The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Lawyer With Disabilities — Duty of Disclosure to Clients

***Moye White LLP v. David I. Beren*, 2013 WL 2454060 (Colo.App., June 6, 2013)**

Risk Management Issue: What duties does a law firm have to disclose information about the medical and arrest history of one of its attorneys to clients for whom the attorney has provided services?

The Case: Law firm sued a former client for attorney fees incurred during its representation of the former client in a probate matter from 2009 to 2010. Former client counterclaimed against the firm, arguing, among other things, that the firm breached its fiduciary duty to him by failing to disclose and intentionally concealing material information about Attorney A, one of the attorneys working on his case, who had a history of disciplinary proceedings, mental illness, alcoholism, and related arrests. The Colorado Court of Appeals, affirming the trial court, found that the firm had no legal or ethical duty to disclose information about Attorney A's history of mental illness, alcoholism, and a stayed suspension to practice law absent evidence that any of these issues materially affected his performance as an attorney.

The Court emphasized several facts in reaching this decision. From the outset of the representation, the firm had informed former client that various lawyers would work on his case, and the former client had placed no limitations on how many or which lawyers at the firm could assist. The Court particularly noted that 'the former client's retainer agreement with the firm specified that although a specific attorney would "have supervisory responsibility … [the firm would] draw upon the abilities of various members of [the] Firm as necessary or appropriate to handle ['former client's] matters efficiently and effectively." Subsequently, the specific attorney sent an email to former client informing him that he was bringing Attorney A onto the case for added experience and assistance.

In addition, the firm, aware of Attorney A's circumstances, had established numerous procedures to monitor Attorney A's alcoholism and other medical issues, and to ensure that his work product did not suffer. Several medical professionals, including Attorney A's treating psychologist, had previously certified him fit to practice law. Most importantly, at no point during the representation was Attorney A "materially impaired." His performance reviews indicated that his work was "excellent," and his supervising attorney never reported any issues.

In these circumstances, the Court found that Attorney A's medical and arrest history was not material to any decision on 'former client's part to retain him, and thus the law placed no fiduciary duty on the firm to disclose the information. The Court likewise found no violation of either Rule 1.4 or Rule 7.1 of the Rules of Professional Conduct. According to the Court, Rule 1.4 was inapposite because it relates to disclosure of information necessary for a client to give informed consent, and there is no authority requiring a client's informed consent before a law firm can allow an additional attorney to work on a matter. In addition, by signing the retainer letter, former client specifically delegated the decision of who could work on his case to the firm. The Court found that Rule 7.1 was not applicable, because there was no attorney advertisement at issue, but even if it were, there was no violation because the Rule only prohibits material omissions, and the Court had already determined that information relating to Attorney A's background was not material.

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Risk Management Solution: Critical to the outcome was the fact that the firm was aware of Attorney A's circumstances and actively monitored his work. The outcome might have been different had the firm permitted Attorney A to work for the client without closely managing that work. Had the Court found that the firm inadequately monitored Attorney A, the firm would have been faced with complex issues resulting from the need to balance its duties to the client with the various statutory protections surrounding employee privacy rights.

The case also enshrines two other important risk management principles. First, it underscores the importance of the need for a carefully constructed engagement letter. The Court specifically referenced the language of the law firm's letter in defeating former client's claim. As here, it is advisable that the engagement letter should include language identifying what attorneys may work on the file, and who will be responsible for staffing and supervising the team.

Second, this case serves as an example of the problem of unintended consequences, namely that lawyers who sue clients for fees often end up on the receiving end of a malpractice or breach of fiduciary duty counterclaim. As we have noted in the past, suing clients for fees is often a counterproductive exercise.

Conflicts of Interest — Representing Corporate Entities

Kentucky Bar Association v. Hines, 399 S.W.3d 750 (Ky. 2013)

Risk Management Issue: What are the professional and ethical duties of an attorney representing a corporation when a conflict arises between the corporation and its constituents?

