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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

MISSED STATUTES OF LIMITATION, DOG CASES, AND NOT KNOWING WHAT YOU ARE DOING

Don't Be A Time Optimist!

There is a disturbing increase in claims for missed time limitations, both judicial and administrative. When a case dispositive time limitation is missed there is little the negligent lawyer can do except hope there were no damages – not likely. Reasons for the missed limitations include inadequate docket control systems, failure to properly use a docket control system, dog cases, and not knowing what you are doing.

DOCKET CONTROL SYSTEMS

One of the best risk management checklists for calendar and docket control is offered in the *Risk Management Handouts* of Lawyers Mutual of North Carolina:

- **Docket czar.** Appoint one staff member as docket control coordinator.
- **Statute of limitation**. A new client cannot be accepted and a new file cannot be opened on any plaintiff litigation until a statute of limitation date has been established. The new matter/client intake sheet should contain a line for the statute of limitation date, with a signature line next to it. Each date entered on the sheet should be verified by the responsible attorney and initialed. Copies of the sheet should then be given to the person responsible for the central calendar and to the responsible attorney. The system should provide ticklers at least 180, 90, 60 and 30 days before the statute of limitation date. When you have a client whose injury occurred in another state [e.g. a car accident that took place in Virginia or Tennessee], be sure to determine the correct statute of limitation for that state before entering the deadline into your system.

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FAILURE TO INFORM CLIENT OF SETTLEMENT OFFER COSTS LAWYER $84,000 IN FEES

Virginia lawyer Francis brought a federal Fair Debt Collection Practices Act suit against two lawyers that represented a creditor of his client. When a settlement offer from the defendants did not include attorney's fees, Francis decided not to communicate it to his client. If he had, the settlement would have been accepted and concluded the case. The court found that the Francis' failure to consult with his client, and other unreasonable behavior, amounted to conduct that multiplied the proceedings "unreasonably and vexatiously" in violation of 28 U.S.C. § 1927. This was sufficient to warrant sanctions and award of attorney's fees and cost to the defendants of $84,752 [*Blowers v. Lerner*, Case No. 1:15-cv-889-GBL-MSN [E.D. Va. Aug. 31, 2016]].

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EDITOR'S NOTE: *The quotations in this issue are from William H. Janeway's "Doing Capitalism in the Innovation Economy." Lawyers often represent clients with start-ups. The quotes are intended to alert you to how risky they are in this expert's opinion. A prime risk management principle is that it is often prudent to avoid matters that are not within your usual practice. Be careful out there!*

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TIME OPTIMIST

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- **Statute of limitation follow-up**. One system is to have one attorney in the firm assigned the responsibility for following up on all statute dates. The follow-up attorney should receive a printout each week of upcoming statutes. This attorney should require proof that the suit has been filed such as a copy of the filed complaint. Firms have been stung by malpractice claims because one attorney has covered up a missed statute in hopes of later correcting the situation.
- **Procedure for incoming mail**. Each piece of incoming mail should be date-stamped and reviewed for dates that need to be calendared, such as deposition dates, tax payment dates, etc. Those dates should then be placed into the central calendar. The clerk reviewing the mail should initial each date calendared for accountability. After the dates are recorded in the central calendar, the mail should then be distributed to the responsible attorney or staff member. The attorneys should calendar all relevant dates in their personal calendars.
- **Automatic review dates**. After attorneys have completed a specific event in a particular file or matter, they should automatically place a follow-up date in the calendar. This date may be every 30, 60 or 90 days. This system ensures that no file or matter will go unattended for a long period of time.
- **Redundancy**. Each critical date must be entered in at least two diaries maintained by separate individuals. In the case of a sole practitioner, the dates can be maintained by the attorney and her secretary. [EDITOR'S NOTE: *Sole practitioners should also program office computers and mobile devices to automatically show critical dates the first thing each morning.*] In the case of a larger firm, the dates can be maintained in a central computer system and in the individual diary of each attorney who is responsible for a particular matter.
- **Daily and weekly deadline lists**. Each day the coordinator will distribute the docket entry forms calendared for that day. The coordinator can prepare and distribute weekly calendar listings of all deadlines due within the week.
- **Advance warnings**. The docket control coordinator is responsible for setting up the advance warning dates and putting the docket entry forms into the system. Two advance warnings are recommended for deadlines of 30 days or sooner [for example, two weeks/one week or two weeks/two days]. This may vary if your deadlines are more than 30 days away.
- **Everyone has input.** The system will succeed only if everyone participates and makes it work.

