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The Risk Manager

A quarterly newsletter by Lawyers Mutual Insurance Company of Kentucky

FALL 2010
Volume 21, Issue 4

The Social Media and Lawyer Risk Management

We lawyers tend to be gregarious and the opportunity presented by the social media on the Internet to exercise that tendency is enormous. It seems everyday there is yet another new way to get on the Internet and touch somebody. These contacts often lead to new friends and maybe even a new client or a client we did not know we had. Therein is the rub. While it is true that lawyers can have a personal life, when their social media networking spills over into professional activities they are at risk.

At the American Bar Association Spring 2010 National Legal Malpractice Conference two programs on social media risk management were presented – *A Guided Tour of Social Media** and *The Challenge Of Social Media For The Ethical Practice Of Law.***

In "*A Guided Tour*" social media was categorized with examples as:

- ***Personal:*** Facebook, Classmates.com, and MySpace
- ***Professional:*** LinkedIn, TalkBizNow, and Plaxo
- ***Legal:*** LawLink, Legal OnRamp, MH Connected
- ***Microblogs:*** Twitter, Tumblr, Jaiku, and Yammer

In "*The Challenge Of Social Media*" it was stressed that:

"Social media and social networking activities can be problematic because lawyers can

- post profiles,
- answer questions,
- add comments,
- market their professional services, and
- discuss their professional and personal lives."

The program then covered the following risk management considerations to avoid malpractice and ethics issues when using the social media:

- Don't talk about clients or their matters
- Don't talk to clients about their matters
- Know and respect the marketing-related Rules of Professional Conduct
- Avoid the Unauthorized Practice of Law
- Avoid conflicts of interest
- Don't give legal advice AKA avoid phantom clients
- Protect your identity
- Be polite and professional
- Avoid making the wrong friends
- Beware of employee social networking

** Presented by Catherine Sanders Reach, MLIS ABA Legal Technology Resource Center.*

***Materials for a Panel Discussion prepared by Simon Chester, Heenan Blaikie LLP, and Jeffrey T. Kraus, Vice President and Loss Prevention Counsel, ALAS, Inc., together with articles written by Dan Pinnington Director of practicePRO, LAWPRO's risk and practice management program.*

Since 1987

"Even if one succeeds in making a silk purse of a sow's ear, there remains the problem of what to do with a one-eared sow."

Dave Hickey

Client Files – *Risk Managing Client E-Mail*

We are seeing more and more problems with defending malpractice claims because lawyers are failing to file e-mail correspondence with a client or about a client's matter. This has resulted in the loss of key evidence supporting a lawyer's competent representation making an otherwise strong defense of a claim problematic.

The *Bench & Bar* article "The Amazing Client Electronic File" covers a lawyer's obligation to retain e-mail and e-documents relating to a representation, the ethical considerations in how a lawyer should organize and store e-mail and e-documents, and which retained e-mail and e-documents should be included in the client's electronic file that should be provided the client upon request. If you are unclear on these ethical requirements, it is recommended that you soon read the article (*Bench & Bar* May 2010, Vol. 74, No.3; available on Lawyers Mutual's Web Site at lmick.com – click on Resources, click on *Bench & Bar* Articles, select article).

What follows is a recap of the risk management considerations for client electronic files covered in the article.

Risk managing a lawyer's duty to maintain client files in a manner to competently represent a client involves:

- Implementing a file retention and disposition plan.
- Including in all letters of engagement how a client's file is managed.
- Establishing office procedures for protecting client file confidentiality.
- E-mail and e-documents must be specifically covered by each of these risk management tools.

E-mail and e-documents in file retention and disposition plans

Law firms must have a filing procedure that systematically collates retained records in a readily retrievable paper and electronic filing system format. The first step is to integrate e-mail and e-documents file identification procedures with those used to code paper files for a client by using the same identifying characteristics for both. It is key not to allow a gap in how a client's paper file and e-file are compiled and retrieved. Lawyers sometimes overlook that a client's file is not completely protected by privilege and that some parts are subject to discovery. Organize the office filing system in a way to avoid costly e-document retrieval searches because of a discovery demand or for any other reason.