The Case: Attorney represented a corporation that was formed by about 100 heirs of a decedent's estate to manage the property — an estate with rich timber and coal holdings. The corporation took title to the property of the estate and facilitated the commercial operation of the assets. The corporation was formed with an eight-person board of directors. Attorney was hired by the corporation to represent it "in connection with any and all actions, claims, sales, leases, purchases whatsoever situated" regarding the land.

Attorney represented the corporation in a variety of contexts, including litigation to recover the proceeds of timber wrongfully harvested and coal wrongfully mined from the land. One of those actions was a claim against a coal company ("Coal Company").

A dispute arose between two factions of the heirs to the estate. One faction was led by Heir A, the president of the corporation. Attorney sided with the other faction after taking the position that Heir A was not eligible to serve as an officer since she was not a true "heir." Following that dispute, Heir A began the process of severing Attorney's engagement with the corporation.

In October 1999, Heir A sent Attorney a letter terminating his services in "marketing the assets of the corporation." The letter asked Attorney to continue working on the litigation against Coal Company. The letter specifically stated that Attorney should make no further deals on behalf of the corporation.

A meeting of the corporation's shareholders was subsequently held where directors and officers were elected. Attorney was present at the meeting and expressed concern that the election of the board and officers was invalid because of the lack of notice. At that time, the board of directors voted to appoint a new general manager of the corporation, ("General Manager"), a CPA.

In October 2000, General Manager sent Attorney a letter and explained he had assigned the responsibility to market the mineral and timber assets, and negotiate leases going forward to another attorney, noting that the president had previously terminated Attorney's employment with respect to those activities. He also asked Attorney to keep him informed about the Coal Company litigation. Attorney responded to this letter with a letter challenging the legality of the election of General Manager, and informing General Manager that he (Attorney) had a lien on all corporate income.

Attorney continued to hold himself out as counsel for the corporation. In October 2001, he wrote a letter to a company, with whom he had previously negotiated a lease for the corporation, stating that he was the only legally recognized representative of the corporation and that he was the contact on the matter. In September 2001, a member of the minority faction, through Attorney, filed a criminal complaint against Heir A and a petition for declaration of rights on behalf of the corporation. The action was eventually converted to a shareholder derivative suit on behalf of the minority shareholders.

In 2005, Heir A filed a bar complaint against Attorney, which resulted in two formal charges by the Inquiry Commission under, among other rules, Rules 1.13(a) of Kentucky's Rules of Professional Conduct. With respect to Rule 1.13(a) the commissioner held that when a corporation is the client, as opposed to individual constituencies of the organization, the lawyer owes the duties to the organization, and that while the lawyer is obliged at times to take certain reasonable measures in the interests of the organization, the steps Attorney took (such as filing the suit on behalf of the minority) were not reasonable. The commissioner found that Attorney's behavior amounted to representation of certain heirs, not the corporation, and that such representation was improper given his employment by the corporation.

The commissioner also found that Attorney made a deliberate choice to side with the faction that opposed the president and that his "loyalty and efforts shifted from the corporate entity" to the anti-president faction. Despite this shift, Attorney did not explain to the corporation "the identity of his new, actual clients" thus violating Rule 1.13(d). Based on these findings of misconduct, the commissioner recommended a 120-day suspension from the practice of law. Attorney sought review of the recommendation.

Attorney argued that he acted properly if his behavior was viewed within the overall context of what was happening with the corporation. He noted that some board members and shareholders were frustrated with what was happening with the corporation and that the board and officer elections deviated from past practice. He argued that there were legitimate questions about who was lawfully authorized to act on behalf of the company, and that his decision-making was difficult because of the volatile situation.

The Kentucky Supreme Court declined to accept these arguments. The court noted that since he was engaged as a lawyer for the corporation, when a derivative action is brought by minority shareholders alleging that the officers and directors are acting wrongly, then there is an inherent conflict in that lawyer representing the plaintiffs. Attorney, by helping the minority faction, violated his duty of loyalty to his corporate client.

Based upon the violation of RPC 1.13(a), the Court upheld Attorney's suspension.