In addition, we recommend this procedure for manually risk managing client files to avoid missing time limitations:

- No new matter is opened without researching statute of limitations periods. Applicable statutes should be noted in the file in writing by a lawyer and a copy of the statute included in the file. If there are none, a note for file to that effect should be made.
- Stamp on the front of the file applicable limitations periods and set reminder notice dates in the firm's docket system providing ample lead-time to meet limitations periods.
- The responsible lawyer, after meeting a deadline, should record the next deadline on the file and set a reminder notice in the docket system.
- Assign an alternative lawyer or staff member responsibility to see that a response is made to a reminder notice if the responsible lawyer is unavailable or fails to respond.

DOG CASES

Dog cases are those litigation cases lawyers take knowing they are weak, but hoping they will develop into a worthwhile undertaking. As so often happens they do not improve with investigation and linger on as an active case going nowhere. Too often lawyers then procrastinate on practicing the case with the result they suddenly find that a time limitation was missed.

The case for the lawyer that was a dog case now becomes a lucrative malpractice claim for the client. One experienced Kentucky lawyer advises: "The best approach is to take your

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What chance does a start-up have?

"AT **ANY POINT IN TIME,** THERE IS MORE TECHNOLOGY AVAILABLE THAN ANYONE KNOWS **WHAT TO DO WITH..**"

"**MERELY CONTRIBUTING** TO THE STOCK OF AVAILABLE TECHNOLOGY CREATES **NO ECONOMIC VALUE.**"

William H. Janeway

TYPICAL EVENTS TO CALENDAR*

LITIGATION

- ❑ Statutes of limitations
- ❑ Court appearances
- ❑ Trials
- ❑ Judgment renewals
- ❑ Pleading due dates
- ❑ Discovery deadlines, replies to interrogatories, requests for admission, depositions, discovery cut-off dates
- ❑ Due dates for appellate briefs and arguments, notices of appeal and records on appeal
- ❑ Returns on service
- ❑ Briefs and memoranda due dates
- ❑ Settlement conferences
- ❑ Motions
- ❑ Pre-trial conferences
- ❑ Receipt of investigative materials
- ❑ Mediation, arbitration and other alternatives to trial

REAL ESTATE

- ❑ Closing dates
- ❑ Survey and inspection deadlines
- ❑ Financial disbursement dates
- ❑ Rescission dates
- ❑ Environmental compliance deadlines
- ❑ Lender-imposed deadlines
- ❑ Deadlines for zoning cases, board of adjustment matters and other applications for permits or exceptions
- ❑ Recordation deadlines
- ❑ Follow-up to receive cancelled instruments and recorded documents

OTHER CLIENT MATTERS

- ❑ Tax return due dates
- ❑ Note payment due dates
- ❑ Renewals of leases and licenses
- ❑ Renewals of insurance
- ❑ Due dates in probate and estate proceedings such as inventory and appraisal dates, hearing dates and due dates for tax returns
- ❑ Appearances in bankruptcy proceedings
- ❑ Due dates in corporate and security matters
- ❑ Stockholder and director meetings
- ❑ Filing corporate documents
- ❑ Corporation renewal dates
- ❑ Renewal dates for copyright, patent and trademark status
- ❑ Review dates for wills and trusts [long-term obligations]
- ❑ Labor contract expiration dates
- ❑ EEOC deadlines
- ❑ Family law matters
- ❑ Workers' compensation deadlines
- ❑ Receipt of information and documents from clients
- ❑ File purging and destruction

OFFICE DEADLINES

- ❑ Client appointments
- ❑ Client follow-ups
- ❑ Periodic file reviews
- ❑ Staff meetings
- ❑ Renewal/reissue of malpractice and other insurance
- ❑ Renewal of office lease
- ❑ Renewal or review of equipment leases
- ❑ Partner/shareholder meetings
- ❑ Review dates for associate and staff evaluations
- ❑ Bar dues
- ❑ Professional commitments, such as dates of bar meetings
- ❑ Subscription expirations for professional publications
- ❑ Filing CLE
- ❑ Attending CLE
- ❑ Discretionary deadlines [doctor's appointments, PTA, recreational activities, luncheons, vacations, etc.]

* *From Calendar And Docket Control, Risk Management Handouts of Lawyers Mutual of North Carolina*

How much skin in the game does my entrepreneur client have?

