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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

Hooray!

THE KENTUCKY SUPREME COURT DUMPS THE "APPEARANCE OF IMPROPRIETY" CONFLICT OF INTEREST STANDARD

Marcum v. Hon. Ernesto Scorsone, No. 2014-SC-000172-MR (4/2/2015)

The appearance of impropriety standard has a long and checkered history as a basis for finding a disqualifying conflict of interest. Condemned as vague and little more than the subjective judgment of the offended party, the 1990 Kentucky Rules of Professional Conduct attempted to delete it as a basis for disqualification of Kentucky lawyers.

Unfortunately, in two cases in the mid-1990s the Supreme Court reinstated the appearance of impropriety standard. The Court opined in *Lovell v. Winchester*, Ky., 941 S.W.2d 466 (1997) that "Although the appearance of impropriety formula is vague and leads to uncertain results, it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment."

In *Marcum* the Court reversed *Lovell* as follows:

> The simple fact is that disqualification is easier to achieve under the appearance-of-impropriety standard. While that is appropriate for judicial recusal questions, *see* SCR 4.300, Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."), because there is a heightened concern about public

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WHEN IS LINKEDIN ATTORNEY ADVERTISING?

Any time lawyers get on social media they should have three risk management questions in mind:

1. Am I violating client confidentiality?
2. Am I creating an unintended client- attorney relationship?
3. Am I advertising my services?

Of all the social media networks, the business focused LinkedIn offers the greatest opportunity for inadvertently running afoul of Kentucky's professional responsibility rules on attorney advertising. The recent New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 (3/10/15) offers an excellent analysis of LinkedIn and professional responsibility rules. While the New York rules are not identical to Kentucky's, they are similar enough for Kentucky lawyers to usefully consider Opinion 748 as general guidance.

Opinion 748 described LinkedIn service as follows:

> The site provides a platform for users to create a profile containing background information, such as work history and education, and links to other users they may know based on their experience or connections….

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WHEN IS LINKEDIN ATTORNEY ADVERTISING?

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The site also allows users and their connections to list certain skills, interests, and accomplishments, creating a profile similar to a resume or law firm biography. Users can list their own experience, education, skills, and interests, including descriptions of their practice areas and prior matters. Other users may also "endorse" a lawyer for certain skills – such as litigation or matrimonial law – as well as write a recommendation as to the user's professional skills.

The question then becomes which aspects of an attorney profile constitute Attorney Advertising. Space limitations do not permit a detailed review of Opinion 748, however, the Committee's conclusions provide a useful overview:

> Attorneys may maintain profiles on LinkedIn, containing information such as education, work history, areas of practice, skills, and recommendations written by other LinkedIn users. A LinkedIn profile that contains only one's education and current and past employment does not constitute Attorney Advertising. If an attorney includes additional information in his or her profile, such as a description of areas of practice or certain skills or endorsements, the profile may be considered Attorney Advertising and should contain the disclaimers set forth in Rule 7.1 *[SCR 3.130(7.25)]*. Categorizing certain information under the heading "Skills" or "Endorsements" does not, however, constitute a claim to be a "Specialist" under Rule 7.4 *[SCR 3.130(7.40)]*, and is accordingly not barred, provided that the information is truthful and accurate.
>
> Attorneys must ensure that all information in their LinkedIn profiles, including endorsements and recommendations written by other LinkedIn users, is truthful and not misleading. If an attorney believes an endorsement or recommendation is not accurate, the attorney should exclude it from his or her profile. New York [*Kentucky*] lawyers should periodically monitor and review the content of their LinkedIn profiles for accuracy.

The May 2015 Hinshaw & Culbertson *The Lawyers' Lawyer Newsletter*, after reviewing Opinion 748, offered this risk management advice on using LinkedIn:

> 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 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 … if appropriate and required by the relevant state's rules of professional conduct.

Keeping up with the ethical issues of use of the Internet is a major challenge in today's practice of law. We recommend Opinion 748 for your professional reading. Just Google it *(last viewed on 6/9/2015)*. We agree with Hinshaw & Culbertson's advice to play it safe and err on the side of posting disclaimers and advertising notices liberally. If in doubt, seek an advisory opinion from the KBA Attorneys' Advertising Commission (SCR 3.130(7.06)).