> ***It is key not to allow a gap in how a client's paper file and e-file are compiled and retrieved.***

E-documents are not difficult to manage since they are primarily the electronic version of the kind of documents lawyers are used to filing. The real problem is controlling the filing, retention, and destruction of e-mail. Unlike mail that is received in a central office location, e-mail is sent and received on an individual basis and often on portable e-mail devices, laptops, and computers used outside the office. Furthermore, many firms automatically delete e-mail on a periodic schedule. It is critical that e-mail concerning a representation be at least temporarily part of the client's e-file for retention review and that automatic deletion of e-mail that should be permanently filed be avoided.

A recommended approach in accomplishing this is:

- Ensure that all substantive e-mail communications with clients is maintained in the client's correspondence file, either by printing hard copies or creating a permanent e-mail folder for client correspondence;
- Establish a protocol for ensuring that e-mails are maintained for the client file. For example, if multiple attorneys are working on a matter, assign one person on the matter to be in charge of ensuring that all appropriate e-mails are maintained in the file or create a public folder in which all client e-mail can be stored; and
- Consider deleting internal e-mails with drafts of documents that are not forwarded to the client.

Include in e-mail retention procedures the requirement that e-mail recipients record insofar as possible:

- Date and time of transmission and receipt of the e-mail;
- Author, writer, sender; and
- Identification of the recipient, other addressees, and person for whom intended.

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"When the facts change, I change my mind. What do you do, sir?"

John Maynard Keynes

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Use a letter of engagement to obtain agreement on how a client's e-file will be managed.

It is recommended that a lawyer and client reach agreement at the beginning of a representation on retention, storage, and retrieval of electronic documents in a letter of engagement by considering:

- The types of e-documents and e-mail that the lawyer intends to retain, given the nature of the engagement;
- How the lawyer will organize those documents;
- The types of storage media the lawyer intends to employ;
- The steps the lawyer will take to make e-mail and other electronic documents available to the client, upon request, during or at the conclusion of the representation; and
- Any additional fees and expenses in connection with the foregoing.

In addition consider including in the letter of engagement:

- A specific time and procedure for the client to claim his paper and e-file after the representation is concluded.
- That the file is subject to destruction if not claimed as stipulated.
- All means of communication the firm uses – fax, cell phone, e-mail, etc. – disclosing the risk of interception and providing that the client consents to these means.
- (*optional*) A condition that the firm has the choice of returning some or all of the client's file in electronic format, except for original documents.

Protecting confidentiality of client information in e-mail and e-documents.

Basic Rules: Every firm should have in place measures to protect client e-document confidentiality. This begins with basic rules on office access security, locking doors and filing cabinets, turning off computers and copy machines, memorizing passwords, and making sure that computer screens are not visible to other than firm members.

Hacker Protection: Use "firewalls" -- electronic devices and programs that prevent unauthorized entry into a computer system from outside that system.

Off-Site Access: Use a password for access to the firm's computer system by firm members working from home or out of the office. Establish encryption requirements for sensitive matters. Limit or prohibit permanent storage of e-documents on home computers, laptops, and other portable e-mail devices. Prohibit communicating confidential information over public connections. If absolutely necessary to do so, use an encryption program.

Portable and E-Mail Devices: Register all portable and e-mail devices used by firm members for firm matters. Establish procedures for prompt notification of the loss of any registered device. Confirm that the firm has the ability to wipe these devices remotely.

E-Mail: Implement written procedures for managing e-mail that protect confidentiality by covering:

- Who has access to confidential e-mail;
- How confidential multiple address messages and group distributions are to be controlled;
- How confidential e-mail is to be backed up, stored, and destroyed; and
- How people who work at home get access to the firm's computer system and send and receive confidential e-mail.

