VOLUME 31, ISSUE 2 SPRING 2019

THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

MESSAGE FROM ANGELA EDWARDS, CEO

For nearly 30 years, Lawyers Mutual Insurance Company of Kentucky has provided its quarterly *Risk Manager* newsletter. We've heard from many of you about how much you appreciate its guidance and counsel. Dulaney L. "Del" O'Roark, the first employee and first chief operating officer of Lawyers Mutual, has been the voice behind the countless articles on professional responsibility, malpractice and risk management. It is hard to imagine that there has been another so well qualified to guide the lawyers of our Commonwealth.

Del has taught professional responsibility at both the University of Kentucky College of Law and the Brandeis School of Law at the University of Louisville. In addition to teaching law students, he has educated many of the Commonwealth's new lawyers. Del was the first moderator of the "New Lawyers" two-day training program required by the Kentucky Supreme Court for all new admittees and continued doing so for more than 10 years. He served as chair of the Kentucky Bar Association's Ethics 2000 Committee which recommended an overhaul of the 1990 Kentucky Rules of Professional Conduct leading to the 2009 Revised Kentucky Rules of Professional Conduct. He edited the *Client Trust Account/Principles & Management for Kentucky Lawyers*, the bible on a lawyer's fiduciary obligations when entrusted with the property of clients and prospective clients. And, over his career, he contributed nearly 60 articles on professional responsibility to the KBA's *Bench & Bar* magazine.

This issue/edition of the *Risk Manager* is the last one that Del will author fully and exclusively. We anticipate that he will periodically contribute his wisdom going forward, but his work on the *Risk Manager* for so many years will be missed greatly. Del has been instrumental in helping Lawyers Mutual deliver on its mission of educating the lawyers of Kentucky on their professional responsibility obligations, malpractice pitfalls and risk management strategies. He has monitored ethics decisions here at home and across the country to bring you the developing issues and concerns. Del followed the trends and stayed abreast of the issues in order to decrease the time you had to do the same. He developed risk management checklists which are used in law offices across the Commonwealth.

To say thank you is inadequate to demonstrate what Del means to Lawyers Mutual and to the lawyers of Kentucky who have benefitted from his writings, his lectures and his teaching. On behalf of the Lawyers Mutual staff, Board of Directors, policyholders and your other faithful followers – THANK YOU! We wish you and Jane peace, joy, and good health in this next phase of your life. Any time you want to write an article for the *Risk Manager*, the pen is yours dear friend.

There are some other changes coming to the *Risk Manager* and to Lawyers Mutual. We are excited to share that, starting with the summer issue/edition, the *Risk Manager* is going digital. We know that some of you prefer the paper copy, but it is past time to take the newsletter digital. Many more of you have expressed a preference for a digital newsletter and we've heard you. We are planning to distribute the newsletter more often than quarterly and doing it digitally will allow us to bring you information in a more timely, and less costly, fashion. Additionally, Lawyers Mutual will launch a new look and a new but similar name at the KBA Convention in June. Despite the new look and name, the lawyers of Kentucky will get the same service, dedication, compassion and excellent claims service that you've come to expect, and that you deserve. In short, we will continue to treat your practice as if it were our own. Come by the (spoiler alert on the new name) **Lawyers Mutual of Kentucky** booth at the KBA Convention in June to see our new look. We look forward to seeing you. Happy Spring!

Angela Logan Edwards/CEO

INSIDE THIS ISSUE:

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YOUR NEW CLIENT WANTS TO PAY YOUR FEE BY CROWDFUNDING ON THE INTERNET.

What Could Go Wrong With That?

