VOLUME 31, ISSUE 1 WINTER 2019

THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

THE INTERNET'S IMPACT ON CLIENT SCREENING RISK MANAGEMENT

Lawyers learn early on in their practice that refusing to represent certain clients is the best way to avoid malpractice claims. The pre-Internet risk management procedures developed useful checklists for screening prospective clients. The assumption with these checklists is that the lawyer has face-to-face contact with prospective clients. Additionally, before the Internet, most prospective clients lived in the same community, county, or region as the lawyer. It was not difficult to learn all the lawyer needed to know to decide whether to accept the prospective client.

All of this changed with the Internet when prospective clients could approach lawyers from virtually anywhere in the USA or the world. A lawyer may never personally see a client during the entire representation, communicating via email, fax, and social media. Thus, lawyers lost for many prospective clients the ability to gain an impression of the person that only personal contact allows. Experienced lawyers are exceptionally good in face-to-face meetings at spotting difficult, troublesome, and shady prospective clients. Much of that has been lost on the Internet.

Additionally, the Internet challenged lawyers with new malpractice risk and ethics problems. Some lawyers to this day have never acquired the sophisticated computer and social media technical skills for avoiding making unintended client-attorney relationships, revealing client confidential information, violating advertising ethics rules, and inadvertently becoming involved with a client's dishonest actions. This necessitated new client screening checklists to analyze all the risks an Internet prospective client may bring, as well as the need to continue to screen some problematic Internet current clients.

What follows is a compilation of traditional client screening checklists and newer checklists that address Internet screening considerations. In combination they should serve your risk management program well.

CONTINUED ON PAGE 2

ARE YOU SURE YOU UNDERSTAND THE DIFFERENCE BETWEEN WHEN IT IS OK TO "REVEAL" CLIENT CONFIDENTIAL INFORMATION AND WHEN IT IS OK TO "USE" CLIENT CONFIDENTIAL INFORMATION?

This question concerns the "generally known" exception to client confidentiality in the ABA Model Rule 1.9, Duties to Former Clients, and Kentucky's rule SCR 3.130 (1.9) Duties to Former Clients. This exception permits a lawyer to use information to the disadvantage of a former client if the information is generally known. Problems with interpretation of generally known led to two recent ABA ethics opinions that provide an excellent overview of the issue and useful guidance on how to determine whether client information is generally known. This article includes the key points made in the opinions and our risk management advice.

Lawyers often use the term confidentiality when referring to the attorney /client privilege, a rule of evidence, and work product immunity, a rule of civil procedure. What must not be lost in this use of confidentiality is the overarching professional conduct rule SCR 3.130(1.6) Confidentiality of information, that establishes a much broader fiduciary duty not to reveal or use client information to the

CONTINUED ON PAGE 4

INSIDE THIS ISSUE:

Lawyers Mutual
www.lmick.com

MEMBER NATIONAL ASSOCIATION OF BAR RELATED INSURANCE COMPANIES

INTERNET'S IMPACT

CONTINUED FROM FRONT PAGE

Traditional Prospective Client Screening

1. If your first impression of the prospective client or his matter is unfavorable, think twice before accepting the case. It is best to avoid a prospective client who demonstrates a difficult personality along with other indications that he will be uncooperative. If your intuition tells you to avoid a prospective client, listen to it.
2. Be cognizant of the client's relationship and experience with previous lawyers. Beware of the client who constantly changes lawyers. Look out for the case that was rejected by one or more lawyers or by one or more other firms.
3. Be cognizant of the client's attitude toward other professionals such as doctors, accountants, bankers, or lenders.
4. Consider the client's attitude and method of operation. If he or she has come to you with a "done deal," researched the case extensively, or failed to attend to the matter until it became an emergency, the case may require special handling.
5. Does the prospective client have a history of questionable prior litigation?
6. Does the prospective client have unrealistic expectations for the matter that cannot be altered?
7. Does the prospective client have an unreasonable sense of urgency over the matter? Beware of a case that has an element of avoidable urgency.
8. Beware of the prospective client who has already contacted multiple government representatives to plead his case.
9. Beware of the prospective client who wants to proceed with his case because of principle and regardless of cost.
10. Beware of the prospective client who has done considerable personal legal research on his case.
11. Is the prospective client difficult about reaching agreement on fees? Does he appear to be price shopping? Can he afford your services? Does he refuse to give an adequate retainer?
12. Avoid prospective clients with matters outside your firm's regular practice areas unless you are prepared to spend the time and resources necessary to develop the required competence to practice the matter. Can the prospective client afford the cost associated with this effort?
13. Avoid prospective clients when the statute of limitations is about to run or other deadline is impending on their matter unless you are absolutely sure you can meet the limitation or deadline. A good rule of thumb is that a new case should not be accepted if it is within three months of the statute of limitations. This is just too short a time to identify and name all the parties. Accepting unrealistic time pressure to represent a client is an invitation to commit malpractice (think medical malpractice suits).
14. Be leery of accepting prospective clients who are family or friends. Fee misunderstandings along with the loss of objectivity when representing family or friends can lead to bitter results.
15. Learn everything you can about the quality of a prospective client before you take the matter – not just verification of the facts of the case. Do a Google search – look for Websites, blogs, and participation on sites such as Facebook, Twitter, and, Instagram. Determine whether the prospective client has:
    a. Good credit and is financially solvent.
    b. A criminal record.
    c. Frequently filed claims for injuries.
    d. Retained numerous lawyers in the past.
    e. Ever sued a lawyer for malpractice or filed a bar complaint.