"RISK BEARING IS NO PART OF THE ENTREPRENEUR FUNCTION. IT IS THE CAPITALIST WHO BEARS THE RISKS ... THE ENTREPRENEUR LOSES OTHER PEOPLES MONEY." *William H. Janeway*

TIME OPTIMIST

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medicine. Quit procrastinating, do the discovery, set the case for trial, try the case, lose the case; i.e., clean up your own mess. After all, you took the case!" All we can add to this good advice is to meticulously use your docket control system to keep up with all limitations periods to protect yourself from the dog cases you never should have taken.

NOT KNOWING WHAT YOU ARE DOING

The most important word in the practice of law is competence, i.e., knowing what you are doing. Avoiding missing time limitations depends on a lawyer's competence in accurately identifying limitations periods, recording them in a docket control system, and then applying the docket controls with no exceptions. Identifying limitations periods is usually a straightforward matter of researching the applicable statutes, regulations, and rules. What follows are examples of how lawyers can trip over this seemingly easy task.

DO NOT USE SECONDARY AUTHORITY TO RESEARCH LIMITATIONS PERIODS.

Some brave souls publish statutes of limitations practice guides. Assuming these guides are accurate in the first place, they are virtually out of date the moment they are published. Limitations periods are subject to change that secondary sources are hard put to timely supplement. Never use secondary authority or prior case files to identify limitations periods – always go to the governing statute, regulation, or rule. Always check to be sure there are no current or prospective changes to these authorities.

DO NOT OVERLOOK CASE GEOGRAPHY.

In Kentucky we understandably focus on Kentucky law when representing a Kentucky client. This focus, however, has caused more than a few lawyers to apply Kentucky limitations periods when the facts show that another state's limitations apply. If the client's cause of action accrued in another state, that state's limitations period control if shorter than Kentucky's [see KRS 413.320]. Seven states border on Kentucky, each with their own limitations periods. A Kentucky lawyer's chance of having a Kentucky client with a case arising in one of those states is good. Be sure you know your case geography and where and when the cause of action accrued. Carefully research limitations periods as well as the "borrowing" statutes of the states involved [*See Abel v. Austin*, 411 S.W. 3d 728 [2013]].

DO NOT ASSUME ANYTHING WHEN IDENTIFYING LIMITATIONS PERIODS.

Case in point: A California law firm dodged a bullet when a client advised the firm that it was suing for malpractice. The firm advised the client that it must withdraw as counsel and that the firm's attorney-client relationship with the client "is terminated forthwith." The firm then asked that the client advise immediately where to send the client's files. The client responded by telling the firm to send the files to a successor counsel. This was done seven days later. The successor counsel then violated the one-year statute of limitations for filing a malpractice case against the former firm by one day. Successor counsel "assumed" the seven days it took to forward the file tolled the statute of limitations. The court ruled that the administrative function of transferring client files to successor counsel was not legal services:

> If client actually believed that [*the former*] firm … would continue to provide legal services by transferring its files to replacement counsel, its belief was unreasonable as a matter of law. [*The former*] firm made clear in its email that it would not provide further legal services. The transfer of the files was a clerical, ministerial activity

The Court then added this zinger:

> The record does not show why [the successor] firm … waited until what it believed was the "eleventh hour" to file the malpractice action. We agree with the trial court that it waited too long. *GoTek Energy, Inc.,v. SoCal IP Law Group, LLP*, 2016 BL 339640, Cal. Ct. App., 2d Dist., No. B266681, 10/12/16

Don't be a "time optimist." Time is usually not on a lawyer's side. It is astonishing how many lawyers optimistically wait until the last day to file an action, appeal, or request for reconsideration before a time limitation period is violated. In *GoTek Energy* the client is in good shape – it now has an excellent malpractice claim against successor counsel.

What could go wrong?

"I LEARNED MORE THAN ONCE THAT START-UPS SUCK."

"DOING A START-UP IS A LAST RESORT."

"WILL THE PRODUCT LIGHT UP WHEN YOU PLUG IT IN?"

"WILL ANYONE PAY FOR IT IF IT DOES?"

William H. Janeway

FAILURE TO INFORM CLIENT OF SETTLEMENT OFFER COSTS LAWYER $84,000 IN FEES

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This case gives us the opportunity to stress how important it is to promptly communicate settlement offers to a client. The Kentucky Supreme Court in *Clark v. Burden*, 917 S.W.2d 574 [1996], wrote:

> With respect to compromise or settlement of a claim, final decision-making authority rests with the client. Kentucky Rules of Professional Conduct provide that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter" [SCR 3.130-1.2[a]] and the rules require a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" [SCR 3.130-1.4[b]].

