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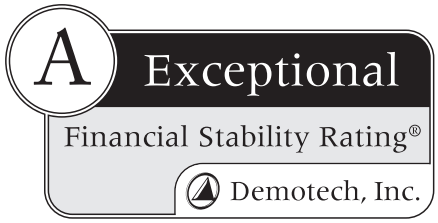
THE RISKMANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEMOTECH, INC. ASSIGNS FINANCIAL STABILITY RATING® OF A, *EXCEPTIONAL* TO LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

Columbus, Ohio, December 11, 2014: Lawyers Mutual Insurance Company of Kentucky has earned a Financial Stability Rating® (FSR) of A, *Exceptional*, from Demotech, Inc. This level of FSR is assigned to insurers who possess exceptional financial stability related to maintaining positive surplus as regards policyholders, liquidity of invested assets, an acceptable level of financial leverage, reasonable loss and loss adjustment expense reserves (L&LAE) and realistic pricing.



FSRs summarize Demotech, Inc.'s opinion of the financial stability of an insurer regardless of general economic conditions or the phase of the underwriting cycle. FSRs utilize statutory financial data based on insurance accounting principles prescribed or permitted by the National Association of Insurance Commissioners (NAIC). Since 1989, FSRs of A or better have been accepted by the major participants in the secondary mortgage marketplace.

About Demotech, Inc.

Demotech, Inc. is a financial analysis firm specializing in evaluating the financial stability of regional and specialty insurers. Since 1985, Demotech, Inc. has served the insurance industry by assigning accurate, reliable and proven Financial Stability Ratings® (FSRs) for Property & Casualty insurers and Title underwriters. FSRs are a leading indicator of financial stability, providing an objective baseline of the future solvency of an insurer. Demotech Inc.'s philosophy is to review and evaluate insurers based on their area of focus and execution of their business model rather than solely on financial size.

WHAT DO YOU REALLY KNOW ABOUT SOCIAL MEDIA PROFESSIONAL RESPONSIBILITY?

Rapidly expanding use of the social media requires lawyers to obtain the competence to advise clients on social media matters as well as to ethically use social media for their own professional purposes. Test your competence by evaluating your knowledge of the following ten key issues:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.

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WHAT DO YOU REALLY KNOW ABOUT SOCIAL MEDIA PROFESSIONAL RESPONSIBILITY?

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5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.
10. Whether attorneys may connect with judges on social networking websites.

The answers to these issues have come out piecemeal from bar ethics committees and the courts resulting in a mishmash of guidance for the practicing lawyer. In *Formal Opinion 2014-300* (9/14) the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility comes to the rescue. The opinion begins with the above list of ten issues and proceeds to analyze each in detail. It cites applicable Pennsylvania rules of professional conduct that are quite similar to Kentucky's, and cites a variety of opinions from other jurisdictions. This opinion is the best and most comprehensive treatment of social media ethics issues to date.

What follows is an overview of *Formal Opinion 2014-300* using extracts from the opinion covering key points. Our intent is to assist you in avoiding social media ethics violations and malpractice claims.

BACKGROUND

WHAT DOES COMPETENCE MEAN IN THE CONTEXT OF SOCIAL MEDIA LEGAL ADVICE?

- As a general rule, … to provide competent representation under Rule 1.1, Competence, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.
- Lawyers must be aware of how these websites operate and the issues they raise … to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private.
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of benefits and risks associated with relevant technology.… Thus, … to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

LAWYERS MUST BE ALERT TO THE HIGH RISK OF MISREPRESENTATION ON SOCIAL MEDIA

- Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated.