Primary sources for this item are the ABA/BNA Lawyers' Manual on Professional Conduct, Electronic Communications, 55:404 (4/30/2008); Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010, Use of Client Engagement Letters to Authorize the Return or Destruction of Client Files at the Conclusion of a Matter; MacAvoy, Espinoza-Madrigal, and Starr, Think Twice Before You Hit The Send Button! Practical Considerations In The Use Of Email, The Practical Lawyer, Vol. 54, No. 6, 12/2008; and Martin, Why You Need An Employee Policy For Electronic Information, The Practical Lawyer, Vol. 56, No.1, 2/2010.

Avoiding Fee Disputes – When Are Advance Fees Earned?

One of the surest ways to receive a malpractice claim is to get into a fee dispute with a client. One source for a problem over fees concerns advance fees and when a lawyer earns them. Kentucky Rule of Professional Conduct 1.15(e) requires that advance fees and expenses be deposited in a client trust account:

> (e) Except for non refundable fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid

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"The man who is a pessimist before 48 knows too much; if he is an optimist after it, he knows too little."

Mark Twain

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in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Comment (5) to the Rule emphasizes this requirement as follows:

> Paragraph (e) requires that when a lawyer has collected an advance deposit on a fee or for expenses or a flat fee for services not yet completed, the funds must be deposited in the trust account until earned, at which time they should be promptly distributed to the lawyer. The foregoing shall not apply to non-refundable fees. At the termination of the client-lawyer relationship the lawyer must return any amount held that was not earned or was an unreasonable fee, as provided by Rules 1.5 and 1.16(d).

The issue of unethical conversion of client funds is raised if a lawyer transfers advance fees to an operating account before they are earned. Conversely, if earned advance fees are not promptly moved to an operating account, the issue of comingling client funds with firm funds is raised. Unfortunately, there is no available Kentucky authority on how to risk manage this dilemma. To fill the gap what follows is a paraphrase of the well-reasoned D.C. Bar Association Ethics Opinion 355 (June 2010). It contains helpful guidance on determining when advance fees are earned that should be useful for Kentucky lawyers.

General guidance for managing advance fees:

- A lawyer must deposit a flat or fixed fee paid in advance of legal services in the lawyer's client trust account.
- Such funds must remain in the lawyer's client trust account until earned.
- The lawyer and client may agree concerning how and when the attorney is deemed to have earned some, or all, of the flat fee. Such an agreement must bear a reasonable relationship to the anticipated course of the representation and must avoid excessive "front-loading."
- A written agreement or a writing evidencing the agreement is strongly recommended but not mandatory.
- In the absence of an agreement with the client with milestones by which the lawyer earns portions of the fixed fee, the lawyer has the burden of establishing that advance funds transferred to the lawyer's operating account were earned.

A structure for lawyer and client agreement on when advance fees are earned:

Earned advance fees may be measured by milestones based upon the passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and the client, provided that there is no extreme front loading of payment milestones (citing *In re Mance*, 980 A.2d 1196 (D.C. 2009) at 1204).

Examples of milestones are:

- Agreement on withdrawals based on the application of an hourly rate to the lawyer's efforts.
- Withdrawals timed to events in a representation, e.g.,
  - o Completion of discovery,
  - o Hearings or the setting of a trial date, or
  - o Completion of specific tasks, such as witness interviews, filing of motions, or, in a non–litigation matter, the completion of specified draft documents.
- Setting alternative milestones to address uncertainties about the future course of a representation.

Other considerations:

- The agreement may contain language reflecting that the lawyer will earn the entire fee at the conclusion of a representation even if certain specified milestones have never been reached.
  - o For example, a lawyer who persuades a prosecutor to dismiss criminal charges in advance of trial could earn the entire fee, even if the lawyer and client had specified the trial as a milestone in their agreement.
- The milestones and approaches used should be tailored to the type of engagement. Those suitable for a criminal matter may not be appropriate to use for a real estate transaction or the drafting of a will.

Advance fee withdrawals when there is no agreement:

- Rule 1.15 requires a lawyer to withdraw from a trust account funds that have been earned even when there is no agreement. A lawyer who has charged a client, for example, two thousand dollars for the preparation of an estate plan has under most circumstances earned some portion of the fee when the lawyer sends the client a set of draft documents. A lawyer in a criminal matter has likewise ordinarily earned some amount when the lawyer appears for the trial date prepared to present a defense.