"IT TOOK MAN **THOUSANDS OF YEARS** TO PUT WORDS DOWN ON PAPER, AND HIS LAWYER STILL WISHES HE WOULDN'T" — *Mignon McLaughlin*

CAVEAT: EXTENDING A PROFESSIONAL COURTESY TO A LAWYER FRIEND CAN RESULT IN ETHICS VIOLATIONS AND MALPRACTICE CLAIMS

Treating fellow lawyers with professional courtesy is a primary standard of civility in the practice of law. Nonetheless, in doing so, care must be taken not to inadvertently create professional duties to those you do not consider clients. A recent disciplinary action against a District of Columbia lawyer vividly illustrates this risk (*In re Fay*, 2015 BL 74532, D.C., No.14-BG-7, 3/19/15).

In this action Carter was injured in an auto accident in the District of Columbia and retained attorney Chasnoff to represent him in his personal injury suit. Chasnoff was admitted to practice in Maryland and D.C., but his admission to practice in D.C. was suspended for failure to pay bar dues. For this reason, Chasnoff asked Fay, a member of the D.C. bar, to sign his name to and file a complaint in the D.C. Superior Court. The complaint showed both Chasnoff and Fay as attorneys. Chasnoff then failed to serve the complaint on the defendant resulting in the dismissal of the case. In spite of efforts by Fay to revive the case, it was ultimately dismissed with prejudice. Chasnoff was thereafter disbarred in Maryland and D.C., and a bar complaint filed against Fay.

Fay claimed that since he had no representation agreement with the client, he had no attorney-client relationship with him and owed him no duties. The D.C. Court of Appeals disagreed as follows:

> It is critical that respondent authorized the filing of Mr. Carter's complaint with his signature and bar number and later initiated and filed an additional pleading in which he identified himself as Mr. Carter's attorney. As an officer and fiduciary, respondent represented to the court, through his filings, that an attorney-client relationship existed.
>
> ....
>
> Moreover, respondent was aware that he was the only counsel of record in Mr. Carter's case who was licensed to practice law in the District; respondent knew that Mr. Chasnoff's bar membership was inactive. Like local counsel facilitating the practice of an attorney admitted *pro hac vice*, respondent was responsible for Mr. Carter's case in the event that Mr. Chasnoff failed to adequately pursue it.
>
> ....
>
> By asserting his bar membership to aid Mr. Chasnoff in presenting Mr. Carter's claim, respondent, like local counsel, assumed the ethical responsibilities and duties of Mr. Carter's attorney.

The decision included this spot on advice:

> We say again, in the hopes that our message will reach the ears of the whole Bar, that when an attorney undertakes to act on behalf of another person in a legal matter, no matter how pure or beneficent his original intention may have been, he invokes upon himself the entire structure of the Code of Professional Responsibility and its consequent enforcement through disciplinary proceedings.
>
> The short truth of the matter is that the [C]ode does not, and [cannot], create two tiers of ethical obligations, one for attorneys acting formally and for gain, and another for those who act for other reasons. All attorneys must act in an ethical manner when they act as attorneys regardless of what motivates them to undertake the attorney-client relationship. *In re Washington*, 489 A.2d 452, 456 (D.C. 1985)

Fay was lucky in that his discipline was only an informal admonition. We doubt he will be so lucky in any malpractice claim.

Our prior newsletters include these two examples of lawyers learning that no good deed goes unpunished:

> **Too Accommodating:** A California law firm learned the hard way that a single brief appearance as an accommodation to another lawyer creates an attorney-client relationship with malpractice exposure. A firm lawyer, as a professional courtesy, appeared for the lawyer at a summary judgment motion hearing. When the lawyer's client later sued for malpractice the "accommodating firm" was sued along with other defendants. The firm argued that it had not advised the client or become associated with the other lawyer. Rather they made a special appearance as the other lawyer's agent on this single motion and owed no duties to his client. The court held "By appearing at a hearing in a case in which the attorney has no personal interest, the attorney is obviously representing the interest of someone else, someone who is a party to that action. The client is

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"IF YOU CAN'T RECALL IT, FORGET IT." | *Goodman Ace*

DOES YOUR FIRM HAVE A "BYOD TO WORK" RISK MANAGEMENT PROGRAM?