Editor's Note: *Lawyers must be sure that neither they nor their clients engage in conduct involving dishonesty, fraud, deceit or misrepresentation on the social media that could result in a violation of Rule 8.4 (c), Misconduct, and disciplinary action against the lawyer.*

Formal Opinion 2014-300 ANSWERS TO THE TEN SOCIAL MEDIA ISSUES

1. Attorneys May, Subject to Certain Limitations, Advise Clients About the Content of Their Social Networking Websites

- Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.
- In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal. This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully

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"SUCCESS = TALENT + LUCK. GREAT SUCCESS = A LITTLE MORE TALENT + A LOT MORE LUCK." *Daniel Kahneman in "Thinking Fast and Slow"*

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alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless of whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

- Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

- There is no per se prohibition on an attorney connecting with a client or former client on social media.
- … if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice.
- … an attorney must not reveal confidential client information on social media. …. [S]ocial media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

- Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited, it would also be prohibited while using social networking websites.
- … unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.
- Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.
- While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes.

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"WE CAN'T TAKE ANY CREDIT FOR OUR TALENTS. IT IS HOW WE USE THEM THAT COUNTS." *Madeline L'Engle*

WHAT DO YOU REALLY KNOW ABOUT SOCIAL MEDIA PROFESSIONAL RESPONSIBILITY?

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4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis for Viewing Otherwise Private Information

- The Kentucky Bar Association Ethics Committee concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context." The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication. (KBA E-434 (2012))
- … a lawyer may not use deception to gain access to an unrepresented person's social networking site. A lawyer may ethically request access to the site, however, by using the lawyer's real name and by stating the lawyer's purpose for the request.

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

- If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of this Opinion.
- … a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

- Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements.

Editor's Note: *This issue could implicate the professional responsibility rules on advertising. When in doubt contact the KBA Advertising Commission.*

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

- … a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.
- … lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad.

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"THE **BLESSINGS OF OPTIMISM** ARE OFFERED ONLY TO INDIVIDUALS WHO ARE ONLY MILDLY BIASED AND WHO ARE ABLE TO 'ACCENTUATE THE POSITIVE' WITHOUT LOSING TRACK OF REALITY." *Daniel Kahneman in "Thinking Fast and Slow"*

WHAT DO YOU REALLY KNOW ABOUT SOCIAL MEDIA PROFESSIONAL RESPONSIBILITY?

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8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

- Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. …. [W]hen a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

- The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Editor's Note: *In Sluss v. Commonwealth (2012 WL 4243650 (Ky. 2012)) the Kentucky Supreme Court provided guidance for Kentucky lawyers using social media to investigate jurors.*

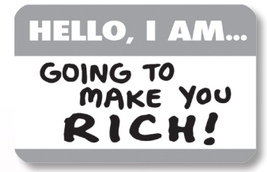
- *It is proper and ethical under [Rule of Professional Conduct] 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to "friend" jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not "friend" the juror, email, send tweets to the juror or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any representations or engage in deceit, directly or indirectly, in reviewing juror social networking sites.*
- *SCR 3.130(3.5)(c) also clearly governs the circumstances when an attorney may communicate with a juror after the jury has been discharged. The same principles that apply to communications made before and during trial apply to post-trial communications as well.*

10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

- … attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no ex parte or other prohibited communication.
- … although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.

Formal Opinion 2014-300 is highly recommended professional reading for all Kentucky lawyers. We suggest you download a copy at **www.danieljsiegel.com/Formal_2014-300.pdf** *(last viewed on 1/13/15)* or with a Google search and place it in your *Risk Management* file. Always remember when in doubt on an ethics questions, the KBA Ethics Hotline is just a phone call away.

LAWYER SCAMS: NIGERIA STRIKES AGAIN



An Iowa lawyer's client showed him documents indicating that the client was the beneficiary of a bequest of $18,800,000 from his long-lost cousin in Nigeria. All that was necessary to receive the bequest was payment of $177,600 in taxes owed on the inheritance in Nigeria. The lawyer's fee for representing the client in collecting the inheritance was 10% or over $1.8 million dollars.

To raise the money to pay the taxes the lawyer solicited over $200,000 from current and former clients, neglecting to tell them of his enormous fee. The lawyer then contacted several persons including those he believed were representatives of the "Central Bank of Nigeria," the "African Union," the President of Nigeria, and a Nigerian lawyer who claimed to have witnessed the will. After the money was transferred to the scammers, the money, and the bequest soon disappeared.