The Internet and Social Media Requires Enhanced Client Identification Due Diligence (EDD)

In the program "Fraud, Breach of Trust and Breach of Warranty of Authority," the authors* provided the best analysis of a risk based approach to client identification in the Internet era that we have found. The program is presented in the context of real estate matters, but works equally well with other matters. What follows is a summary and paraphrase of key screening considerations from that program.

- Lawyers must recognize that times have changed. Commercial imperatives risk diminishing ideal legal thoroughness. The profession must move with the times.

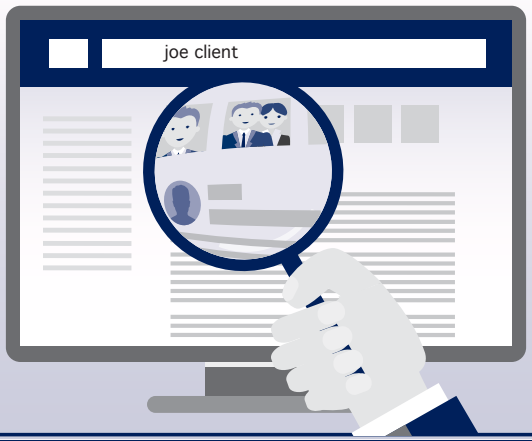
CONTINUED ON PAGE 3

"FOR FAST-ACTING RELIEF, TRY SLOWING DOWN." *Lily Tomlin*

INTERNET'S IMPACT

LEARN EVERYTHING YOU CAN ABOUT THE QUALITY OF A PROSPECTIVE CLIENT BEFORE YOU TAKE THE MATTER – NOT JUST VERIFICATION OF THE FACTS OF THE CASE.

DO A GOOGLE SEARCH...



CONTINUED FROM PAGE 2

- Lawyers must now employ enhanced due diligence in client intake risk management. What is required is "exemplary professional care and efficiency." "[C]areful conscientious and thorough" inquiry is necessary. Not perfection –but any departure from normal good practice will be hard to justify.
- "Good risk management requires "identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source." This includes "obtaining information on the purpose and intended nature of the business relationship."

Risk Based Approach:

- Consider a "Risk Factors" Checklist – Are there multiple warning signs? Is this is transaction carrying more than normal risk?
  - Unexpected change of instructions.
  - Unusual features: transaction not consistent with client age/financial position.
  - Discrepancy between sale price and your expectation.
  - Empty and/or unencumbered properties.
  - Client contact details – email only?
  - High value properties, especially with no mortgage.
  - Surrounding circumstances: Client face-to-face? Abroad? Impatience?
  - Documents not executed in front of you.
  - Other addresses for service? *(CLC AML Guidance / Law Society P&RF Practice Note –Warning Signs)*
- What does Enhanced Due Diligence require? – ID checks should not be mechanistic/formal.
- Understand why the client is giving you the instructions that they are.
- Be inquisitive – Fraudsters rely on an "unquestioning" attitude for fraud to succeed.
- Why have you been instructed by the client? Get proof of employment?
- Email only contact – A real challenge and a real problem. Establish the link to the property (or other assets that are part of the representation).
- Speed of sale – A regular feature in these cases. Why the urgency? Clients should not be evasive.
- Ongoing vigilance – The Court will expect you to notice red flags in documents. Do borderline detective work if the risks are clear.

Inquiries, Replies and Statements About Your Client

Making inquiries about your client:

1. If you ask, you must closely analyze the reply.
2. Scrutinize the response – Cardinal Rule is if you pose a question you have a duty to review the reply carefully. Is it a full answer?
3. Report results to the client – If not a complete answer, report it to the client in a clear and intelligible way.

