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Recent Developments in Risk Management

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Conflict of Interest — Disqualification — The Importance of Timely Ethical Screening *Before* Undertaking the Representation

***Signature MD, Inc. v. MDVIP, Inc.*, Case No. CV 14-5453 (C.D. Cal. Jan. 20, 2015)**

Risk Management Issue: A new matter comes in requiring immediate attention, but a conflict check reveals a prior representation of the adverse party. To the extent that screening may avoid or reduce the risk of disqualification, how quickly must a law firm implement the ethical screen?

The Case: Plaintiff health concierge service sued its competitor for antitrust violations, contending that defendant utilized anti-competitive tactics and agreements to preclude competition. Defendant moved to disqualify plaintiff's counsel, an AmLaw 200 firm, on the basis that it previously represented defendant from 2008 to 2012. Judge Dolly M. Gee of the U.S. District Court for the Central District of California granted the motion, finding that: (1) there was a substantial relationship between the subject of the firm's current and former representations, and (2) the firm failed to establish that an effective ethical screen was implemented.

Plaintiff's antitrust allegations included, among other things, defendant's use of exclusive dealing agreements with physicians to lock competitors out of the concierge medicine membership program market. The court found that there was a substantial relationship between the firm's current representation of plaintiff and prior representation of defendant — in a suit for misappropriation of trade secrets by a group medical practice — because both suits focused on defendant's "practices of recruiting and engaging physicians in its concierge . . . program." Accordingly, a rebuttable presumption arose that the "tainted" attorneys within the firm shared privileged and confidential information with the attorneys working on the new file. It is unclear from the court's order, but it appears that the tainted attorneys worked out of a separate regional office. The burden then shifted to the firm to establish that an ethical screen had been implemented.

Citing well-established law in California, the court noted that an effective ethical screen must be timely, meaning it "should be implemented *before* undertaking the challenged representation or hiring the tainted individual." The evidence established that the screen was implemented two days after the firm was retained by plaintiff. The court acknowledged that two days is a short time period, but emphasized there was no evidence that preventative measures were in place to prevent disclosure of privileged information during that time. Declarations stating that there was no such disclosure and that the tainted attorneys did not work on the case would not have helped the firm absent timely implementation of an ethical screen.

Risk Management Solution: This ruling emphasizes the importance of implementing an ethical screen *before* undertaking the potentially problematic representation. In this case, the court required strict compliance with the rule even though the current and prior matter seemed only loosely related and the potentially tainted attorneys worked out of a different office. American Bar Association Model Rule 1.10(a)(2), adopted by some states, provides a useful checklist for firms seeking to remain as counsel, including: (1) timely screening of the disqualified lawyer; (2) no apportionment of the fee from the representation to the disqualified lawyer; (3) prompt written notice to any affected former client describing the screening procedures, noting that review is available, providing a statement of the screened lawyer's rule compliance, and offering an agreement that the firm will promptly respond to written inquiries or objections; and (4) further compliance certifications at "reasonable" intervals and upon termination of the screening procedures. Because rules vary between jurisdictions, it is essential to consult all potentially relevant rules. Note that even in jurisdictions that have declined to adopt a screening rule like Rule 1.10(a)(2), many courts will decline to disqualify law firms that have put timely and effective screens in place, even if conflicts exist, as long as the courts are satisfied that no "trial taint" results from the conflict. *See, e.g., AIG, Inc. v. Bank of America Corp.,* 827 F. Supp. 2d 341 (S.D.N.Y. 2011); *Arista Records LLC v. Lime Group LLC,* 2011 WL 672254 (S.D.N.Y. 2011). Other case law considering screening procedures has been previously discussed in the April 2014 and January 2011 editions of *The Lawyers' Lawyer.*

For current comments on issues of professional ethics see our new blog: www.lawyersfortheprofession.com.

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Lawyers Professional Liability Insurance — Notice Provision — Consequences of Failure to Provide Adequate Detail

Illinois State Bar Ass'n Mut. Ins. Co. v. Beeler Law, P.C., 2015 IL App (1st) 140790-U, 2015 WL 1407310 (Ill. Ct. App. Mar. 25, 2015)

Risk Management Issue: What are the consequences of failing to provide detailed information to the insurer when reporting claims?