The ensuing bar complaint resulted in the lawyer receiving a minimum one-year suspension from practice. The Iowa Supreme Court found that the lawyer failed to make a competent analysis of the legitimacy of the client's inheritance, engaged in conflicts of interest, and violated rules that regulate lawyers' business transactions with current clients. (Iowa Supreme Court Attorney Disciplinary Board, Complainant, v. Robert Allan Wright Jr., Respondent; No. 13–0780; December 6, 2013)

The lessons learned from this case are self-explanatory. We hope all Kentucky lawyers are on the alert for this and all other kinds of scams.

"NOTHING IS EVER QUITE AS BAD AS IT COULD BE." *Amy Hempel*

BUSINESS TRANSACTION LAWYERS FACE AN INCREASING RISK OF MALPRACTICE CLAIMS

The Great Recession resulted in numerous business transactions failing. Clients of the lawyers in these transactions often blame them for the failure looking for deep pockets to bail them out of a bad deal. This increased exposure to malpractice claims necessitates that transaction lawyers even more carefully risk manage their practice. This article reviews a recent case demonstrating this risk and offers risk management guidance gleaned from the opinion and other sources.

THE MORE COMPLICATED THE BUSINESS TRANSACTION THE GREATER THE MALPRACTICE RISK

*Cottone v. Fox Rothschild LLP** was an appeal from summary judgment in favor of a lawyer and his firm in a malpractice claim. The issue was "whether the trial court correctly determined that an attorney owes no duty, as a matter of law, to explain unambiguous business terms in a written agreement, when the client is a sophisticated businessperson who negotiated the terms of the agreement himself."

This suit concerned a buyout negotiation between the client and a company in which he held an equity interest. The client had several million dollars at stake on the outcome of the negotiation. The draft negotiation agreement included especially complicated and ambiguous terms. The firm's lawyer advising the client, without specific instructions, reviewed the draft agreement on several occasions offering suggestions and advice. In reviewing the final draft of the agreement both the client and the lawyer missed the significance of newly inserted terms by the company that substantially reduced the amount the client would receive. The client signed the modified agreement only to realize later that he would not receive nearly as much money as he anticipated. He soon sued the lawyer and his firm for malpractice.

The client claimed that the lawyer's error in failing to explain the significance of the added language caused him to agree to terms that cost him millions of dollars. The lawyer and the firm defended by claiming that they were acting only as scrivener and "that the mere existence of an attorney-client relationship between the parties did not impose on them a legal duty to explain to plaintiff, a sophisticated client, clear and unambiguous business terms in the Redemption Agreement."

The Appeals Court found that summary judgment was premature because there were genuine issues of material fact over the communications between the client and the lawyer concerning the client's expectations from the final agreement. The Court then offered this useful risk management guidance:

> "[We] perceive several actions which may be considered by a jury in determining whether the attorney breached the standard of care."
>
> - "First, did the attorney ascertain the client's business objectives through appropriate consultation."
> - "Was reasonable advice provided to the client on the various legal and strategic issues bearing on those identified business objectives. ('An attorney in a counseling situation must advise a client of the risks of the transaction in terms sufficiently clear to enable the client to assess the client's risk.')."
> - "During the drafting process, did the attorney scrutinize the proposed agreement to ensure that the writing effectuates the business objectives defined by the client."
> - "Did the attorney review the written agreement with the client, to determine that the client understood the material terms that might reasonably affect the client's decision to execute it. (attorney is obligated to inform the client 'promptly of any known information important to him [or her]'); (attorney should 'review all important provisions with the client before proceeding to an agreement')."
> - "Were the various provisions to accomplish each of the client's stated objectives pointed out or, if they were not, did the attorney ensure that the client assents to the omission of any such objective."
>
> "We do not suggest that all of these actions are always required. However, if the scope of representation includes one or more of these activities, failure to perform an included act in a reasonably competent manner may indicate a breach of the standard of care." *(citations omitted)*

