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The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

September 2014 | Volume 19 | Issue 4

Named by *U.S. News - Best Lawyers* as the 2014 "Law Firm of the Year" in the area of Ethics and Professional Responsibility Law, Hinshaw is devoted to representing and advising lawyers and law firms on all aspects of the "law governing lawyers."

Attorneys' Review of Jurors' Social Media Accounts — Ethical Jury Research — Considerations and Obligations That Arise When Conducting Jury Research Online

American Bar Association Standing Committee on Ethics and Professional Responsibility; Formal Opinion 466, "Lawyer Reviewing Jurors' Internet Presence"

Risk Management Issue: What may a lawyer do, within the ethics rules, to review the electronic social media presence and posts of jurors?

The Opinion: On April 24, 2014, the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "Committee") submitted a formal opinion on whether a lawyer may review a juror or potential juror's internet presence, and the ethical considerations and obligations that arise from the lawyer's review.

The Committee first distinguished between websites that the general public can access, which it labeled "websites," and social media sites that allow account owners to restrict access and receive visitor notifications, which it labeled "ESM" (electronic social media). The Committee addressed three types of lawyer review: (1) review of a juror's website or ESM where the lawyer does not make an access request and without the juror becoming aware of the review; (2) review where the lawyer requests access to the juror's website or ESM; and (3) review where the lawyer does not request access to the juror's website or ESM, but the juror becomes aware of the research through a notification feature of the website or ESM. The Committee performed its analysis pursuant to ABA Model Rule 3.5, under which a lawyer may not communicate with a potential juror leading up to trial or any juror during trial unless authorized by law or court order.

The Committee first determined that when a lawyer reviews a juror's website or ESM without making an access request, and the juror is not aware of the review, the lawyer has not violated Rule 3.5. Comparing this type of review to the "world outside of the Internet," the Committee equated it to "driving down the street where the prospective juror lives to observe the environs in order to glean publically available information that could inform the lawyer's jury-selection decisions." The Committee cited to several jurisdictions that came to the same conclusion, including Oregon, New York, Kentucky, New Hampshire, and California, and did not note any jurisdictions that came to the opposite conclusion.

The Committee next determined that when a lawyer sends an access request to a juror to view the juror's website or ESM, the lawyer has violated Rule 3.5. The Committee reasoned that such a request is akin to asking the juror for information the juror has not made public, and equated it to "driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house." The Committee referenced certain jurisdictions in agreement, including Oregon, New York, and Missouri, but noted others have ruled such communications valid provided that no misinformation is used when making the request, including Pennsylvania and New Hampshire.

Lastly, the Committee determined that when a lawyer does not request access but reviews a juror's website or ESM, and the website or ESM notifies the juror of the lawyer's identity and review, the lawyer has not violated Rule 3.5. The Committee discussed two recent ethics opinions, Formal Opinion 2012-2 by the Association of the Bar of the City of New York Committee on Professional Ethics, and Formal Opinion 743 by the New York County Lawyers' Association Committee on Professional Ethics, both of which concluded that such a request constituted an impermissible communication for purposes of Rule 3.5. Both opinions were based on the reasoning that the request may influence the juror's actions, as the juror would be aware of the fact that she had been researched. The Committee, however, disagreed with these opinions, reasoning that the lawyer is not communicating

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with the juror — the website or ESM is. The Committee equated this type of review to "a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street." Such a review would not result in an impermissible communication with the juror, because the lawyer did not make the communication and there would be no violation of Rule 3.5.

After making its determinations, the Committee remarked on further ethical considerations that arise when a lawyer reviews a juror's website or ESM. The Committee looked to ABA Model Rule 3.3, under which a lawyer has an affirmative duty to take remedial measures to prevent a person from engaging in criminal or fraudulent conduct, including, "if necessary, disclosure to the tribunal." The Committee advised that if a lawyer sees what may be the juror's impermissible communication about the case or improper personal research, a court may consider this criminal or fraudulent conduct by the juror, which gives rise to the lawyer's duty to take reasonable remedial measures including, if necessary, disclosure. The lawyer's obligation will depend on the lawyer's assessment of the juror's conduct.

Risk Management Solution: This opinion makes evident that jurisdictions have come to different conclusions when confronted with a lawyer's review of a juror's online presence, some concluding that a lawyer's access request to review a juror's social media violates Rule 3.5, some concluding that it does not. Lawyers should not engage in online jury research without first checking their jurisdiction's ethical opinions and case law to determine if that jurisdiction has hard and fast rules regarding a lawyer's review of a juror's social media accounts. Also, while ABA advisory opinions are not binding and are for guidance only, this opinion can help answer these questions if a lawyer's jurisdiction has not issued an opinion on the subject.

It is also important for lawyers to understand the end-user agreements of social media sites, which may determine whether reviewing a juror's page will notify the juror of the lawyer's identity and review. For example, Facebook currently does not notify a user of another user's review of her profile, but LinkedIn may. Social media technology is constantly changing and lawyers should stay abreast of the technology to ensure compliance with the ethical rules.