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"The advice of the old is like the winter sun: it sheds light, but does not warm us."

French Saying

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- In the absence of an agreement with the client, the burden is on the lawyer to demonstrate that the amount withdrawn from the client trust account was earned. Under such circumstances, the lawyer's conclusion as to what portion of a flat fee was earned must be reasonable. Further, the lawyer should give notice to the client of the withdrawal so that the client will have an opportunity to review the amount of the withdrawal, question the lawyer and perhaps contest it.

ABA House of Delegates Approves New Model Rules for Client Trust Account Recordkeeping

In August 2010 the ABA adopted the Model Rules for Client Trust Account Records, replacing the Model Rule on Financial Recordkeeping. This change is important for Kentucky lawyers because the Model Rule on Financial Recordkeeping is cited in the comments to Kentucky Rule of Professional Conduct 1.15, Safekeeping Property.

The primary reason for the new Model Rules for Client Trust Account Records was explained in the report to the House of Delegates as follows:

> There have been many changes in banking laws and practices since the adoption of the Model Rule on Financial Recordkeeping. The Check Clearing for the 21st Century Act ("Check 21"), 12 U.S.C. §5001 *et. seq.*, was adopted in 2003 and allows banks to use electronic images of checks as a substitute for canceled checks. In addition, many merchants now convert paper checks into electronic images and the original checks are often destroyed. Most jurisdictional rules, and the current ABA Model Rule on Financial Recordkeeping, require lawyers to maintain the original canceled checks. Accordingly, lawyers are inadvertently running afoul of their jurisdiction's rules of professional conduct. This resolution eliminates this danger for lawyers by defining what records a lawyer must maintain to satisfy the "complete records" requirement of Rule 1.15 and how those records be maintained.
>
> Along with changes to banking practices through "Check 21," methods of banking have changed for lawyers and their clients. Electronic banking, and specifically, wire transfers or electronic transfers of funds have become more prevalent. This form of banking presents a special set of problems for lawyers with trust accounts because there is often no discernable paper trail to the transaction. Records of these transactions can be found as part of the lawyer's monthly statement or through the lawyer's online banking system, but banks do not provide specific confirmation of electronic transactions as a matter of course. Lawyers must be proactive in securing the necessary records for these transactions.

Key changes in Rule 1 on required financial records are:

> (g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;
>
> (h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

The Rule comments concerning electronic records are especially helpful:

> [2] Rule 1(g) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of five years after termination of each legal engagement or representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12 67 U.S.C.§5001 *et. seq.*, recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall

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"One of the lessons of history is that nothing is often a good thing to do and always a clever thing to say."

Will Durant

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be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

[3] The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the inter-bank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds.) In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of Rule 1(h).

The new Model Rules cover law firm dissolution, sale of a practice, and make it clear that electronic filing of required records is permissible in "electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced."

It seems reasonable to conclude that the new ABA Model Rules for Client Trust Account Records by implication are incorporated into Kentucky's Rule 1.15 Comments and are appropriate guidance for Kentucky lawyers. By any measure these Rules are a much-needed update for client trust account management and are to be commended for their thorough and helpful instruction on ethically maintaining client financial information. We urge you to go to http://www.abanet.org/cpr/clientpro/home.html and download the new Model Rules to use in your firm's financial management. If in doubt about their application to your situation, call the KBA Ethics Hotline.

Note: For a quick refresher on client trust account professional responsibility we suggest "Client Trust Account Principles & Management for Kentucky Lawyers, Second Edition, 2010." This 48-page guidebook covers the fundamentals of client trust account management and includes the complete text of key KBA Ethics Committee Opinions on client trust accounts. It is yours for the asking by contacting Nancy Meyers at Lawyers Mutual (502-568-6100 or 800-800-6101). It is also available on our Website at lmick.com – click on Resources.