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Newsletters

The Lawyers' Lawyer Newsletter - Recent Developments in Risk Management - February 2020

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Expand each of the topics below to learn more about the risk management issues and solutions covered in this edition of *The Lawyers' Lawyer Newsletter*.

Law Partnerships – Age Discrimination Against Law Firm Partners – Owners or Employees – Civil Rights Laws

Von Kaenel v. Armstrong Teasdale, LLP, 943 F. 3d 1139 (2019)

Risk Management Issue: Are law firm partners "employees" and therefore entitled to protections of civil rights laws such as the Age Discrimination in Employment Act?

The Case: Plaintiff Von Kaenel, an equity partner at Armstrong Teasdale, sued his former law firm for a violation of the Age Discrimination in Employment Act (ADEA). At the end of 2014, Von Kaenel was forced into retirement at age 70 by the firm's mandatory retirement policy. Von Kaenel claimed that he would have retired at or around age 75, had it not been for the firm's mandatory retirement policy. Armstrong Teasdale required mandatorily retired attorneys to cease practicing law to qualify for a two-year severance benefit. However, after departing Armstrong Teasdale, Von Kaenel continued to practice law and was thus ineligible for the severance. As a result, he filed charges with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights. The Missouri Commission determined that Von Kaenel fell outside the protected age group. The EEOC terminated its proceedings and issued a Right to Sue. Von Kaenel then filed suit in federal court, where the central issue was whether he was an employee covered under the ADEA .

On appeal, the Eighth Circuit determined that Von Kaenel was not an "employee" as a matter of law, and therefore not protected by the ADEA. In ruling against Von Kaenel, the Eighth Circuit used the balancing test set out in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 450 (2003). The court set forth six factors to consider: 1) whether the organization can hire or fire, or set rules for the individual's work; 2) whether and to what extent the organization supervises the individual's work; 3) whether the individual reports to someone higher in the organization; 4) whether and to what extent the individual is able to influence the organization; 5) whether the parties intended the individual to be an employee, as expressed in written contracts or

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agreements; and 6) whether the individual shares in the profits, losses, and liabilities of the organization. The Eighth Circuit also cited decisions from the Seventh, Eleventh, and Tenth Circuits, in which the other circuits determined that partners or shareholders vested with an ownership interest and/or authority to manage and control the firm were not covered "employees."

In its ruling, the Eighth Circuit focused on a number of facts, including: Von Kaenel was required to make a capital contribution for his equity; he had the right to vote on changes proposed to the partnership agreement; he benefited from the firm's profits; he had the right to vote on the admission of new partners; and he was protected from involuntary expulsion and could lose his job and equity only through a vote by the partners or the operation of the mandatory retirement provision.

Risk Management Solution: Despite the favorable ruling for Armstrong Teasdale, law firms should exercise care in imposing mandatory retirement policies or other policies based on ages. Not all partners are created equal, and firms with multitiered partnership levels should be especially wary. Most non-equity partners—and even equity partners with little to no management authority and few voting rights—could be considered employees under the ADEA. The test and issues are not limited to ADEA cases, but also apply to gender discrimination and other statutes. For example, in *Ramos v. Superior Court*, 28 Cal. App. 5th 1042 (2018), the law firm's partnership agreement's arbitration provision was unenforceable under the California Fair Employment and Housing Act. Observers of the law on this topic will also recall an unfavorable decision for Sidley & Austin in the Seventh Circuit with respect to enforcement of an EEOC subpoena following the "de-equitizing" of a number of the firm's partners. When drafting and applying retirement policies, it is best practice to carefully consider the *Clackamas* factors and their application to the firm's specific situation.

Advertising – Social Media – Maintenance of Profiles

The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2019-199

Risk Management Issue: What are an attorney's ethical obligations regarding a profile maintained on a third-party website?

The Opinion: The State Bar of California Standing Committee on Professional Responsibility and Conduct (the "Committee") issued a formal ethics opinion regarding attorneys' ethical obligations with respect to online profiles maintained by third-party administrators. For purposes of the opinion, the Committee presumed that the online profile will contain three separate sections of information:

1. The first section would include factual information on the attorney's law firm, undergraduate and law schools, areas of practice, disciplinary history, and contact information.
2. The second section would set forth the attorney's qualifications, experience, activities, and publications. The hypothetical website would require an attorney to "adopt," or verify, the profile listing before the attorney could edit or supplement the information contained in the first and second sections.
3. The third section would be for reviews and testimonials from clients, former clients, peers, or other third-parties. The attorney could not make any edits or changes to this section of information.

Rule 7.1(a) of the California Rules of Professional Conduct prohibits an attorney from making a communication about the attorney's services that is false or misleading. A "communication" is defined as including "any message or offer made by or on behalf of a lawyer concerning the availability for professional employment of a lawyer or a lawyer's law firm directed to any person."

If an attorney "adopts" an online profile, the Committee considers the profile to be a communication for purposes of a Rule 7.1, regardless of the fact that the attorney does not administer or control the website. Even if an attorney does not "adopt" the profile, but uses it to advertise his or her own services—such as posting a link to the profile on the attorney's firm's website—the Committee still considers this to be a communication under Rule 7.1. In either of these scenarios, where the profile is a communication, the lawyer is obligated to ensure the information contained in the profile is truthful and not misleading. Other ethics opinions have also concluded that websites containing an attorney's background information and

experience constitute a "communication" about the lawyer's services that must be truthful and not misleading. See Volume 16, Issue 1 (Jan. 2011) of *The Lawyer's Lawyer Newsletter*.