The Case: Plaintiff insurer, Illinois State Bar Association Mutual Insurance Company (ISBA), issued to defendant Beeler Law a claims-made-and-reported professional liability policy, with a policy period from September 25, 2009 to September 25, 2010 (the "Policy"). On September 24, 2010, Beeler reported three potential claims by way of the ISBA's online "contact us" form. Beeler included the name of his law firm, his e-mail address and his telephone number. In the comments section, Beeler stated: "Potential claims: 1) RM Lucas, Co.; 2) R. Magnum; 3) Abdul Razzaq. Details to follow." Beeler did not provide additional information regarding the prospective claims prior to the Policy's expiration on September 25, 2010.

On April 15, 2011, Ronald S. Magnum sued Beeler, asserting claims for breach of fiduciary duty, professional negligence and breach of contract. Beeler provided the complaint to the ISBA on August 1, 2011, and tendered the matter for defense under the Policy. Thereafter, R.M. Lucas Company and Chicago Title Land Trust filed a similar suit against Beeler, who again provided a copy of the complaint to the ISBA and tendered the matter for a defense under the Policy.

In response, the ISBA sought a determination that it did not owe Beeler a duty to defend based on Beeler's insufficient notice of the underlying claims. Beeler filed a counterclaim seeking a declaration that the ISBA had a duty to defend and indemnify Beeler in both actions. The trial court determined that Beeler breached the notice provision under the Policy, thereby relieving the ISBA of its duty to defend.

The Illinois Appellate Court affirmed the trial court's finding that the ISBA had no duty to defend Beeler. In so holding, the court noted that Beeler failed to comply with the notice provisions set forth in the Policy, which required specific information regarding any prospective claim. The court agreed that Beeler's cursory e-mail to the ISBA only one day before the Policy's expiration failed to set forth the requisite detail, as mandated by the Policy, regarding the prospective claims.

The court rejected Beeler's argument that, although it failed to comply with the Policy's notice requirements, Beeler gave general notice to the ISBA during the policy period, and the ISBA cannot evade its duties based on a procedural deficiency. The court explained that to credit Beeler's argument would be tantamount to ignoring a condition precedent to coverage, which the court refused to do. Further, the court noted that, unlike a lay person, as an attorney, Beeler had sophistication in commerce and insurance matters, and as such, should have had a clear understanding of its contractual obligations and reporting requirements under the Policy. Finally, the court noted that to accept Beeler's argument would fundamentally frustrate the purpose of a claims-made-and-reported insurance policy, which is to allow the insurance company to know in advance the extent of its claims exposure and compute its premiums.

In sum, because Beeler failed to give the ISBA detailed notice of the prospective claims as required by the Policy, the court held that the ISBA was relieved of its duty to defend Beeler for both underlying cases.

Risk Management Solution: Entitlement to insurance coverage is dependent on strict compliance with the policy's terms and conditions. In the context of lawyers professional liability insurance, which generally operates on a claims made and reported basis, an insured is required to promptly provide an insurer notice of any circumstances that the insured knows or reasonably should know may result in a claim. Importantly, the insured's notice to the insurer must contain the requisite information and detail regarding a prospective claim as demanded by policy. *Beeler* highlights that an insured's failure to timely provide detailed notice of a prospective claim in the manner and specificity demanded by the policy may constitute a breach of a condition precedent to coverage, which may in turn absolve the insurer of any duty to defend or indemnify the insured. Lawyers should be especially concerned about the court's willingness to hold lawyers to strict compliance with the terms of the contract because of their presumed sophistication.

Client On-Line Reviews of Lawyers' Services — Right of Response? — Application of "Self-Defense" Exception to Rule of Professional Conduct 1.6

New York State Bar Association Committee on Professional Ethics Opinion 1032, Responding to a former client's critical commentary on a website (October 30, 2014)

Pa. Bar Assoc. Formal Op. 2014-300, Ethical Obligations for Attorneys Using Social Media, 2014

Risk Management Issue: Can a lawyer respond to a client's (or a former client's) critical online review of legal services by rebutting the accusations using the client's confidential information?

The Opinions: Two State Bar Association Ethics Opinions, from New York and Pennsylvania, have addressed this precise issue.

