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The Biggest Legal Ethics Decisions Of 2017: Midyear Report

By **Andrew Strickler**

Law360, New York (June 20, 2017, 7:33 PM EDT) -- With half the year gone, the professional liability bar has so far seen the U.S. Supreme Court tighten the reigns on judges issuing sanctions, an $8 million verdict for a general counsel-turned-whistleblower, and a split jury decision for Dewey & LeBoeuf LLP leaders.

This year also brought a deep dive by a New York federal judge into conflicts in a politically fraught Iran sanctions case and a rare face-off between the White House and a government watchdog over lobbying ethics waivers.

Here, Law360 explores some of the top legal ethics and malpractice decisions from the first half of 2017.

California Jury Backs Bio-Rad's General Counsel Whistleblower

After a lengthy federal trial in California, a jury came back with a whopping $8 million verdict in favor of former Bio-Rad general counsel Sanford Wadler that included nearly $3 million in back wages and $5 million in punitive damages.

The verdict came with a finding that Wadler's reporting of concerns about potential Foreign Corrupt Practices Act breaches was a motivator for Bio-Rad's decision in 2013 to fire him, after he had been the company's GC for 26 years.

The fate of Wadler's suit was largely determined in December when U.S. Magistrate Judge Joseph C. Spero ruled that the Sarbanes-Oxley Act's whistleblower protections preempt attorney-client privilege, thus allowing Wadler to use otherwise privileged information as evidence.

Todd Presnell of Bradley Arant Boult Cummings LLP, who writes frequently about privilege issues, said the judge looked to a privilege exception in the American Bar Association's model rules for attorney-client fee disputes to make that call, sidestepping California's stricter regulation.

"Essentially what the court said was, 'We're not going to make a blanket exception but we are going to recognize that, within limits, an in-house counsel should be able to use privileged information to prove a retaliation claim,'" he said. "This decision will help in-house lawyers bring those suits when before they might have thought, 'I can't prove my claim ... because the company would never waive the privilege.'"

The case is Wadler v. Bio-Rad Laboratories Inc. et al., case number 3:15-cv-02356, in the U.S. District Court for the Northern District of California.

Conflicts Quagmire in Iran Sanctions Case

A New York federal judge went down a conflicts rabbit hole in an Iran sanctions case this year, emerging with a ruling that Rudy Giuliani and Michael Mukasey could stay on the defense team for Reza Zarrab, a Turkish financier charged with exploiting holes in U.S. sanctions against Iran and running a five-year scheme to cloak transactions on behalf of Bank Mellat and others.

U.S. District Judge Richard Berman of the Southern District of New York made the call despite many unknowns about what the politically connected pair were doing for Zarrab outside of the court's supervision, and how the role of Giuliani's firm, Greenberg Traurig LLP, a registered lobbying agent of Turkey, might influence the case or those of other defendants. Mukasey's firm, Debevoise & Plimpton LLP, represented a number of the banks that federal prosecutors allege were victims of a Zarrab-led scheme to cloak millions of dollars in transactions to dodge U.S. sanctions.

After a series of hearings, ethics opinions and affidavits, Judge Berman ultimately had to rely largely on Mukasey and Giuliani's own assertions that any potential conflicts of interest between Zarrab, the U.S. and Turkey were minimal and waivable. He also signed off on a long series of waivers from banks that had been named in the government's case.

The case is U.S. v. Zarrab et al., case number 1:15-cr-00867, in the U.S. District Court for the Southern District of New York.

High Court Calls for 'But For' Test on Civil Discovery Sanctions

With an eye on limits on judicial authority and civil sanctions, the U.S. Supreme Court in April tossed a $2.7 million fine Goodyear Tire & Rubber Co. was facing for hiding evidence in a vehicle crash suit.

With Goodyear arguing that a Arizona district court set what was essentially a criminal penalty for withholding a key tire test from a plaintiff family, the high court agreed that civil procedure sanctions should be limited to costs that wouldn't have been incurred but for the misdeeds.

The Haegers, who sued the tire company and later secured the discovery sanction, "cannot demonstrate that Goodyear's nondisclosure so permeated the suit as to make that misconduct a but-for cause of every subsequent legal expense, totaling the full $2.7 million," Justice Elena Kagan wrote in a unanimous opinion.