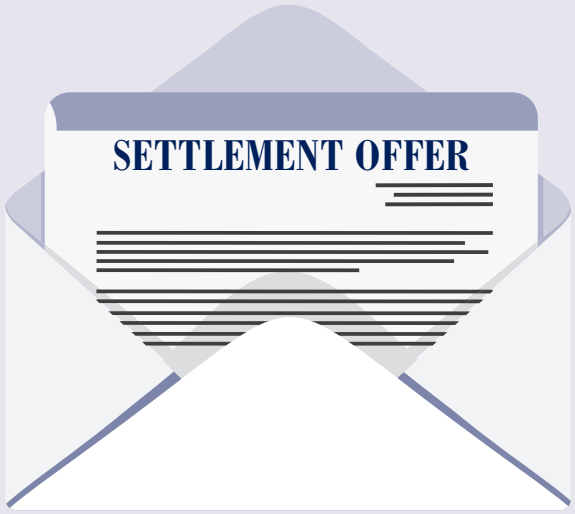
Additionally, Comment 2 to Rule 1.4 provides:

> For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously communicated to the lawyer that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.

Our long-standing risk management advice for settlements is:

- Do not encourage false or unreasonable expectations. Compromise is hard enough to achieve with reasonable expectations.
- Discuss settlement with the client throughout the representation. It is not a sign of lawyer weakness to discuss reality with a client.
- Take plenty of time to explain the advantages and disadvantages of a legitimate offer to the client. Since settlement involves compromise, the client must process some amount of disappointment. This is easier for a well-counseled client.
- Keep your client involved in settlement negotiations from start to finish. In view of *Clark v. Burden* getting the client's decision in writing is the only safe way to consummate a settlement agreement. Document thoroughly all settlement negotiations, client emails, and client discussions about settlement.

WITH RESPECT TO COMPROMISE OR SETTLEMENT OF A CLAIM, FINAL DECISION-MAKING AUTHORITY RESTS WITH THE CLIENT.



- Recognize that settlement of a divorce case does not carry with it the same finality typical of other settlements. A divorce settlement is not the end of the matter for the client — rather a new beginning. Future consequences of faulty divorce settlements will reveal a lawyer's negligence with a vengeance. Many decisions involve divorce settlements that did not adequately cover taxation, pensions, IRAs, and valuation of real estate.
- Avoid settlement remorse malpractice claims by **always** getting the client's decision in some form of writing, even if it is hand-written on a yellow pad during trial.

If you are interested in more analysis of risk managing settlements go to **LMICK.com**, click on **Resources**, click on **Subject Index**, go to **Negotiation and Settlement**, and select the article "Unsettling Settlements."

Laws of venture capital:

"NO NEWS IS EVER GOOD NEWS."

"DON'T EXPECT WHAT YOU DON'T INSPECT." *William H. Janeway*

KEEPING UP WITH SOCIAL MEDIA RISK MANAGEMENT

One of the benefits of the nearly universal use by the states of the ABA Rules of Professional Conduct is that other state ethics opinions now offer useful information for Kentucky lawyers. Two recent examples of this are D.C. Bar Ethics Opinion 370, *Social Media I: Marketing and Personal Use* [11/16]; and Ethics Opinion 371, *Social Media II: Use of Social Media in Providing Legal Services* [11/16]]. This article highlights some of the key information in these opinions. Both include comprehensive treatment of the ethics and malpractice risks lawyers face when using the social media and are based on rules very similar to the Kentucky Rules of Professional Conduct.

D.C. BAR ETHICS OPINION 370, *SOCIAL MEDIA I: MARKETING AND PERSONAL USE*

For purposes of this opinion the committee identified the following personal use activities that lawyers may engage in on social media and covers each in detail:

1. Connecting and communicating with clients, former clients or other lawyers on social networking sites;
2. Writing about an attorney's own cases on social media sites, blogs or other internet-publishing based websites;
3. Commenting on or responding to online reviews or comments;
4. Self-identification by attorneys of their own "specialties," "skills" and "expertise" on social media sites;
5. Reviewing third-party endorsements received by attorneys on their personal or law firm pages; and,
6. Making endorsements of other attorneys on social networking sites.

One of the more interesting aspects of the opinion is that the committee posited for the first time the risk of a positional conflict of interest when a lawyer takes a position on social media that could be adverse to the interest of a client. Traditionally, positional conflicts of interest apply only to positions taken in different tribunals — not on a lawyer blog.

THE KEY RISK MANAGEMENT PRINCIPLE IS THAT LAWYERS ABSOLUTELY MUST KNOW AND UNDERSTAND THE PRIVACY RULES OF ANY SOCIAL MEDIA SITE AND ITS DATA COLLECTION PRACTICES.