Editor's Note: *We know of no Kentucky authority providing guidance on lawyer fees paid by crowdfunding. This article is a synthesis of ethics opinions by the D.C. Bar Legal Ethics Committee Opinion 375, (11/18); New York State Bar Association Committee on Professional Ethics Opinion 1062 (6/29/15); and the Philadelphia Bar Association Professional Guidance Committee Opinion 2015-6 (12/ 2015). All three bar associations have rules of professional conduct virtually identical to the Kentucky Rules of Professional Conduct and all are well reasoned. Accordingly, we consider them valid secondary authority for Kentucky lawyers considering receipt of crowdfunding fee payments.*

WHAT IS CROWDFUNDING?

The D.C. Bar describes crowdfunding as:

> [T]he process of raising money from third parties for the benefit of another. While the term is most often used to describe the practice of raising small amounts of money from numerous people through social media and other platforms, as used in [*the D.C.*] opinion,"crowdfunding" refers to the solicitation and acceptance of such funds to pay for someone else's legal representation.
>
> Crowdfunding is generally structured in one of two ways:
>
> 1) equity-based funding, in which the investor retains an ownership interest in either the recipient (here, the law firm or its client) or in future recoveries/earnings/profits of the firm or matter, or
>
> 2) donation-based funding, in which the donor receives no financial interest in the legal matter, but may receive other incentives. This opinion focuses solely on donation-based funding ….

There is agreement in the opinions that there is nothing in the rules that *per se* prohibit a lawyer from accepting fees raised by crowdfunding. This does not mean, however, that there are not a number of risks of violating laws or professional conduct rules when accepting crowdfunding fees. The threshold question is whether the funds are raised by the client or by the lawyer.

CLIENT INDEPENDENTLY RAISES FEE PAYMENT BY CROWDFUNDING

The D.C. Bar opinion points out that clients often depend on family and friends for help in paying fees. This does not automatically trigger ethics issues for lawyers. Similarly, clients independently soliciting donations from friends and strangers on the Internet do not necessarily create ethics issues. Nonetheless, lawyers should take these precautions with clients who use the Internet to raise funds:

- The client should be counseled about disclosures to third parties whether family or on social media. While some information must be revealed to interest potential donors in participating, clients must understand the risk of waiving the attorney-client privilege or revealing case strategy.
- The client should be warned about giving misleading information about the matter to encourage donations. Angry donors may resort to legal remedies for fraud.
- There is a heightened risk of fraud, money laundering, and scams with crowdfunding. Lawyers must be careful to avoid becoming involved in a client's illegal acts. If a lawyer knows or suspects fraud, the lawyer is required to counsel the client of the limitations on his ability to represent the client in these circumstances. Lawyers must avoid the accusation of engaging in or assisting the client in unethical or illegal conduct.
- Lawyers must be sure that crowdfunding by a client does not result in a violation of SCR 3.130(1.5)'s prohibition of excessive fees and complies with the writing requirement of the Rule. Paragraph (b) of the Rule provides:

  > The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation….

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"ZEAL IS A VOLCANO, ON THE PEAK OF WHICH THE GRASS OF INDECISIVENESS DOES NOT GROW." *Kahlil Gibran*

CROWDFUNDING

THERE IS A **HEIGHTENED RISK** OF **FRAUD, MONEY LAUNDERING,** AND **SCAMS** WITH **CROWDFUNDING.** LAWYERS MUST **BE CAREFUL** TO **AVOID** BECOMING INVOLVED IN **A CLIENT'S ILLEGAL ACTS.**

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LAWYER MANAGED CROWDFUNDING

When a lawyer controls crowdfunding several ethics rules are triggered dealing with accepting fees from third parties, client confidentiality, misleading statements, excessive fees, and use of client trust accounts for crowdfunding donations. What follows are the key considerations for each of these issues.

Accepting fees from third parties.

The Kentucky Rules of Professional Conduct permit lawyers to accept payment from third parties if certain conditions are met. SCR 3.130(1.8) Conflict of Interest: Current Clients; Specific Rules provides:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

Misleading statements.

