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THE RISK MANAGER

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CAREFULLY RISK MANAGE WEBSITE E-MAIL FROM STRANGERS SEEKING COUNSEL

Virtually every law practice now has a website. These websites vary in content, but usually include information about the firm and provide website visitors the opportunity to contact the firm or individual lawyers in the firm. These contacts risk the inadvertent creation of duties owed a prospective client or those of a lawyer-client relationship. This in turn can lead to conflicts of interest, bar complaints, and malpractice claims.

Wisconsin Formal Ethics Opinion EF-11-03: Who is a Prospective Client: Lawyer Websites and Unilateral or Unsolicited E-mail Communications *(7/ 29/2011)* provides a useful review of these risks along with several website disclaimer examples. The key considerations in evaluating website risks as explained in this opinion are:

- A person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.
- To avoid creating ethical duties to a person in search of counsel, a lawyer who places advertisements or solicits e-mail communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that a lawyer-client [or prospective client] relationship is created solely by virtue of the person's response and that the person's response is confidential.
- Lawyers should use website disclaimers that have two separate and clear warnings: that there is no lawyer-client relationship and that the e-mail communications are not confidential. Moreover, these warnings should be short and easily understood by a layperson.

The Appendix to the opinion offers several examples of disclaimer language. Three of these are:

Example:

If you are seeking representation, please read the following notice before sending an e-mail to our firm:

> Sending us an e-mail will not make you a client of our firm. Until we have agreed to represent you, anything you send us will not be confidential or privileged. Before we can represent you, a lawyer will first take you through our conflict of interest procedure and see that you are put in touch with the lawyer best suited to handle your matter.

If you proceed with an e-mail, you confirm that you have read and understood this notice.

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"Nothing succeeds like success."

Alexandre Dumas

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Example:

If you send e-mail through this service, your e-mail will not create an attorney-client relationship, and any information you include in your e-mail will not necessarily be treated as privileged or confidential. You should not send sensitive or confidential information through this e-mail service. The firm may not choose to accept you as a client. Moreover, the Internet is not necessarily a secure environment, and it is possible that your e-mail might be intercepted and read by third parties.

Example:

Please Read Before Sending E-Mail.

Please note that any communication with us by e-mail through this website does not constitute or create an attorney-client relationship with us. Please do not send any confidential information. A conflicts-of-interest procedure must be completed by us before we can establish an attorney-client relationship with you.

By clicking "Accept/Submit" below, you agree that we may review any information you transmit to us. You recognize that our review of your information, even if it is highly confidential and even if it is transmitted in a good faith effort to retain us, does not preclude us from representing another client directly adverse to you, even in a matter where that information could and will be used against you.

If you wish to discuss the possibility of potential legal representation, you may request a consultation by e-mail or by calling one of our offices.

Lawyers Mutual's risk management guidelines for lawyer websites is reflected in the *Bench & Bar* article "Lawyer Website Disclaimers – Fact or Fiction," (Vol. 70, No. 1, Jan. 2006):

- Prepare and keep on file a written firm policy on the purpose of the website, what it is supposed to do, and what it is not intended to do. Include detailed guidance on specific features of the site and how they are to function. Specifically, how legal advice, if any, is to be provided through the website. This guidance should include how information is to be displayed that avoids misleading site visitors into believing they are getting legal advice for their matter; how terms and conditions and disclaimers are prominently featured to assure that site visitors assent to them; and how prospective client e-mail is managed to avoid issues of attorney-client relationships, confidentiality, and failure to respond to an e-mail.

- Keep a complete paper and disk copy of each iteration of the website for at least five years. Be sure it reflects how site visitors manifest assent to terms and conditions and disclaimers. Use "click wraps" or "click throughs" that require a site visitor to click on a disclaimer to show affirmatively the visitor's assent before accessing the website and before information can be sent to the firm. Be sure that the site visitor cannot finesse the click wrap procedure. Click wraps may be appropriate for several of the website pages.

- Be sure that disclaimers are prominently displayed on the home page. While it may be undesirable to pepper the disclaimer notice on every page of the website, that is the percentage way to go. Rulings that have not accepted disclaimers as effective often note their brevity or inconspicuous display on a website. Use click wraps liberally.