In the situation presented to the New York State Bar, a disgruntled former client of a New York law firm negatively characterized the firm's representation on a lawyer review website. Specifically, the former client stated on the website that he/she regretted retaining the firm, the firm provided inadequate services, the firm inadequately communicated with client, and the firm did not achieve the client's goals. The former client's posting did not say anything about the merits of the underlying legal matter and did not reference any particular communications with the firm or other such confidential information. The former client had not filed or threatened to file civil or disciplinary action against the firm. The firm disagreed with the former client's comments about its services and the outcome of the legal matter. The firm wanted to respond to the former client's negative posting "by telling its side of the story." The firm contacted the New York State Bar Association Committee on Professional Responsibility to inquire whether such a response would be consistent with its continuing duties to preserve a former client's confidential information.

In Opinion 1032, the committee analyzed the issue under Rules 1.6 and 1.9 of the Rules of Professional Conduct, which generally prohibit a lawyer from revealing confidential information of a former client. There is a "self-defense" exception provided in Rule 1.6 and incorporated into Rule 1.9 for former clients, in many states, including New York, but not California. New York's Rule 1.6(b)(5)(i) states that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary . . . to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." When applicable, this exception permits, but does not require, disclosure of confidential information to the extent the lawyer reasonably believes is necessary to serve the purpose of self-defense. See New York Rule 1.6, Cmts. [12] & [14].

The committee focused on the word "accusation," defined by Black's Law Dictionary as "[a] formal charge against a person, to the effect that he is guilty of a punishable offense[,]" and in Webster's dictionary as a "charge of wrongdoing, delinquency, or fault." The committee also looked to Comment 10 of Rule 1.6, which uses the words "claim" and "charge" and further analyzed New York cases and disciplinary proceedings. It reasoned that the exception does not apply to informal complaints when there is no actual, or even threatened, proceeding such as the website posting at issue. Therefore, the committee concluded that client confidences cannot be disclosed by a lawyer solely to respond to a former client's criticisms of the attorney on a website that includes client reviews of lawyers.

The opinion clarifies, however, that "it does not unduly restrict the self-defense exception" because the commencement of a formal proceeding is not necessarily required to trigger the authorized disclosure under Rule 1.6(b)(5)(i), stating: "There may be circumstances in which the material threat of a proceeding would give rise to that right." The committee did not more directly address that question because it was not the subject of the inquiry. It further did not consider whether and when a negative website posting may effect a waiver of a client's right to confidentiality under Rule 1.6(a) because this was not the case in the inquiry presented and because waiver of attorney-client privilege turns on questions of law beyond the committee's jurisdiction.

The Pennsylvania Bar Association addressed several social-media-related ethical issues in its Formal Opinion 2014-300, including whether attorneys may comment on or respond to reviews or endorsements. In sum, the opinion concluded that lawyers may comment or respond to online reviews or endorsements, but may not reveal confidential client information without the client's consent in accordance with Rule of Professional Conduct 1.6. This was consistent with the committee's previous conclusion in its Formal Opinion 2014-200 that lawyers may not reveal client confidential information in response to negative online reviews. Like the New York State Bar Ethics Committee, the Pennsylvania committee agreed that certain circumstances would allow a lawyer to reveal confidential information, but "a negative online client review is not a circumstance that invokes the self-defense exception." Overall, "a lawyer's comments on social media must maintain attorney-client confidentiality, regardless of the context, absent the client's informed consent."

Risk Management Solution: Although responding to a client's (or a former client's) online negative review is tempting, and technically allowed under the rules of professional conduct (at least in New York and Pennsylvania), attorneys must be careful what they write. Any information posted by a lawyer on social media, whether in response to a review or not, is subject to attorney-client confidentiality rules. Whether or not you practice in New York or Pennsylvania, it is not appropriate for a lawyer to reveal confidential client information or otherwise make prohibited extrajudicial statements on social media.

Social Networking — Personal Profiles on LinkedIn — Application of the Rules of Professional Conduct

New York County Lawyers' Association Professional Ethics Committee Formal Opinion 748, The ethical implications of attorney profiles on LinkedIn (March 10, 2015)

Pa. Bar Assoc. Formal Op. 2014-300, Ethical Obligations for Attorneys Using Social Media, 2014

Risk Management Issue: How do the rules of professional conduct regulate the contents of lawyers' personal profiles on LinkedIn?