CONTINUED ON PAGE 6

"THOU SHALT NOT CARRY MODERATION UNTO EXCESS." *Arthur Koestler*

UNDERSTAND THE DIFFERENCE

CONTINUED FROM FRONT PAGE

disadvantage of a client unless it is allowed by Rule 1.6 or SCR 3.130(1.9) Duties to former clients.*

ABA Formal Opinion 479, The "Generally Known" Exception to Former-Client Confidentiality (12/15/2017), describes how Rule 1.6 and 1.9 operate to establish a lawyer's fiduciary duty not to reveal or use client or former client information as follows:

- Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b) *(in Kentucky to prevent reasonably certain death or substantial bodily harm; to secure ethics legal advice; to establish a claim or defense to a malpractice claim, a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or to comply with other law or a court order).*
- Model Rule 1.9 extends lawyers' duty of confidentiality to former clients.
- Model Rules 1.9(a) and (b) govern situations in which a lawyer's knowledge of a former client's confidential information would create a conflict of interest in a subsequent representation.
- Model Rule 1.9(c) "separately regulates the use and disclosure of confidential information" regardless of "whether or not a subsequent representation is involved.
- Lawyers thus have the same duties not to *reveal* former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.
- In contrast, Model Rule 1.9(c)(1) addresses the *use* of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client's representation "to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become *generally known*."
- The terms "reveal" or "disclose" on the one hand and "use" on the other describe different activities or types of conduct even though they may – but need not – occur at the same time. **The generally known exception applies only to the "use" of former client confidential information. This opinion provides guidance on when information is generally known within the meaning of Model Rule 1.9(c)(1).** (*emphasis added*)

MODEL RULE 1.6(A) PROHIBITS A LAWYER FROM REVEALING INFORMATION RELATED TO A CLIENT'S REPRESENTATION UNLESS THE CLIENT GIVES INFORMED CONSENT, THE DISCLOSURE IS IMPLIEDLY AUTHORIZED TO CARRY OUT THE REPRESENTATION, OR THE DISCLOSURE IS PERMITTED BY MODEL RULE 1.6(B).

**Editor's note: The ABA Model Rules 1.6 and 1.9 are virtually identical to the Kentucky Rules of Professional Conduct 1.6 and 1.9. The analysis in the ABA opinions is valid secondary authority for interpreting the Kentucky Rules.*

The opinion recognized that what is generally known is counterintuitive. It gave these examples of information that do not qualify as generally known:

- [T]he fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known.
- The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing

CONTINUED ON PAGE 5

"THE PURSUIT OF PERFECTION OFTEN IMPEDES IMPROVEMENT." *George Will*

UNDERSTAND THE DIFFERENCE

CONTINUED FROM PAGE 4

legal education classes, does not make that information 'generally known.'

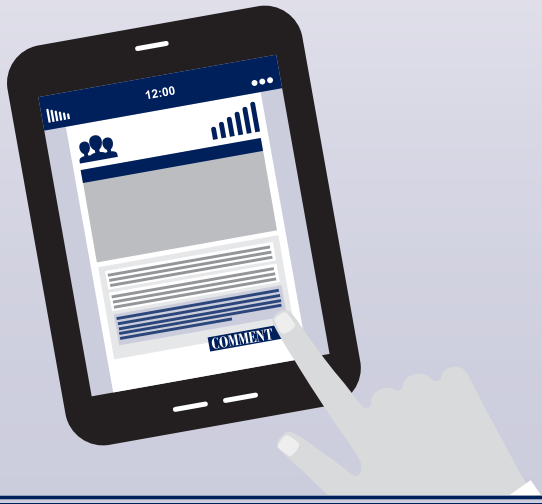
- Information that is publicly available is not necessarily generally known. 'Generally known' does not only mean that the information is of public record . . . . The information must be within the basic understanding and knowledge of the public.
- Certainly, if information is publicly available, but requires specialized knowledge or expertise to locate, it is not generally known.
- Generally known does not mean information that someone can find.
- "[T]he Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.
- A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that 'has become generally known' is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found.

The opinion concluded with this advice:

> A lawyer may use information that is generally known to a former client's disadvantage without the former client's informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer's agents. Information that is publicly available is not necessarily generally known.

