongly questioned the adequacy of the lead plaintiff, finding it to be a "serial plaintiff" whose involvement "seems to have been confined to an endorsement of lead counsel's proposed fee." *Id*. at *31.

Because of the "serial" nature of the lead plaintiff and the law firm representing it – Milberg Weiss – Judge Walker reluctantly found it "necessary to address criminal charges pending against lead counsel." *Id*. at *38. The judge noted that the case before him is not directly implicated in the criminal case, which involves alleged payment of kickbacks to lead plaintiffs. "But given the temporal proximity of this settlement and the criminal proceeding against lead counsel," he wrote, "whether the charges bear on this case is a determination best left to the class following full disclosure." *Id*.

Whether it is imposing monetary sanctions, issuing a public "censure", or appointing special counsel to enforce a criminal contempt ruling, judges possess the authority to regulate lawyers and the litigation process. As Judge Baer stated in *Wolters Kluwer*, not only is attorney misconduct and incivility "a drain on valuable judicial resources," *supra* at *7, it also "undermine[s] public confidence in the legal system" and works "to the serious detriment of the very individuals that have sought counsel." *Id*. at *8. Reasons abound for judges to use their considerable statutory and inherent police powers. With these recent decisions, the momentum to do so will hopefully continue to grow.

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