Risk Management Solution: When a dispute arises among the constituents of a corporation, an attorney for the corporation may not take sides, notwithstanding the relationships that he or she may have with the individuals involved. A conflict of interest will almost certainly arise out of any action that a corporate lawyer takes for any particular constituent when a dispute does occur. Once such a dispute does arise, and provided the lawyer does not take sides, the corporation's lawyer may remain in his or her role, if so authorized by the corporation's highest authority. Such disputes come with significant risk of potential claims against the lawyers involved, so that careful documentation of the lawyer's role and responsibilities at every stage is likely to be critical in avoiding liability to the entity or to individual constituencies.

E-Mail Communications Between Clients and a Departing Attorney

The Philadelphia Bar Association Professional Guidance Committee, Opinion 2013-4 (Sept. 2013)

Risk Management Issue: What are a law firm's ethical duties in handling the email account of a departing attorney?

The Opinion: In this Opinion, the Philadelphia Bar Association Professional Guidance Committee considered inquiries from a law firm's managing partner regarding the law firm's management of a departing attorney's email account. Upon the departure, the law firm had programmed the departing attorney's account to send a reply to senders advising that the departing attorney was no longer with the firm. The law firm also opened and read the emails, and forwarded any email to the departing attorney relating to a matter that he retained. The law firm took

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the position that any email coming into the firm was "presumptively firm email" and must be reviewed. The departing attorney, however, requested that the firm program his former email account to merely "bounce back" unread emails to senders with an indication that the account had been closed so that no email messages addressed to the attorney would be received — or read — by the firm.

The managing partner inquired as whether the law firm's handling of the departing attorney's email account complied with the ethical rules, or whether the firm must honor the attorney's request that the firm avoid receiving those emails. Noting that the Pennsylvania Rules of Professional Conduct, the rules of other jurisdictions, and the Model Rules of Professional Conduct failed to expressly address the issue, the Committee turned for guidance to a prior Opinion jointly issued by the Committee and the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility addressing ethical obligations in a lawyer's changing of firms. Citing that opinion, the Committee highlighted the duty of lawyers to protect the interests of clients during periods of transition, and explained that "both the departing lawyer and the old law firm owe an obligation to ensure that the interests of the clients in active matters are competently, diligently and loyally represented" in accordance with the Rules. The Committee explained that, in these situations, the old law firm is required to keep clients informed of the impending departure of a responsible attorney, to make clear to an inquiring client that the client may choose to be represented by the departing attorney, to assure that active matters continue to be managed by remaining lawyers, and to assure that the firm will take reasonable steps to protect the client's interests.

Based on these principles, the Committee reasoned that the law firm's practice of opening and reviewing the departing attorney's emails was permissible to the extent necessary to carry out its duties as described above. The Committee also reasoned that simply "bouncing back" the emails to the senders would not fulfill the law firm's duties to ensure that the client's best interests were protected.

A review of the emails is, however, insufficient for the firm to meet its ethical obligations. The Committee advised the law firm that it should include the departing attorney's current contact information in its reply messages informing email senders that the departing attorney is no longer with the firm, and that it must immediately provide to inquiring and former clients sufficient information for the client to make contact with the departing attorney prior to the law firm offering of its services as an alternative. The Committee also cautioned the law firm against the failure to forward any email received that was meant for the departing attorney.

Risk Management Solution: Law firms need to have a policy for handling departing attorneys' email accounts. Since most clients rely on email as the primary method of contacting their attorneys, it is imperative that both the law firm and its attorneys have an understanding of how the law firm will handle post-departure email communications should an attorney leave the firm. As noted by the Committee, while the firm may review emails addressed to a departing attorney in order to make sure that the client's interests are protected, the handling of those emails must also comport with the ethical rules that give clients the choice as to who will represent them going forward when a lawyer leaves the firm.

Arguably, the Opinion requires modification in one respect, namely that once a client has indicated its desire that the departing lawyer and his or her new firm should take over the representation, from that moment forward the law firm should have no interest in the contents of emails from or relating to that client, and indeed would be violating the client's attorney-client privilege with their "new" lawyer in continuing to review the contents of emails sent to the departing lawyer's account. Until that point is reached, however, the Opinion correctly gives the firm the obligation as well as the right to review emails sent to the departing lawyer's account.