If you don't know what BYOD means, this article is for you. BYOD stands for Bring Your Own Device to Work. Devices includes personally owned laptops, iPhones, iPads, smart phones, and tablets that are used for both work and personal use. Apple even has an "iPhone in business" feature on its website to facilitate its use at work.

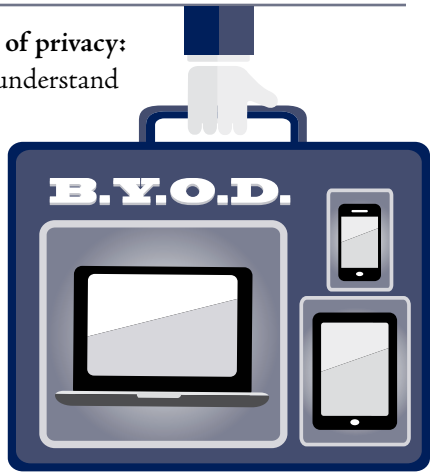
This article is intended to alert you to the risk management considerations of allowing firm lawyers and staff to turn their personal devices into ones used for both personal use and firm activities. The source for this information is *The Littler Report: The "Bring Your Own Device" To Work Movement*. This report is a comprehensive treatment of BYOD directed at all businesses and equally applicable to law firms. What follows is an overview of the issues discussed and risk management advice offered.

The overarching risk of BYOD is that firm data is no longer stored on devices the firm owns and controls. This risk includes client confidentiality breaches, loss of records retention control, loss of privacy for firm members, and more. *The Littler Report* identifies BYOD risks as follows:

1. **Lost or stolen devices:** This is the greatest risk of loss of firm data.
2. **Malware:** The opportunity for the introduction of malware in firm IT systems is significantly increased.
3. **Friends and family:** Friends and family using the device is counter-intuitively a greater security risk than hackers.
4. **Gateway to the cloud:** BYOD allows firm members to store data in the Cloud in a variety of ways that exposes firm data to a security breach far beyond any Cloud secure service the firm is using. It in effect can amount to complete loss of control of firm data.
5. **Implications of a security breach:** Any of these risks can expose a firm to violation of numerous laws such as HIPPA.

The Littler Report includes a list of considerations in developing a risk management program. The key ones from a law firm perspective are:

- **Decide which employees should be permitted to participate in a BYOD program:** Not everyone in a firm needs to BYOD. Tight control over who is authorized to do so is essential.
- **Reduce expectations of privacy:** Firm members must understand that the firm may need access to their device and may need to copy the entire device.



- **Require employee consent:** Do so in writing, including consent to monitor the device, copy it, and remotely wipe it.
- **Authorization to use BYOD is a privilege not a right.**
- **All other firm policies apply when firm members use their dual-use device during work hours or on work premises.**
- **Firm members must provide to the firm dual-use devices upon demand, preserve data, and delete backups.**
- **Firm members must follow good security practices:** This includes using strong passwords, not disabling security settings, and no upgrading of device without coordination with the firm.
- **Immediately report lost or stolen devices.**
- **Compliance with firm IT configuration instructions:** Firm members must comply with all instructions on device configuration.
- **No friends and family sharing BYOD.**
- **Limit BYOD use of cloud-based storage for company data:** Use the Cloud only with firm approval.
- **Firm help desk support:** Whether a firm should provide help with device technical problems concerns the risk of firm members seeking support from outside technicians thereby exposing firm data.
- **Mobile device safety:** Establish firm safety rules for use of BYOD while driving on firm business.