When crowdfunding, lawyers must not let donors influence the purpose of the representation or legal strategies in any way. The Philadelphia Bar opinion nicely lays out a lawyer's duty not to mislead donors:

> Finally, the [*lawyer*] also should consider the duties owed to non-clients. The Rules refer in several places to the obligation of lawyers to be truthful in all respects to third parties. Rules 4.1* states that "[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person. Rule 7.1* requires that lawyers not make false or misleading communications about the lawyer or the lawyer's services, noting that a communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

**Note: Kentucky Rules of Professional Conduct, SCR 3.130 (4.1 and 7.10).*

Publicizing the crowdfunding drive and client confidentiality.

The Philadelphia Bar opinion explains well the enhanced sensitivity to client confidentiality that crowdfunding requires:

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"JUSTICE IS TRUTH IN ACTION." *Benjamin Disraeli*

CROWDFUNDING

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> In order to seek funds on a crowdsourcing site, the lawyer will of course have to reveal certain information about the matter sufficient to interest the public in making contributions. That will require obtaining the informed consent of the client. The [*lawyer*] indicates he is aware of this requirement and provided the [*lawyer*] obtains the informed consent of the client by satisfying the requirement of having "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" (see Rule 1.0e)*, the Committee believes that is possible. Care should be taken, of course, to keep information revealed about the client and the matter to the minimum necessary to achieve the purpose.

*(SCR 3.130(1.0e)

Fees.

Excessive fees

The overarching problem in avoiding excessive fees when agreeing to accept crowdfunding payment is that it cannot be known how much money will be raised. The Philadelphia Bar opinion offers this analysis:

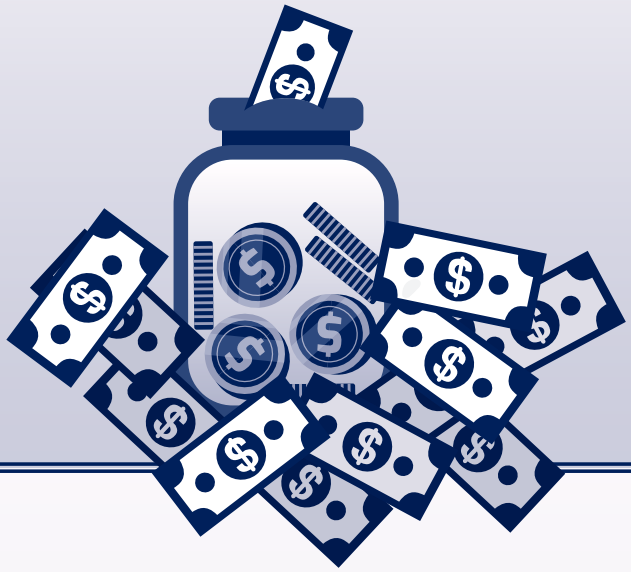
> It cannot be known how much may be raised; and the course of the representation is by no means certain. The litigation could end quickly, either favorably or not; before the litigation's end the [*lawyer*] may seek to withdraw or the client may wish to discharge him; or the [*lawyer*] may or may not succeed in seeking the payment of fees and expenses under an applicable fee shifting statute. Thus, just to give one example, if the matter ends quickly with relatively few hours of work expended, the retention of the entire amount raised on the crowdfunding site may produce an effective hourly rate that is extremely high. Without knowing how much was raised, it would therefore be difficult to determine whether or not the fee would be clearly excessive.

WHAT SERVICES DO THE CROWDFUNDING FEES COVER?

The Philadelphia Bar opinion raises this issue:

> The scope of the [*lawyer's*] obligation in return for the payment of the fee also is not clear to the Committee.

CROWDFUNDING MAY INCREASE THE RISK OF DISPUTED OWNERSHIP OF FUNDS.



> Does the [*lawyer*] anticipate that if the client agrees to allow the lawyer to retain the total raised on the crowdfunding site that the [*lawyer*] is promising that he will handle the matter from its inception to its conclusion in return for whatever the crowdfund raised fee turns out to be? That is, in return for the fee, does the lawyer promise to remain in the case through its termination, regardless of what the fee is, or may he withdraw in the event certain contingencies arise but still keep his fee?