ABA Formal Opinion 479 was closely followed by ABA Formal Opinion 480, Confidentiality Obligations for Lawyer Blogging and Other Public Commentary (3/6/2018). Unlike Opinion 479 that focused on when client confidential information may be used, Opinion 480 deals with avoiding revealing unauthorized client confidential information on social media and in other public forums.

WHEN USING THE SOCIAL MEDIA OR COMMENTING IN PUBLIC FORUMS, BEST PRACTICE IS TO GET BOTH CURRENT AND FORMER CLIENTS' CONSENT IN ADVANCE TO REVEAL CLIENT CONFIDENTIAL INFORMATION.



The opinion describes the risk of revealing confidential information in social media and public commentary as follows:

- Lawyers comment on legal topics in various formats. The newest format is online publications such as blogs, listserves, online articles, website postings, and brief online statements or microblogs (such as Twitter®) that "followers" (people who subscribe to a writer's online musings) read. Lawyers continue to present education programs and discuss legal topics in articles and chapters in traditional print media such as magazines, treatises, law firm white papers, and law reviews. They also make public remarks in online informational videos such as webinars and podcasts (collectively "public commentary").
- Lawyers who communicate about legal topics in public commentary must comply with the Model Rules of

CONTINUED ON PAGE 8

"HUMAN BEINGS ARE THE ONLY CREATURES WHO ARE ABLE TO BEHAVE IRRATIONALLY IN THE NAME OF REASON." *Ashley Montagu*

INTERNET'S IMPACT

IS THE CLIENT UNUSUALLY SECRETIVE AND REFUSES TO PROVIDE REQUESTED INFORMATION PURPORTEDLY TO PROTECT THEIR COMPETITIVE POSITION?

CONTINUED FROM PAGE 3

4. Further inquiries – If you need to go back for more information, so be it. The law expects this of you.
5. A fraud prevention measure – does the prospective client balk at providing info about employment.

Responding to inquiries about your client:

1. Avoid promises – (warranties) about your client being the "true" owner or guaranteeing who they are.
2. Handling questions about ID checks you have done – First step is to seek client instructions. If the client does not want you to engage, why?
3. Answer factually – list what you have done.

Dealing with 3rd Parties

1. Do not rely on others' ID checks – In one case the agent sought to rely on conveyer checks. Not good enough – a non-delegable obligation.
2. Check who the 3Ps you deal with are – Establish the practice of checking your opposite number online. This extends to others: In one case the law firm was criticized for failing to check out the notarizing party on certified documents (Google would have shown not a lawyer). Another aspect of being inquisitive.
3. 3Ps are allies in preventing fraud – They can help build a picture of a transaction and a client. This can help with Enhanced Due Diligence.

**Jacqui Gillespie –Plexus Law*

Simon Hale –4 New Square

Screening for Dishonest or Unworthy Clients

The Internet has exponentially increased the risk of representing a dishonest or unworthy client. The following risk management checklist specifically screen for these risks:

1. Is the client a public or private company? Unworthy clients are typically not public companies.
2. Is the client's business financial services or a related industry dealing with other people's money?
3. Has the business experienced phenomenally aggressive recent growth that could be the result of cutting corners?
4. Is the client unusually secretive and does the client refuse to provide requested information purportedly to protect their competitive position?
5. Does the business have a dominating CEO who runs the business with an iron hand?
6. Does the business employ a bullying style when dealing with outside professionals?
7. Is a foreign business client unusually secretive?
8. Change in control – Has there been a sudden change of management or has management gone into weaker hands? Are the client's employees leaving the client or being laid off?
9. Change in ownership – Has the client been acquired by a conglomerate or gone into bankruptcy? Successors, receivers, regulators, and trustees are not your friend, even if the client was.
10. Unusual transactions – Does the client want to do a transaction with no apparent business purpose?
11. Nature of client's business – Does the client owe fiduciary duties to customers and is the client dealing with other people's money?
12. Change in relationship with the client – Has the client's behavior changed as reflected in sudden urgent requests for legal advice giving little time for response? Is the client tense, erratic? Does the client want to micromanage the

CONTINUED ON PAGE 7

"PART OF GETTING OVER IT IS KNOWING THAT YOU WILL NEVER GET OVER IT." *Anne Finger, In Past Due (1990)*

ONE AND DONE MAY BE OK FOR KENTUCKY BASKETBALL, BUT NOT OK FOR KENTUCKY LAWYER CONFLICTS OF INTEREST CHECKS

Lawyers typically make a careful conflict of interest check when accepting a new client. Some, however, are not alert to conflicts that can arise during a representation. Best practice is to use a conflicts system that recognizes new information during a representation that poses a conflict issue. Our risk management advice on conducting interim conflicts of interest checks is:

> During the course of a representation a conflict check should be made anytime a new party is named, a new entity becomes involved, new witnesses are identified, or any other development arises that triggers conflict issues. This is especially important in business and commercial transactions. When the deal goes bad or the business fails, lawyers involved with any whiff of a conflict are sued either for malpractice or breach of fiduciary duty. These are difficult claims to defend and juries have little sympathy for lawyers perceived as disloyal or devious.