Nonetheless, good risk management is to avoid the problem by not taking a contrary opinion to a client's interest on a blog or other social media.

The committee noted another potential conflict of interest risk by observing that "online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients."

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Is there enough cash?

"THE DEEP LESSON I LEARNED ... WAS TO UNDERSTAND THE INTERNALS OF A BUSINESS BY FOLLOWING THE CASH."

"THE LAW OF THE EQUITY MARKETS: "NO ONE KNOWS ENOUGH, AND EVERYONE AT SOME LEVEL KNOWS THAT ABOUT HERSELF AND EVERYONE ELSE."

William H. Janeway

SOCIAL MEDIA

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Opinion 370 surfaced for the first time the serious risk of LinkedIn's "Imported Contact" feature for violating client confidentiality, creating conflicts of interest, and other problems:

> Most social networking sites require an e-mail address from the user as part of the registration process. Then, once the social networking site is accessed by a lawyer, the site may access the entire address book [or contacts list] of the user. Aside from any data collection purposes, this access allows the social media site to suggest potential connections with people the lawyer may know who are already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer.
>
> However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts.

The key risk management principle is that lawyers absolutely must know and understand the privacy rules of any social media site and its data collection practices.

EDITOR'S NOTE• *Kentucky has a much stricter rule on advertising specialization than D.C.[See SCR 3.130[7.40]. Accordingly, disregard paragraph II D of Opinion 370 on specialization.*

D.C. BAR ETHICS OPINION 371, *SOCIAL MEDIA II: USE OF SOCIAL MEDIA IN PROVIDING LEGAL SERVICES*

Relying on over 19 other jurisdiction's analyses of social media issues, this opinion provides a comprehensive review of the major issues. Space limitations preclude discussing each, however, the following is an overview of what the opinion covers. We urge you to read the opinion that is readily available using Google.

- What lawyers must understand about social media
- Letters of engagement and social media
- Lawyer review of client social media
- Advising about adversary review of client social media
- Document preservation
- Substantive regulatory risks
- Investigation of social media of adverse parties, counsel, and experts
- Contacting represented persons and unrepresented persons
- Pretexting
- Inadvertent disclosure
- Social media of jurors, fact witnesses and other sources of facts
- Social media of judges, arbitrators, and regulators
- Supervision of lawyers and staff use of social media

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Is there enough cash?

"DOES THE START-UP HAVE 'CASH CONTROL' – ASSURED ACCESS TO **SUFFICIENT CASH** IN TIME OF CRISIS TO BUY THE TIME NEEDED TO UNDERSTAND THE UNANTICIPATED, AND **SUFFICIENT CONTROL** TO USE THE TIME EFFECTIVELY, IS THE JOINT HEDGE AGAINST THE **INESCAPABLE UNCERTAINTIES** OF ECONOMIC AND FINANCIAL EXISTENCE?"

William H. Janeway

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RISK MANAGING DISPUTED SHARED FEE DIVISION

IT IS NOT UNUSUAL for lawyers not in the same firm when dividing a shared fee to disagree on the division of the proceeds. When one lawyer receives earned fees in which the other lawyer has an interest that is disputed, how should the lawyer holding the fees safeguard them until the dispute is resolved?

The ABA in Formal Opinion 475, *Safeguarding Fees That Are Subject to Division With Other Counsel* [12/7/2016] provides an answer to this question by equating the other lawyer to a third person for purposes of Model Rule 1.15[a] and [d], *Safeguarding Property*. The opinion makes it clear that this is the only context in which the other lawyer has the status of third party for purposes of the Rules of Professional Conduct.

From this designation as a third party it follows that the disputed funds should be treated in the same manner as disputed funds with a client. The opinion includes this guidance:

- The receiving lawyer should deposit the funds in which co-counsel holds an interest in an account [typically a trust account] separate from the lawyer's own property.
- The lawyer who receives the earned fees subject to a division agreement must promptly notify the other lawyer who holds an interest in the fee of receipt of the funds, promptly deliver to the other lawyer the agreed upon portion of the fee, and, if requested by the other lawyer, provide a full accounting.
- If there is any dispute as to the interest of the receiving lawyer and the other lawyer with whom the receiving lawyer is dividing the fee, the receiving lawyer must keep the funds separate from the lawyer's own property until the dispute is resolved.

EDITORS NOTE: *The Kentucky Rule of Professional Conduct 1.15 is compatible with Model Rule 1.15 in all pertinent parts for the purposes of the ABA's guidance on this issue.*