The Littler Report: The "Bring Your Own Device" To Work Movement is recommended risk management reading for all firms allowing BYOD. It is readily available on the Internet – just Google the title. *(last viewed on 6/9/2015)*

"IF YOU WANT TO BE A **SUCCESS IN LIFE**, THEN A EQUALS X PLUS Y PLUS Z. WORK IS X; Y IS PLAY; AND Z IS KEEPING YOUR MOUTH SHUT." *Albert Einstein*

"APPEARANCE OF IMPROPRIETY"

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confidence in the judiciary, that concern is less pressing when dealing with the private lawyer-client relationship. If anything, use of such a low standard in that context creates a "greater ... likelihood of public suspicion of both the bar and the judiciary" and "would ultimately be self-defeating," *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976), because it creates the impression that courts are ruling based on appearances rather than facts. Before a lawyer is disqualified based on a relationship with a former client or existing clients, the complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation.

....

Lovell applied a standard that is no longer a part of the Rules of Professional Conduct and is simply inadequate to preserve the interests involved when a conflict of interest is alleged. To the extent that *Lovell* and other cases have approved the appearance-of-impropriety standard, they are overruled. Instead, in deciding disqualification questions, trial courts should apply the standard that is currently in the Rules of Professional Conduct, which at this time requires a showing of an actual conflict of interest.

Marcum came to the Supreme Court as an appeal of a denial of a writ of prohibition to bar the enforcement of the trial court's order disqualifying the appellants' lawyers. The underlying case concerned a shareholder-derivative suit. The complicated facts of this suit involve multiple parties, lawsuits, and a multitude of lawyers. The Supreme Court referred to these facts as an example of the infamous "Gordian knot." We recommend Marcum for your professional reading and alert law professors to what a great professional responsibility exam question could be made out of this decision.

PROFESSIONAL COURTESY

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such a person; the client's attorney of record is not. We conclude that an attorney making a special appearance is representing the client's interests and has a professional attorney-client relationship with the client." *Streit v. Covington & Crowe*, Cal. Ct. App. 4th Dist., Division 2, No. E023862, 7/20/00.

Too Accommodating: Two attorneys practiced law in the same building, though not in the same law office. They were acquainted and on friendly terms. The first lawyer, who had successfully settled a case for his client, approached the second lawyer and asked him for the accommodation of depositing the settlement check in the second lawyer's trust account so that everything could be finished that day. The second lawyer's self-protection antennae should have tingled, but did not. The second lawyer had a good relationship with his bank and knew they would immediately credit his account with the deposited funds. He accepted the endorsed check and deposited it into his trust account. That same day he wrote a check to the first lawyer noting on it that it was for the first lawyer's benefit and the benefit of his client.

No one reading this will be surprised to learn that the first lawyer cashed the check, did not take care of his client's medical bills, did not give any money to his client, and was disbarred. The sad ending to this story is that the second lawyer was also sued, also had a bar complaint filed, and although "all he did was try to do a favor for a friend," he lost that suit and was also disbarred (*Hetzel v. Parks*, 971 P. 2d 115 (1999)). The moral is that even the most innocent appearing accommodation of another lawyer, party, or nonclient can carry huge liability and disciplinary exposure. Sort of like buying Yahoo stock at $240 hoping it will go up to $250, but it is now at $15. The potential benefit just didn't justify the risk of that much capital.

THE RISK MANAGER
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DEL O'ROARK
Newsletter Editor

"MISTAKES ARE A FACT OF LIFE. IT IS THE RESPONSE TO THE ERROR THAT COUNTS." *Nikki Giovanni*

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ARE YOU KEEPING UP WITH STATUTE OF LIMITATIONS CHANGES?

Missing a statute of limitations is the surest way of receiving a malpractice claim. About all you can do is hope there are no damages and, if there are, ask where to send the check. Since limitations periods are subject to change, you cannot rely on past experience or checklists, but must research limitations periods for all new matters.

For example, are you aware of these 2014 KRS changes?

- KRS 413.090(2) and 413.160 change the limitations period for actions upon written contracts executed after July 15, 2014 to 10 years from 15 years. (***Editor's note:*** *Be sure to confirm that none of the special situation exceptions in KRS 413.090 are applicable.*)
- KRS 413.090(5) establishes a new limitations period of 15 years for actions to recover unpaid child support arrearages.

We recommend you read KRS 413.090 and 413.160 and use the following statute of limitations risk management procedures for all new matters:

- 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 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 responsibility to respond to a reminder notice if the responsible lawyer is unavailable or fails to respond.