**2014 BL 240874, N. J. Super. Ct. App. Div., No. A-0420-12T4, 9/2/14, (unpublished).*

"THE MAIN BENEFIT OF OPTIMISM IS **RESILIENCE** IN THE FACE OF SETBACKS." *Daniel Kahneman in "Thinking Fast and Slow"*

2014 ABA FALL NATIONAL LEGAL MALPRACTICE CONFERENCE ON BUSINESS TRANSACTION RISK MANAGEMENT

A panel at the recent ABA Fall National Legal Malpractice Conference discussed the increasing risk of transaction malpractice claims offering this risk management advice:

1. Make sure you have identified, in writing, who your client is and what the scope of the representation will be.
2. Check back on these two questions often, and identify – again in writing – any changes that have occurred.
3. Document what you won't do, and who you won't represent, as well. Don't take on tasks or clients that are outside the scope of representation.
4. Check in on conflicts frequently as new parties join the transaction or engagement.
5. Don't get involved in your client's management, other than evaluating the business risk of proposed actions and transactions. If you do, you will be a target for liability.

Source: ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 30, No. 20, page 632, 9/24/14.

LAWYERS MUTUAL'S CHECKLIST FOR BUSINESS TRANSACTION RISK MANAGEMENT

- ✔ Make sure everyone (including you) knows who your client is. In any ambiguous situation clarify your role early. If necessary to make your position perfectly clear, advise nonclients to get counsel. Make sure that officers and employees of business entity clients, no matter how high ranking, understand you represent the business– not them.
- ✔ Avoid tempting reliance on you by nonclients through your affirmative conduct (accommodative minor legal service to get the deal done) and passive conduct (allowing impressions to stand that you are acting in the nonclient's interest as well as your client's).
- ✔ In appropriate circumstances caution your client that your advice is offered in the client's best interest and should not be passed on as "good advice" to nonclients involved in the same business transaction.
- ✔ Carefully prepare opinion letters by:
  - Specifying the scope of the opinion, its purpose, authorized uses and restrictions.
  - Setting out the facts and assumptions on which the opinion is based. Be specific about facts based on your own knowledge and those provided by others who bear responsibility for their accuracy. If others are preparing evaluations on other aspects of the transaction, clearly exclude those parts from your opinion. If you are relying on an expert opinion as part of your analysis (e.g., an environmental assessment), spell it out in your opinion.
  - Being complete – include the pros and cons of the matter. Do not expose yourself to the accusation that you misled by omission. Material limitations must be disclosed.
- ✔ Establish office procedures for quality control of opinion letters. Procedures should indicate who is authorized to sign and release opinion letters for the firm, provide for a formal and cold review before opinion release, and require careful screening for prior inconsistent firm opinion letters.
- ✔ Unrealistically short deadlines for the production of opinion letters should not be accepted from clients and requests for additional information from the client should be made without hesitation.
- ✔ Because opinion letters carry a high risk for claims against both you and the client, they require extra time and often much more than the client anticipates. Be sure the client understands this and is prepared for the high billing that usually goes with a good opinion letter.
- ✔ If you deliver documents to a nonclient for your client, be sure you know what information is in them. If the documents do not contain some semblance of truth, you will in all likelihood be held responsible for their accuracy along with the client.
- ✔ If appropriate, be sure to cover with the client in writing (preferably in a letter of engagement) precisely how client funds are to be disbursed.
  - Get client approval before hiring experts and incurring other high expenses. At final disbursement and billing don't surprise your client with a huge claim on funds.
  - Consider getting the client to pay large expenses directly while the transaction is ongoing and prior to final disbursement. This simplifies things at the conclusion of the matter for all concerned.

"THE **OPTIMISM** OF A HEALTHY MIND IS INDEFATIGABLE." *Margery Allingham*

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THE RISK MANAGER
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This newsletter is a periodic publication of Lawyers Mutual Insurance Co. of Kentucky. The contents are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish an attorney's standard of due care for a particular situation. Rather, it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.

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"THERE IS NOTHING FINAL ABOUT A MISTAKE, EXCEPT ITS BEING TAKEN AS FINAL." *Phyllis Bottome*