The Opinions: Many attorneys have personal profiles on LinkedIn, the business-oriented social networking service that allows users to create a profile to connect with other users. LinkedIn users provide background information — such as education and work history — to be displayed on their profiles. They can further list certain skills, interests and accomplishments, which can include descriptions of an attorney's practice areas and prior legal matters. Users can also "endorse" other users, including lawyers, for certain skills as well as write recommendations as to another user's professional skills. LinkedIn allows users to control what information is listed on their profile. As such, some users may opt to list only basic background information, while others may utilize LinkedIn's available options to include more extensive information, such as skills, endorsements and recommendations. Users can also decide whether their profile is publically visible online outside of LinkedIn and their direct connections.

In Formal Opinion 748, dated March 10, 2015, the New York County Lawyers' Association Professional Ethics Committee considered whether a LinkedIn profile was attorney advertising under Rules 7.1 and 7.4 of the Rules of Professional Conduct. Rule 7.1 defines attorney advertising to be "communications made in any form about the lawyer or the law firm's services, the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication." The comments to the rule confirm that "[n]ot all communications made by lawyers about the lawyer or law firm's services are advertising" because the advertising rules do not include communications between attorneys or with current or former clients concerning the representation. The rule further specifies what information may be included in an advertisement and requires that any advertisement containing statements about the lawyer's services, testimonials or endorsements must include the disclaimer "[p]rior results do not guarantee a similar outcome."

The Committee concluded that a lawyer's personal LinkedIn profile containing only education and work history information does not constitute attorney advertising under Rule 7.1. However, if a lawyer chooses to include information on his or her personal LinkedIn profile beyond the basic background information, such as practice areas, skills, endorsements or recommendations, the attorney must treat his or her profile as attorney advertising and include appropriate disclaimers in accordance with Rule 7.1. Under such circumstances and at a minimum, the words "Attorney Advertising" should be included on the lawyer's personal LinkedIn profile. If the lawyer includes statements: (1) reasonably likely to create an expectation about results the lawyer can achieve; (2) statements comparing a lawyer's services with the services of other attorneys; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer's or law firm's services, the disclaimer "Prior results do not guarantee a similar outcome" should also be included on the LinkedIn profile.

The Committee also considered Rule 7.4, which prohibits an attorney from identifying himself or herself as a "specialist" or "specializ[ing]" in a particular field of law unless the lawyer has been certified by an appropriate organization or jurisdiction. The 2013 New York State Bar Association Ethics Opinion 972 concluded that a lawyer or law firm listed on a social media website may identify areas of practice, but cannot list those areas under the heading "specialties" unless the attorney's certifications meet the requirements of that rule. As to the issue of specialization incorporated here, the ethics committee concluded that because LinkedIn headings are not chosen by users, but instead certain default fields are provided, which users can decide to utilize, categorizing one's experience or practice area under a heading such as "experience" or "skills" does not violate Rule 7.4, so long as the word "specialist" is not used or endorsed by the attorney, directly or indirectly.

To avoid any violation of the ethics rules, the Committee recommends that attorneys periodically monitor the content of their personal LinkedIn profiles and delete any inaccurate endorsement or recommendation. Pursuant to Rule 7.1, endorsements and recommendations must be truthful, not misleading, and based on actual knowledge. The recommended disclaimers should also be used if appropriate.

Similar conclusions were reached in 2014 by the Pennsylvania Bar Association. PA Formal Opinion 2014-300 addressed numerous social media related ethical issues. As to this specific issue, it was recommended that attorneys do the following: (1) monitor and review social networking sites periodically — not daily, or even weekly, but at "reasonable intervals;" (2) verify the accuracy of the information posted; and, (3) revise if necessary by removing or correcting inaccurate information, whether posted by the attorney, a client or a third-party. Further, when a lawyer endorses another lawyer on a social media website, the endorsing lawyer must only endorse skills he or she knows to be true. The Pennsylvania opinion also warns that endorsements from celebrities and judges are not permitted.

Risk Management Solution: Attorneys should regularly review their social media accounts, including personal LinkedIn profiles, to ensure that the posted information is accurate and not misleading, whether posted directly by the lawyer, clients or third-parties. Although not every state has opined on this issue, because social media crosses state lines and beyond, law firms and individual attorneys alike may conclude that it is necessary to play it safe, at least for now. If the rules of professional conduct in any jurisdiction where a lawyer is admitted or the firm has offices require, it may be appropriate to include the "Attorney Advertising" disclaimer on their profile if, like most LinkedIn users, information is included beyond simply education and work history. Similarly, lawyers and firms should also consider including the "prior results" disclaimer discussed above if appropriate and required by the relevant state's rules of professional conduct.