Spotting interim potential conflicts can be particularly difficult when representing corporations. Katherine Ikeda of Orrick, Herrington & Sutcliffe LLP suggests these client intake procedures for corporations to help screen for interim conflicts issues:

- Specify the clients name in the engagement letter – don't use "You" or "Client."
- Clearly define who is your client.
- Check the client's outside counsel guidelines for subsidiaries and affiliates provision.
- Ask the company to identify its subsidiaries and affiliates.
- Run a conflict check with the parent company's subsidiaries and affiliates.
- Update your conflict check as necessary.
- If you are going to use an advance conflicts waiver, make sure it specifically defines the subject matter, the parties, and the scope. For example, is it to be applicable to nonlitigated matters as well as litigated matters?

Source: ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports, Vol. 31, No. 5, p.133 (3/11/15).

INTERNET'S IMPACT

CONTINUED FROM PAGE 6

matter? Does the client want a reduction in fees? In bad economic times clients can become desperate.

13. Character change – Does the client expect you to bend rules, endorse a questionable scheme, cover up, or stretch the truth? Is the client uncertain of the source of funds for a deal? Is the client now willing to commit fraud?
14. Change in fee payments – A change in payment habits is a frequent sign of trouble in a client. Accounts receivable building up could be a signal that the client is in financial difficulties. Do a solvency check before the amount of arrearages becomes significant. If you are about to enter a period of intense work for the client that will involve substantial billing, get a retainer supplement and make sure the client knows what is coming. If you cannot readily work out fee payments, consider withdrawing.

Do not rely on a client's continued goodwill. Clients change. There are changes in ownership, control, and circumstances. Educate firm lawyers and staff to be alert to these developments. If you become concerned that a good client is going or has gone bad, withdrawal is often the best risk management. If you continue the representation, be sure that the letter of engagement accurately defines the scope of representation and any changes in scope. Carefully document the file to record significant developments and the advice given. In delicate situations it is especially important that the advice given be reflected in a letter to the client. Do not expose yourself to a claim of fiduciary breach by third parties or of aiding and abetting your client in fraud. If you decide that a client is unworthy, risk manage the situation by withdrawing immediately.

Sources: Conference Report: Aon Law Firm Symposium, ABA/BNA Lawyers' Manual On Professional Conduct, Current Reports, Vol. 26, No. 22, p.657 (10/27/10); "The Impact of the Credit Crunch on Lawyer Risk Management," by Del O'Roark, Kentucky Bench & Bar, July 2009)

THE RISK MANAGER
PUBLISHED BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

DEL O'ROARK
Newsletter Editor

"WHENEVER A MAN'S FRIENDS BEGIN TO COMPLIMENT HIM ABOUT LOOKING YOUNG, HE MAY BE SURE THEY THINK HIM GROWING OLD." *Washington Irving*

Lawyers Mutual
www.lmick.com

A Exceptional Financial Stability Rating® Demotech, Inc.

Waterfront Plaza
323 West Main Street, Suite 600
Louisville, KY 40202

UNDERSTAND THE DIFFERENCE

CONTINUED FROM PAGE 5

> Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. .... A violation of Rule 1.6(a) is not avoided by describing public commentary as a "hypothetical" if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical. Hence, if a lawyer uses a hypothetical when offering public commentary, the hypothetical should be constructed so that there is no such likelihood.

- The salient point is that when a lawyer participates in public commentary that includes client information, if the lawyer has not secured the client's informed consent or the disclosure is not otherwise impliedly authorized to carry out the representation, then the lawyer violates Rule 1.6(a). Rule 1.6 does not provide an exception for information that is "generally known" or contained in a "public record."

MANAGING THE RISK

- The fact that lawyers may use generally known information even when doing so may disadvantage a former client does not mean it should ever be used without former client consent. If the former client balks at granting consent, you are on notice that using it will likely lead to an ethics complaint or malpractice claim. Several commentators have recommended that you "think twice" before you use former client confidential information.
- When using the social media or commenting in public forums, best practice is to get both current and former clients' consent in advance to reveal client confidential information. We concur with that advice.