COURT NOTES

By Ilene Sherwyn Cooper

Appellate Division-Second Department

Attorney Reinstatements Granted

The following attorneys have been reinstated to the roll of attorneys and counselors- at- law:

Andrew Rosner

Attorneys suspended

Ira Podlofsky: By decision and order of the court, the Grievance Committee was authorized to institute a disciplinary proceeding against the respondent and the matter was referred to a special referee. The special referee sustained all the charges against the respondent. The Grievance Committee moved to confirm, and the respondent joined in the application, though requested that he not be suspended or removed. The court noted that the charges against the respondent included misappropriating funds entrusted to his charge, commingled client funds with his own, and made cash withdrawals from said funds. In determining the appropriate discipline to impose, the court noted that the respondent candidly admitted his misconduct, expressed remorse, took steps to insure the errors that occurred would not be repeated, and offered evidence of his good character. Notwithstanding same, the court found that the respondent, a seasoned attorney, failed to maintain a sufficient trust account balance, and improperly used and maintained trust account funds. Additionally, the court found that the respondent's misconduct was not isolated but reflected a long-standing disregard of the rule regarding proper maintenance of attorney trust accounts. Accordingly, the respondent was suspended from the practice of law for a period of two years.

Ilene S. Cooper

Oleg Smolyar: By opinion and order dated Jan. 11, 2017, the United States District Court for the Southern District of New York, on consent, permanently enjoined the respondent from appearing as an attorney in any action or proceeding pending before that court. It appeared from the record that the respondent had prepared an affidavit purportedly for his client's signature, and that although he affirmed to the court that he had discussed the affidavit with his client, and gotten her permission to sign her name thereon, he had not done so. The District Court determined that the respondent's conduct warranted sanctions, based on his bad faith, and false statements to the court. In addition, the District Court found that sanctions were warranted against the respondent's law firm, because of the direct participation of a named partner of the firm in facilitating the respondent's conduct. The matter was then referred to the Committee on Grievances of the District Court, which resulted in the District Court permanently enjoining the respondent from appearing as an attorney in any action or proceeding before that court. In response to an order to show cause by the Appellate Division, Second Department, directing that the respondent show cause why discipline should not be imposed against him, the respondent expressed no objection, but instead, requested a hearing on mitigation. After hearing testimony at the mitigation hearing, the special referee found that the respondent presented credible evidence demonstrating a reputation of honesty and integrity and had expressed contrition and great remorse for his actions. Notwithstanding the foregoing, the court found that while the respondent was not entirely to blame for his false statements to the court, he could not escape responsibility for his role, which included multiple transgressions involving the signing and falsely notarizing of client affidavits. In view thereof, and the discipline imposed on respondent by the District Court, the respondent was suspended from the practice of law for a period of one year.

Attorneys disbarred

Nancy P. Enoksen: On Jan. 29, 2018, the respondent was found guilty of grand larceny in the second degree, a class C felony. On March 20, 2018, respondent was sentenced to a term of imprisonment of 3 ½ to 10 years and ordered to pay restitution in the amount of $187,400. The Grievance Committee moved for respondent's disbarment based on her felony conviction, and the respondent neither opposed or responded to the motion. Accordingly, by virtue of her conviction of a felony, the respondent ceased to be an attorney and was automatically disbarred from the practice of law in the State of New York.

Note: Ilene S. Cooper is a partner with the law firm of Farrell Fritz, P.C. where she concentrates in the field of trusts and estates. In addition, she is past President of the Suffolk County Bar Association and past chair of the New York State Bar Association Trusts and Estates Law Section.

EMPLOYMENT

New Sexual Harassment Laws: What Corporate Counsel Needs to Know

By Mordy Yankovich

On April 12, 2018, New York State enacted sweeping legislation in order to combat the pervasiveness of sexual harassment in the workplace. Among other requirements, section 201-g of the NY Labor Law, mandates that all employers (regardless of the number of employees) in New York conduct annual training on sexual harassment prevention for all of their employees and establish a written anti-harassment policy. The new law takes effect on Oct. 9, 2018. While not the focus of this article, it is important to note that New York City passed a similar law — with some distinctions — which takes effect on April 1, 2019.

The Department of Labor recently released its much anticipated interpretive guidance on the new law detailing the minimum standards for trainings and policies necessary to comply with the new law. In accordance with the guidance, all employers must train their employees between Oct. 9, 2018 and Jan. 1, 2019 and on an annual basis thereafter. In addition, the Department of Labor requires that all new employees be trained within 30 days of their start date.