The conclusion that such penalties need to be tied to actual costs is expected to put a heavier burden on litigants to come up with real numbers in sanctions motions, and on judges to check their math.

"Particularly in federal court, we have a pretty well developed body of law on Rule 11 but nowhere near that level of clarity on courts' inherent power to sanction," said Frank Cruz-Alvarez, a trial lawyer at Shook Hardy & Bacon LLP. "This decision was a good and bold first step to getting a bright line test on what that power is and what the parameters are."

The case is The Goodyear Tire & Rubber Co. v. Haeger et al., case number 15-1406, in the Supreme Court of the United States.

Dewey Do-Over Trial Results in Split Decision

A Manhattan jury in May reached a split verdict in the long-running Dewey & LeBoeuf LLP criminal case, acquitting the defunct firm's executive director, Stephen DiCarmine, and convicting former Chief Financial Officer Joel Sanders.

Following a retrial focused on pared-down accounting fraud and conspiracy charges, jurors said that New York state prosecutors did a far better job of tying Sanders to the scheme, with one noting Sanders' name "was on everything."

The pair had both been accused of carrying out a scheme to mislead lenders and investors in the firm by making a series of fraudulent adjustments to its books between 2008 and 2011 as the lauded white-shoe firm floundered under debt and partner guarantees.

Sanders was found guilty on two felony fraud counts and one misdemeanor conspiracy charge, while DiCarmine was cleared of the same three charges.

The expected Sanders appeal is likely to attack the basis of the second trial as an attempt to "rebrand" conduct that had already been considered by the jury at the first trial. He is scheduled for sentencing in October.

The case is New York v. DiCarmine et al., case number 00773/2014, in the Supreme Court of the State of New York, County of New York.

Pa. High Court Backs Attorney Frivolous Suit Law

In April, the Pennsylvania Supreme Court upheld a decades-old state law allowing attorneys to face civil liability for frivolous litigation, rejecting arguments that it ran afoul of the judiciary's constitutional power to police lawyers.

While the court declined to grant "generalized attorney immunity" to these so-called Dragonetti Act claims, it also suggested the court might be more sympathetic to narrowly tailored arguments about specific points of conflict between the Dragonetti Act and court rules. The justices also declined to claim exclusive authority to punish attorneys for abusive litigation, saying instead that its powers worked in tandem with the legislative branch.

The decision sprang from a Chester County judge's conclusion in 2015 that the statute was in conflict with a state constitutional provision giving the Supreme Court the power to "prescribe general rules ... for admission to the bar and to practice law."

Some experts also said the ruling opened the door to future challenges by raising questions about the availability of punitive damages and the standard for bringing claims.

But Mark Tanner of Feldman Shepherd Wohlgelernter Tanner Weinstock & Dodig LLP, who represented the couple who filed the Dragonetti suit against attorney Thomas Schneider, noted that the punitive damages needed for a future challenge to the law rarely occur.

"The decision clarified and solidified the long-standing principle that, like any other professional, an

attorney who fails to use the power given to them by virtue of their license and harms another person has a civil responsibility," he said.

The case is Jean Louise Villani etc. v. John Seibert Jr. et al. and Frederick Seibert Jr. et al. v. Jean Louise Villani, case number 66 MAP 2016, before the Pennsylvania Supreme Court.

Trump Does an About-Face on Lobbying Ethics Waivers

Following campaign pledges to “drain the swamp” of the Beltway lobbying industry, President Donald Trump issued a lobbying ethics order in January that according to many ethics experts indicated a change of heart.

While the Trump executive branch order in many ways mirrored former President Barack Obama’s order of 2009, it didn’t include a reporting requirement on individuals allowed to ignore, via waver, lobbying restrictions that include a five-year ban on officials lobbying an agency they once worked for.

The loss of the waiver disclosures triggered an unusual dispute between the White House and the Office of Government Ethics, which pressured the administration for waiver disclosures and solicited copies of waivers directly from federal agencies. In May, the White House changed course, publishing a list of 14 waivers issued to members of the executive office and the office of the vice president.

Among those who benefited from the waivers were a group of former Jones Day attorneys in the White House counsel’s office, who were allowed to confer with their former firm. They include its leader, executive office counsel Donald McGahn; deputy counsel Gregory Katsas; and McGahn's chief of staff, Annie Donaldson.

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