- Use letters of non-engagement in response to prospective client e-mails when the firm declines representation. Respond to all e-mails – do not leave a site visitor dangling. Advise site visitors not to consider that their e-mail was received until they receive a confirming e-mail from the lawyer. Save e-mails to disk just as you would file written correspondence from and to potential clients. It is hard to defend against a claim without some record of what occurred.

- Design prospective client information intake procedures so that only the minimum information necessary to perform a conflict of interest check is initially received. Use a click wrap to warn site visitors about sending too much information initially and to protect the firm from a conflict of interest issue if the site visitor does not comply.

- Recognize that a website can be visited from anywhere in the world. Complying with the advertising and unauthorized practice rules of every jurisdiction is impossible. Websites disclaimers should clearly indicate that the lawyer is seeking site visitors only in certain jurisdictions and that the website is inoperative in any jurisdiction that has rules different from those of the lawyer's jurisdiction. Another way to accomplish this is to accept e-mails

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"Nothing succeeds like excess."

Oscar Wilde

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only from persons residing in specified zip codes in named jurisdictions. Admittedly, this is flimsy, but it is the best fix available at this stage of development of Internet ethics.

- Links to other websites require disclaimers of responsibility for their content and currency. Links require routine maintenance to assure that they are still operative and relevant.

- The website should not contain links that serve as referrals to other lawyers that a site visitor can unilaterally choose other than bar referral services. Referral to another lawyer is a malpractice risk and should be done only after sufficient information is received to competently evaluate the site visitor's matter – preferably by telephone or an in-office consultation.

"Lawyer Website Disclaimers – Fact or Fiction?" is available on Lawyers Mutual's website at lmick.com – click on Resources and go to Bench & Bar Articles.

The Mortgage Forgiveness Debt Relief Act and Debt Cancellation Act (MFDRA) Risk Management – *Time Running Out for Lawyers Handling Foreclosures*

The MFDRA provides tax relief for mortgage debt forgiven on principal residences. Originally the MFDRA was set to expire at the end of 2009. Thanks to legislation enacted in 2008, however, MFDRA tax relief was extended through December 31, 2012. Unless the MFDRA is again extended, debt forgiveness after 2012 is taxable. Therein lies a malpractice risk for lawyers.

The essential provisions of the MFDRA, as explained in IRS publication IR-2008-17 (2/12/08), are:

- Normally, debt forgiveness results in taxable income. But under the Mortgage Forgiveness Debt Relief Act of 2007 … taxpayers may exclude debt forgiven on their principal residence if the balance of their loan was $2 million or less. The limit is $1 million for a married person filing a separate return.

- Debt reduced through mortgage restructuring, as well as mortgage debt forgiven in connection with a foreclosure, may qualify for this relief.

- The debt must have been used to buy, build or substantially improve the taxpayer's principal residence and must have been secured by that residence. Debt used to refinance qualifying debt is also eligible for the exclusion, but only up to the amount of the old mortgage principal, just before the refinancing.

- Debt forgiven on second homes, rental property, business property, credit cards or car loans does not qualify for the new tax-relief provision.

Lawyers representing homeowner debtors in matters with MFDRA eligibility must get the matter completed by the end of 2012 for the client to qualify for the tax savings. Amounts forgiven after that date will be taxable unless exempted under some other law. Failure to meet the MFDRA deadline could lead to an expensive malpractice claim.

Conversely, lawyers representing lenders must consider the deadline to avoid making any misrepresentation to persons deeding in lieu of the foreclosure. The availability of the MFDRA tax break is an incentive that should help lender lawyers resolve foreclosures before the end of 2012.

Just as it is good risk management not to take a new matter with an imminent statute of limitations deadline, it is good risk management not to take a matter with MFDRA eligibility in the latter part of 2012 without carefully explaining to the client in writing signed by the client that due to time limitations it may not be possible to get the tax forgiveness. Additionally, lawyers not clear on the effect the MFDRA has on a client's situation should consult a tax professional or the client's tax preparer. Then confirm the financial advice given in a letter following the consultation, with a copy to the client.