In-Firm Privilege — Requirements for Creation of Attorney-Client Privilege for Communications With Law Firm General Counsel — Fiduciary Exception

Crimson Trace Corp. v. Davis Wright Tremaine LLP (2014) 355 Or. 476 (May 30, 2014)

Risk Management Issue: Are communications between firm's lawyers and the firm's in-house general counsel regarding actual and potential conflicts of interests between the firm and a former client protected by the attorney-client privilege?

The Case: Law firm Davis Wright Tremaine LLP (DWT) was sued for legal malpractice and breach of contract, relating to DWT's representation of Crimson Trace Corporation (CTC) in patent prosecution, and separately, in patent infringement litigation, against LaserMax. In the patent litigation, LaserMax asserted counterclaims, challenging the validity of certain of CTC's patents, arguing that they were invalid in part due to work done by one of the DWT lawyers.

During the course of DWT's representation of CTC, the DWT handling attorneys consulted with DWT's in-house counsel relating to several issues potentially impacting ethics issues and/or the quality of DWT's representation. Eventually, CTC stopped paying DWT, unhappy with the legal services. During this time period, CTC's CEO advised the DWT handling attorneys that CTC was contemplating a malpractice suit. DWT continued to bill CTC for small amounts of work done in the LaserMax litigation up until the time CTC actually filed suit for legal malpractice and breach of contract.

In the malpractice litigation, CTC requested production of communications between and among DWT attorneys that related to discussion of possible conflicts while DWT was still representing CTC. DWT resisted, asserting the attorney-client privilege and work-product protection over these materials.

The trial court granted CTC's motion to compel in part finding that, while the privilege existed, a fiduciary exception to the attorney-client privilege compelled their disclosure. The trial court explained that the firm's duties of candor, disclosure, and loyalty to CTC precluded the firm from asserting the privilege to shield the communications. As the trial court described it, DWT's claim of privilege gave way to its "paramount" duties to CTC.

The Supreme Court of Oregon reversed the order to compel. Interpreting Oregon Evidence Code (OCE) Rule 503, Oregon's attorney-client privilege, the Court noted the privilege could be asserted if three requirements were satisfied: 1) the communication must be between a client and its lawyer; 2) the communication must be confidential, and 3) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. The Court rejected CTC's contention that a fourth requirement must be met — namely, that the existence of an attorney-client relationship depended on the reasonable expectations of the parties.

CTC argued DWT's attorneys could not have reasonably expected that it could have an in-firm attorney-client relationship that was in conflict with a current client, because the ethics rules prohibit an adverse representation against a current client. The Court rejected CTC's argument, noting OEC Rule 503 contains no such language. The Court further found where the lawyer and client mutually agree that the relationship has been formed, as is the case between a firm's in-house general counsel and the law firm attorneys, the expectations of any other client are irrelevant.

Turning to the communications at issue, and the three factors set forth in OEC Rule 503, Oregon law recognized that an organization may be a client of its own in-house general counsel. The Court noted that the trial court's finding that the privilege would apply but for the fiduciary exception was an implicit finding that the DWT handling attorneys consulted with a lawyer to obtain legal advice. The trial court also expressly found that the DWT attorneys intended for their in-firm communications to be confidential, thus meeting each of the requirements in OEC Rule 503.

The Court stated that the fiduciary exception is a judicially created rule that originated in trust cases and is not among the five exceptions found in OEC Rule 503. The general rule behind the fiduciary exception is that a trustee who obtained legal advice concerning the administration of the trust was required to disclose that advice to beneficiaries of the trust. The attorney-client privilege did not apply in that circumstance due to the attorney's fiduciary duties to the beneficiaries, for whose benefit the advice was presumably obtained. There was no evidence that the legislature that adopted OEC Rule 503 had any intention of including an additional (fiduciary) exception to the privilege, and the Oregon Supreme Court declined to adopt a new exception in this case.

The Court also noted, and rejected, CTC's effort to conflate other obligations under RPC 1.6 with the "separate issue" of the scope of the attorney-client privilege, indicating that it was important to distinguish between ethical obligations and evidentiary privileges. OEC Rule 503 was intended to contain an exhaustive list of exceptions to the attorney-client privilege and does not concern the broader ethical implications of attorney confidentiality.

Risk Management Solution: This case adds Oregon to the recent trend of jurisdictions acknowledging and supporting the application of an attorney-client privilege for in-firm communications between law firms and their in-house general counsel, irrespective of conflicts issues, and rejecting a fiduciary exception to the attorney-client privilege. *See e.g. St. Simons Waterfront, LLC v. Hunter, MacLean, Exley & Dunn, PC*, 293 Ga 491, 425, 746 SE2d 98, 105-106 (2013); *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 716, 991 NE2d 1066, 1076 (2013); *Garvey v. Seyfarth Shaw, LLP,* 966 NE2d 523, 536 (Ill. App. 2012). These cases are a welcome answer to the question of the discoverability of such in-firm consultations.

Engagement Letters — Enforceability of Arbitration Clauses — Finding of Unconscionability

Feacher v. Hanley, 2014 WL 119382 (D. Utah January 13, 2014)

Risk Management Issue: May lawyers establish binding agreements to arbitrate their clients' disputes by including mandatory arbitration provisions in their engagement letters or retainer agreements?