In California, an attorney may not solicit a person who has never been the attorney's client to post a positive review on the testimonial page of the profile. This would constitute violations of Rule 7.1(a) and Rule 8.4(c), which prohibits an attorney from engaging in dishonesty, fraud, deceit, or reckless or intentional misrepresentation. However, an attorney may ethically ask a client or former client to write a review. If the client makes an error in his or her description of the attorney's services or outcome of the matter, the attorney should first ask the client to correct the mistake. If the client refuses, the attorney should then ask the website administrator to correct the error. If the website administrator will not correct the error, and the attorney cannot make the edits him or herself, then the attorney should post a disclaimer on the portion of the profile where the attorney can post information. The disclaimer should alert the public or website viewers that the client and third-party testimonials are not a guarantee of the attorney's services and that the policies of the website do not allow the attorney to edit the testimonials.

Because the lawyer cannot control or make edits to the reviews and testimonials from clients or third-parties, the attorney can only be expected to take reasonable measures to ensure the content is truthful and not misleading. According to the California Committee, posting a disclaimer like the one described above will satisfy the attorney's ethical obligations. An attorney is not expected to completely abandon the profile, unless the attorney is not able to post a disclaimer. In that scenario, abandonment of the profile may be required.

The Committee concluded that an attorney may ethically post the following information to a profile: information regarding articles or publications the attorney has authored; information about the attorney's involvement in non-legal activities or businesses; and information regarding the attorney's "rating" from a bona fide evaluation organization. It is important to note that there is little guidance in California regarding what qualifies as a "bona fide" organization. However, the Committee concluded that if the organization employs a selection methodology based upon objective or other quantifiable factors relating to an attorney's qualifications, the organization may be considered "bona fide."

An attorney's ethical obligations with respect to a profile will remain in effect until the attorney abandons it. Other ethics committees have reached similar conclusions regarding an attorney's obligation to regularly monitor online profiles that the attorney uses to advertise. See Volume 20, Issue 3 (May 2015) of *The Lawyer's Lawyer Newsletter*. If the attorney wishes to abandon a profile, the attorney should delete any reference or link to the profile that was on the attorney's own website, and consider posting a note on the profile itself that states the attorney is no longer monitoring the profile.

Finally, according to the California Committee, if an attorney is not aware of the existence of an online profile, then the attorney has no ethical responsibility to maintain or monitor the information contained therein. Similarly, if an attorney is aware of the existence of the profile but does not use it to advertise legal services, the attorney is not ethically responsible for its content.

Risk Management Solution: In California, if an attorney "adopts" or uses a third-party profile to advertise his or her services, the attorney is ethically required to ensure the accuracy of the information contained therein. The attorney may never post, or solicit someone else to post inaccurate or misleading information regarding the attorney's services, and must take reasonable steps to correct or disavow untruthful or misleading content posted by clients or third-parties. Note that other states consider other factors, so attorneys are advised to consult the law of the state in which they are licensed.

Firm Administration – Expense Reporting – Oversight – Discipline

Matter of Disciplinary Proceedings Against Bant, 2019 WI 107, 389 Wis. 2d 446, 936 N.W.2d 152

Risk Management Issue: How and how closely should firms track expense reporting?

The Opinion: From February 2014 through December 2016, Ms. Bant worked as an in-house attorney for an insurance company located in Wisconsin. Sometime during October 2016, Bant and her supervisor agreed that Bant would attend an ABA seminar in New Orleans. On October 31, 2016, Bant submitted a request for reimbursement of the $1,115 registration fee by way of a fabricated seminar registration receipt that Bant had created using computer software. The employer paid the requested sum, and Bant told her employer that she would fly to New Orleans on December 7, 2016 in

order to attend the seminar on December 8 and 9. However, the seminar actually took place on November 3 and 4, and a co-worker spotted Bant in town on the morning of December 9, when Bant was allegedly in New Orleans for the seminar.

Sometime in December 2016, Bant uploaded, but had not yet submitted, a variety of elaborately fabricated travel receipts into her employer's expense system. Bant's supervisor confronted her and requested that Bant provide a timeline of her activities during her alleged trip. In response, Bant created an entirely false timeline and eventually claimed that she was physically assaulted while in New Orleans. In response to Bant's new claims, the company audited Bant's prior expense claims and discovered that Bant had previously made a fraudulent request for reimbursement for three nights at a hotel in Madison, Wisconsin. After these discoveries, Bant was terminated in December 2016. An ethics complaint followed.

Reviewing the findings of the referee, the Wisconsin Supreme Court concluded that Bant had violated Wisconsin's versions of Rule 8.4(c) and (f). 8.4(c) provides that "it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation," while 8.4(f) provides that it is misconduct for a lawyer to violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers. The court explained that it "take[s] a dim view of a lawyer's creation and use of false documentation for the purpose of misleading others." The court characterized Bant's actions as "affirmative acts of deception by creating false documentation for the sole purpose of misleading others," and further noted that her actions were "laced with calculated dishonesty." The court admonished Bant for doubling down on her story when questioned by her employer about the trip. Bant's license was suspended for six months.

Risk Management Solution: In addition to clients, courts, and opposing counsel, attorneys also owe ethical duties to their firms and employers. Rule 8.4's prohibition on dishonesty, deceit, and misrepresentation is not limited to clients, courts, or opposing counsel. The first and most important line of defense against fraudulent expense reporting is staff, who must be trained and reminded that their loyalty is to the firm and the firm's clients—not just the attorney to whom staff is assigned. In addition, law firms should have, and communicate, a clearly written policy regarding expense reporting, the firm's procedure for tracking expense reporting, and the system for expense reporting oversight. Expenses should be reviewed and approved by a supervising attorney or office manager in order to ensure expenses are legitimate, properly reported, and administratively tracked.