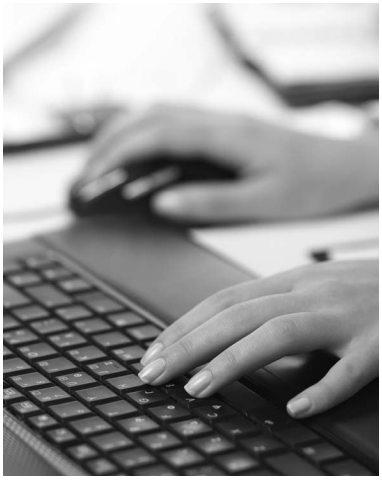
Source: IRS Publication 4681 Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals)*; TitleNews, American Land Title Association, July 2012, Ted Jones, "The Fuse is Burning and Time is of the Essence – The Pending Expiration of the Mortgage Forgiveness Debt Relief Act."*

"Nothing recedes like success."

Walter Winchell

Scams: Do You Know What a "Typosquatter" Is?

Now that virtually every law practice has a website, the alert we provided in our Summer 2011 newsletter about fake law firm websites is even more pertinent. The scam described in that article concerned copycat websites "in which the scammers use photos from a firm's website along with most of the rest of the website to set up a website for a seemingly reputable law firm. One way the plagiarized website is used is to entice lawyers into believing that a counterfeit certified check that the fake firm has sent them for assistance with closing a real estate deal for a foreign client is valid. The deal, of course, falls through and the fake firm then requests a refund. If the lawyer pays the refund before realizing that the certified check is counterfeit, he has been scammed with no recourse."



In New York the Gioconda Law Group discovered that a scammer gained access to firm e-mail using a typosquatter website with the domain name of GiocondoLaw.com – close enough to the firm's website address to lure typographical error contacts meant for Gioconda. The scam was discovered by the firm's risk management procedure of routinely reviewing its domain name for encroachment. The firm determined that something was amiss by sending registered e-mail using the typosquatter address to people at Gioconda that was not returned as undeliverable. Gioconda has since filed suit against the typosquatter.

With copycat and typosquatter websites along with hackers threatening law firm cyber security, it is vital that law firms have risk management programs for protecting firm websites and data. The program should also include a procedure for complying with the computer related technical requirements of the increasing number of government regulations covering such issues as unauthorized practice, advertising, lobbying, and money laundering.

Source: ABA Journal, Legal Technology, 6/25/2012, "Law Firm Sues Over Doppelganger Domain Name, Says Infringing Website is Intercepting Attorney Email."

Are Arbitration Clauses in Letters of Engagement (LOE) Covering Fee Disputes and Malpractice Enforceable in Kentucky?

The Problem

The Kentucky Supreme Court authorized legal negligence and fee dispute arbitration under the jurisdiction of the KBA in SCR 3.800 and 3.810. There apparently are no Kentucky Supreme Court decisions, Court of Appeal decisions, or KBA ethics opinions dealing with LOE arbitration clauses covering fee disputes and malpractice claims. Because the KBA arbitration procedures are permissive and not mandatory, they are not exclusive by their terms. Does this leave open the option for Kentucky lawyers to include arbitration clauses in LOEs?

Is There Any Other Authority for LOE Arbitration Clauses?

In KRS 417.050 the Kentucky Legislature authorized arbitration agreements. This, however, does not answer the question because in Kentucky the Supreme Court, not the Legislature, promulgates the rules that govern the practice of law. While not issuing a specific rule on arbitration, the Court in two places in the Rules of Professional Conduct referred to arbitration agreements in a positive context:

> ***SCR 3.130(1.8) Comments (14 & 15)***
>
> Limiting Liability and Settling Malpractice Claims
>
> (14) Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. <u>This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.</u> ….
>
> *(emphasis added)*

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"Nothing succeeds like one's own successor."