The Case: In April 2012, the plaintiff clients retained the law firm for assistance in obtaining a home loan modification. The law firm e-mailed a fee and representation agreement (the "Contract"), to the clients,and gave the clients 48 hours to sign and return it. One of the attorneys at the law firm told the clients that the Contract outlined everything the parties had discussed. The clients signed the contract without reading it, and faxed it back to the law firm.

Despite the fact that the clients had hired the law firm to assist them with obtaining a home loan modification, the Contract stated that the law firm "does not perform the following services . . . loan modification assistance." The signed Contract included a clause stating that the parties to the agreement would resolve all disputes between them in the small claims division of the court system, and if the matter was not subject to the small claims division's jurisdiction, then the matter would be settled through arbitration. The Contract also limited the law firm's liability to the clients to the amount of fees paid by the clients, and provided that the law firm could withdraw from representing the clients immediately. In addition, the Contract did not provide the clients with an avenue to cancel the Contract if they were dissatisfied with the law firm's representation. The Contract was the only form used by the law firm for engagement of their services, and no clients had ever modified the agreement.

In mid-June 2012, the holder of the clients' mortgage notified the clients of its intent to foreclose on their home on August 30, 2012. The clients contacted the law firm for assistance, but allegedly received no help from the law firm. The clients ultimately lost their home to foreclosure and were sent an eviction notice.

The clients initiated a lawsuit against the law firm for malpractice, and the law firm moved to compel arbitration pursuant to the Contract terms. In response to the motion to compel arbitration, the clients claimed that the Contract was unconscionable, and that the Court should not enforce the arbitration provision.

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The court evaluated whether the Contract was "substantively unconscionable" by reviewing the contents of the agreement itself, and the relative fairness of the obligations on each party. The court found that the Contract was substantively unconscionable because the terms wholly favored the law firm.

The court recognized that the Contract unfairly allowed the law firm to limit its liability (to the fees paid), and noted that the clients did not have adequate time to seek independent counsel regarding this limitation of liability provision in the Contract. The court stated that the law firm's failure to properly limit its liability as to the clients was at odds with Rule 1.8 of Utah's Rules of Professional Responsibility, which requires that any agreement that prospectively limits a lawyer's liability is prohibited unless the client is independently represented by counsel in making such an agreement.

The court also held that Contract allowed the law firm to immediately withdraw from representing the clients despite the fact that Rule 1.16 requires law firms to provide reasonable warning prior to withdrawing representation. Most significantly, the court identified the "extreme imbalance" in the services offered by the law firm as the Contract excluded the very service the clients sought from the law firm — loan modification assistance.

In reviewing the motion to compel arbitration, the court also explored the procedural unconscionability of the Contract — whether there was overreaching by one of the parties occupying an unfairly superior bargaining position. In doing so, the court evaluated whether the clients had a reasonable opportunity to understand the terms of the Contract, or to meaningfully negotiate the terms of the Contract, including a determination of whether the Contract used boilerplate language, whether the terms of the Contract were explained to the clients, whether the clients had a meaningful choice or if they felt compelled to accept the Contract as it was, and whether the law firm employed deceptive practices to obscure key provisions.

In finding that the Contract was procedurally unconscionable, the court held that one of the attorneys at the law firm engaged in deceptive practices when he told the clients that the Contract outlined everything that had been discussed, even though the Contract excluded the very service the clients sought. The court also found the law firm overreached in its dealings with the clients since the clients clearly did not understand the Contract, as it was never explained to them and they were given such a short time to return the signed contract to the firm. The court also recognized the extreme imbalance of power between the law firm and the clients, since the clients were facing imminent foreclosure on their home and may not have had a meaningful choice.

The court found the Contract to be both substantively and procedurally unconscionable and, as a result, denied the law firm's motion to compel arbitration under the agreement.

Risk Management Solution: Almost all jurisdictions have some form of fee arbitration rules and procedures. Most of these are voluntary although about a quarter of the states have requirements making the arbitration of fee disputes mandatory or mandatory under some conditions or in some circumstances.

The states vary widely as to whether, and subject to what requirements, lawyers can obtain binding agreement from clients in advance, in their engagement letters, to arbitrate disputes that may subsequently arise. While there are some exceptions, courts have generally placed a strong presumption in favor of utilizing alternative methods of dispute resolution in lawyer-client disputes, even prior to a dispute arising. As far as we are aware, only Ohio expressly precludes lawyers from using an arbitration clause in their engagement letters in order to obtain advance agreement to arbitrate disputes unless the client is actually represented by independent counsel before agreeing to that arrangement (Ohio Rules of Professional Conduct 1.8(h)).

Lawyers need to be aware of whether their jurisdictions have mandatory or voluntary fee arbitration programs, as well as the arbitrability of all other disputes. In all states that permit advance agreement to arbitrate it is critical to consider the states' case law or ethics opinions regarding specific prerequisites for enforceability of such provisions. The requirements generally forego the necessity for specific language — usually cataloguing the rights being waived by agreeing to arbitrate (jury trial, appeal, etc.) — that must be included as a condition precedent for being enforced.