Mordy Yankovich

Regarding the substance of the required written policy, the Department of Labor mandated minimum standards for anti-harassment policies. Every policy must: 1) prohibit sexual harassment consistent with the guidance previously issued by the Department of Labor; 2) state that sexual harassment is a form of employee misconduct and that discipline will be issued to any employee who engages in such conduct or any manager who enables or allows such conduct to occur; 3) provide examples of prohibited conduct; 4) include applicable federal, state and local laws which outlaw sexual harassment (i.e. Title VII, New York State Human Rights Law, Suffolk County Human Rights Law), all forums available for a complainant to bring an action and remedies available under each statute; 5) include a model complaint form to file an internal complaint of sexual harassment; 6) prohibit retaliation against individuals who complain of sexual harassment or assist or testify in any investigation or proceeding pertaining to sexual harassment; and 7) include a just procedure for timely investigating all internal complaints of sexual harassment.

In order for a training to be compliant, it must include numbers 1, 3, and 4 from the minimum standards for anti-harassment policies as set forth above. In addition, the training must include information addressing responsibilities of supervisors and the training must be interactive (i.e. allowing for employees to ask questions and receive answers to those questions).

Since clients may hesitate to comply with these onerous requirements, it is important to convey to them that failure to comply may have severe ramifications. First, NY Labor Law §213 imposes a fine and possible imprisonment for violation of provisions of the Labor Law.

Second, failure to comply will undoubtedly hamper an employer's ability to defend against any claims of sexual harassment. Under New York State Human Rights Law and Title VII, if the alleged harasser is a non-supervisory employee, an employer is vicariously liable only if the employee can show that the employer knew or should have reasonably known of the harassment but failed to take appropriate action. *State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.3d 684, 687 (1985); *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004).

If the alleged harasser is a supervisor, the harassing conduct will be automatically imputed to the employer unless the employer can show, by a preponderance of the evidence, that: the employer exercised reasonable care to prevent and correct promptly any discriminatory or harassing behavior; and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Adams v. City of New York*, 837 F.Supp.2d 108 (E.D.N.Y. 2011); *Zakrzewska v. The New School*, 14 N.Y.3d 469 (2010) (This affirmative defense is not available under New York City law).

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CMS Cracks Down on Medicare Advantage Plan Denial Abuses (Continued from page 14)

part based on past health plan payment history) for an anticipated patient population. This obviously is not an exact science, and, in good faith, a health plan and a provider often will disagree as to need and intensity. What tips the scale in this report is the sheer number of overturned denials, which clearly cannot be attributed either to coincidence or to the merits of each denial.

When beneficiaries and providers did appeal, 75 percent were successful. First, more than half a million preauthorization and payment denials were overturned by the MA plans themselves on a first level internal appeal. Think about it. The plans are acknowledging that notwithstanding the application of their own unilaterally developed criteria and self-serving polices and procedures they still got it wrong a half million times! Of course, this overturn rate looks good because regulators want to see this. The MA plans can't be blamed, however, if only one percent of denials ever get appealed in the first place, can they? The report also points out something else that providers know and with which they have struggled for years. In spite of state and federal laws that prescribe specificity in denial notices, many if not most are deficient in one or more material respects. Without a certain level of factual specificity how is a provider or beneficiary to frame an appeal in the first place, let alone one that focuses on the actual issue? For example, the denial is for lack of medical necessity but the criteria upon which the decision is based are not set out and the medical sources relied upon by the MA plan clinical reviewer are not identified. Perhaps the claim is denied for lack of benefit coverage, or for member ineligibility, but the provisions of the MA plan benefit design upon which the determination presumably is based are not provided nor cited or referenced. Often a claim is denied based upon some provision in the contract between the provider and the MA plan, but the contract provision is not referenced. How does a healthcare provider frame a relevant appeal if it wanted to? **1**

The report recommends that CMS enhance its oversight of the MA plan contracts with providers and with its own beneficiaries to initiate corrective action to monitor and address high appeal overturn rates and/or low appeal rates. Such action could include plans of correction, fines and penalties and, in extreme cases, suspension or exclusion from the Part C program. As to the denials themselves, CMS should increase scrutiny of the reasons for the denials and identify those that are inappropriate. This inquiry also should include denial notices that are factually and/or legally insufficient. Lastly, CMS should make available to beneficiaries, in a simple and easily accessible format, information about serious MA plan violations, which may affect a beneficiary's decision to renew with a particular plan or to change plans.