Clarence H. Hincks

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(15) Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

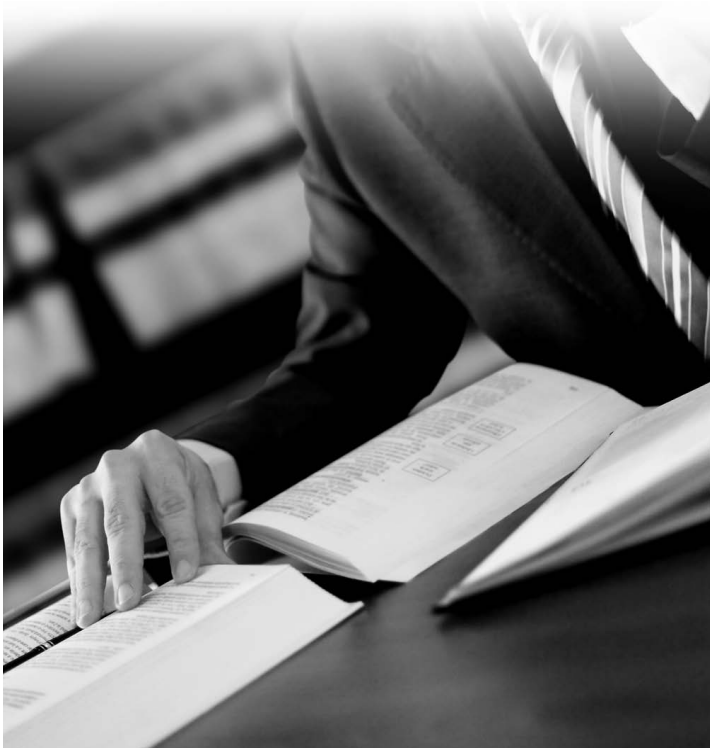
(emphasis added)

SCR 3.130(1.15) Comment (2)

(2) Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

(emphasis added)

Based on the foregoing, and subject to further instructions from the Supreme Court, we cautiously conclude that LOE arbitration clauses are authorized in Kentucky.



What Constitutes an Enforceable LOE Arbitration Agreement?

In the absence of any known Kentucky authority on this question, the recent Louisiana Supreme Court decision, *Hodges v. Reasonover* (La., No. 2012-CC-0043, 7/2/12) provides a good analysis of the enforceability of arbitration agreements along with minimum disclosures lawyers must make to clients about of the effects of binding arbitration. What follows is a snapshot of the key points of the decision:

- " … there is no *per se* rule against arbitration clauses in attorney-client retainer agreements, provided the clause is fair and reasonable to the client. However, the attorneys' fiduciary obligation to the client encompasses ethical duties of loyalty and candor, which in turn require attorneys to fully disclose the scope and the terms of the arbitration clause. An attorney must clearly explain the precise types of disputes the arbitration clause is meant to cover and must set forth, in plain language, those legal rights the parties will give up by agreeing to arbitration."
- " … agreements between law firms and clients are held to higher scrutiny than normal commercial contracts because of the fiduciary duties involved. "The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client on the basis of the strictest fidelity and honor."

"At a minimum, the attorney must disclose the following legal effects of binding arbitration, assuming they are applicable:

- Waiver of the right to a jury trial;
- Waiver of the right to an appeal;
- Waiver of the right to broad discovery under the Louisiana Code of Civil Procedure (*read Kentucky Rules of Civil Procedure*) and/or Federal Rules of Civil Procedure;
- Arbitration may involve substantial upfront costs compared to litigation;
- Explicit disclosure of the nature of claims covered by the arbitration clause, such as fee disputes or malpractice claims;

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- The arbitration clause does not impinge upon the client's right to make a disciplinary complaint to the appropriate authorities;
- The client has the opportunity to speak with independent counsel before signing the contract."

"In summary, we find arbitration clauses in attorney-client agreements may be enforceable, provided the contract does not limit the attorney's substantive liability, is fair and reasonable to the client, and does not impose any undue procedural barrier to a client seeking relief. However, an attorney must make full and complete disclosure of the potential effects of an arbitration clause …."

Conclusion

Put *Hodges* high on your professional reading list. For more on LOE arbitration clauses and lawyer recommended disclosures go to *Legal Malpractice*, Mallen & Smith, 2012 Ed., §§2:45, 2:46, and 2;47 Alternative Dispute Resolution. If you currently employ arbitration clauses in LOEs, their enforceability may be problematic if the client has not been fully informed of the scope and effect of the agreement as provided in Comment (14) to Rule 1.8 of the Kentucky Rules of Professional Conduct. Risk manage this issue by carefully documenting client disclosures on LOE arbitration clauses.