The OIG report may be found at: https://oig.hhs.gov/oei/reports/oei-09-16-00410.pdf

1. Notification adequacy requirements are similar under both state and federal law. Applicable provisions of New York State law as well as the federal Patient Protection and Affordable Care Act mandate that any denial or "adverse benefit determination" set forth the bases for the determination with specificity. The payment of remittance advice that usually sets out a bare-boned denial justification constitutes an "adverse benefit determination" under federal law and regulations. Adverse Benefit Determinations must contain specific information to enable the beneficiary and designated providers to determine whether an appeal is warranted and, if so, to properly frame a meaningful and relevant appeal.

Note: James Fouassier, Esq. is the Associate Administrator of the Department of Managed Care at Stony Brook University Hospital, Stony Brook, New York and Co-Chair of the Association's Health and Hospital Law Committee. His opinions are his own. He may be reached at: james.fouassier@stonybrookmedicine.edu.

Determining Legal Competency in Criminal Cases (Continued from page 4)

denial of defense counsel's motion for a CPL 730 competency exam during the jury trial was affirmed (157 A.D.3d 439 (1st Dep't 2018)). Prior to conclusion, counsel informed the court that he had been contacted by a friend of the defendant who expressed concerns regarding the defendant's mental health. In rejecting defendant's claim that he was unfit for trial, the court considered the timing of the friend's telephone call which it considered an attempt to disrupt the proceedings. The court further opined that competency was demonstrated by defendant's "understanding of the charges and ability to assist in his defense [which] was evident throughout all pretrial and trial proceedings, as well for the remainder of the trial" (*id*.).

Defendant's request for Competency Hearing after plea bargain

Another Appellate Court rejected defendant's post-conviction claim that the trial court erred by failing to conduct a competency hearing before accepting the plea. In *People v. Hilts*, the defendant pled guilty to criminal sale of a controlled substance and was sentenced to four years in prison (157 A.D. 1123 (3d Dep't 2018)). On appeal, defendant asserted that the trial court's failure to "explore" his mental health issues, including depression, anxiety and sleep disorders, prior to accepting the plea, constituted reversible error.

The Appellate Division, Third Department unanimously rejected the claim because the court "is *not* required to order a competency hearing based solely upon a history of substance abuse or mental illness" (*id*.) (emphasis added). The court noted that the defendant responded appropriately during the plea colloquy and further did not make any statements or otherwise act in a way that "called into question" his understanding of the proceedings, the voluntariness of his plea, or his fitness to stand trial (*id*.). Counsel should be mindful that notwithstanding defendant's waiver of his right to appeal, the waiver does not include defendant's claim that the trial court should have "explore[d]" defendant's mental health issues (*id*.).

In closing, competency may be an evolving situation which counsel must monitor throughout the proceedings. The court has discretion regarding the determination and may consider a variety of factors. A finding of incompetency requires a demonstration that the defendant is unable to either understand the proceedings or unable to assist in his or her own defense due to a mental disease or defect.

Note: The Honorable Stephen L. Ukeiley is a Suffolk County Acting County Court Judge and Suffolk County District Court Judge. Judge Ukeiley is also an adjunct professor at the Touro College Jacob D. Fuchsberg Law Center and the author of numerous legal publications, including his most recent book, The Bench Guide to Landlord & Tenant Disputes in New York (Third Edition)©.

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New Sexual Harassment Laws (Continued from page 8)

It is fair to assume that this defense will fail on its face if an employer does not maintain a policy and conduct trainings in violation of New York State Law. S*ee* e.g. *Gorzynikiv v. Jet Blue Airways Corp.*, 596 F.3d, 103 (2d Cir. 2010). While the Second Department has held, prior to the new law, that failing to have a sexual harassment policy alone is not substantial evidence to impute liability to an employer, it is paramount to the analysis. *Medical Express Ambulance, Corp. v. Kirkland*, 79 A.D.3d 886 (2d Dept. 2010); *See e.g. Doe v. N.Y.*, 89 A.D.3d 787 (2d Dept. 2011); *Father Belle Community Center v. N.Y. State Div. of Human Rights*, 221 A.D.2d 141 (4th Dept. 2001); *Sier v. Jacobs Persinger & Parker*, 276 A.D.2d 401 (1st Dept. 2000). It will be interesting to see if courts apply the new law to impute liability on employers solely based on their failure to have a written policy or conduct required trainings.

For these reasons, it is vital to advise employers to adhere to this law in its entirety. In addition, corporate counsel would be well served to become proficient in conducting internal investigations pursuant to the employer's written policy as the employer's defense may be negatively impacted if the employer's litigation or employment counsel conducts the investigation. The new sexual harassment laws create an opportunity for corporate counsel to collaborate with compliance vendors, litigation counsel and employment counsel to best serve the client and to advance their practice while leaning on such collaborators for the support to succeed.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate Law. He can be reached at Mordy@liebatlaw.com.