WHAT SHOULD THE REQUIRED WRITTEN FEE AGREEMENT INCLUDE AND AVOID?

The Philadelphia Bar opinion suggests the following:

- First, the fee arrangement should include terms which describe the lawyer's obligations including the lawyer's obligation to remain in the case, assuming the client wishes him to do so, until its conclusion or until some other point at which retention of the total fees paid would not constitute an excessive fee. For example, the fee

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"LIFE CONSISTS NOT IN HOLDING GOOD CARDS BUT IN PLAYING THOSE YOU HOLD WELL." *Josh Billings*

CROWDFUNDING

CONTINUED FROM PAGE 4

arrangement with the client could state that the [*lawyer*] is obligated to remain in the representation until the time expended reaches a total figure such that the total fee paid is reasonable in light of that time expended.

- Second, the arrangement should require that the amount raised be placed in a trust account established under Rule 1.15 until those amounts are earned in accordance with the terms of the final fee agreement. Until such time that it is determined that the fee is actually earned, the monies raised constitute Rule 1.15 funds and should be held separate from the lawyer's own property.

The D.C. Bar opinion advises that fee agreements also cover who owns excess crowdfunds raised and who is responsible for payment if the crowdfunds are not enough to cover agreed fees and expenses. It is strongly recommended that letters of engagement signed by the client be used in all crowdfunding representations.

TRUST ACCOUNT MANAGEMENT

Fees paid by crowdfunding are advanced fees and must be deposited in the lawyer's client trust account [SCR 3.130, (1.15) Safekeeping Property] and only moved to the operating account after they are earned. The D.C. Bar opinion includes the following guidance for lawyers managing crowdfunds:

- Crowdfunding may increase the risk of disputed ownership of funds. For example, if a donor claims that he or she donated more money than intended, or directed it to the wrong recipient, a lawyer would mitigate his or her ethical risk by ensuring such funds remain in trust until they are earned.
- In the absence of an appropriate agreement, unearned crowdfunds are the property of the client and should be returned to the client upon the matter's conclusion or termination of the representation, unless the client directs the lawyer to do otherwise.
- A lawyer may suggest that the client donate excess crowdfunds to a charity of the client's choice. Ultimately, however, the lawyer must abide by the client's decision and/or an appropriate agreement regarding disposition of unearned crowdfunds.
- The Committee believes it would be unethical for a lawyer personally to claim unearned crowdfunds at the conclusion of a representation. Unlike a contingency fee case, where a lawyer may on occasion obtain a "windfall" due to an unexpected early settlement or other turn of events (and runs an equal risk of earning nothing at all if an unfavorable outcome results), in this situation the lawyer incurs no equivalent risk.

SUMMING UP

While we could locate no Kentucky authority on crowdfunded fees, KBA Ethics Opinion E-432 [5/20/2011] is a comprehensive opinion on third-party litigation financing. In that opinion the Committee advised:

- In the final analysis, the Committee agrees with the numerous other jurisdictions which have concluded that lawyers are not per se prohibited from assisting clients on obtaining funding from a third-party lender.
- It also agrees that there are serious risks to such participation and that third-party litigation financing frequently does not serve the client's best interest.
- Lawyers who assist their client in obtaining funding must be particularly sensitive to the various ethical issues, including:
  1. confusion as to the lawyer's role in the transaction;
  2. whether an additional fee will be charged;
  3. possible interference with the lawyer's independent professional judgment by the lender;
  4. the need to assist the client in understanding the advantages and disadvantages of the transaction;
  5. and the impact that the provision of information to the lender has on the attorney-client privilege and confidentiality.
- Finally, the Committee recommended that understandings between the lawyer and the client regarding issues raised by third-party financing be in writing.

Opinion E-432 uses the same reasoning and cites the same Rules of Professional Conduct that are cited in the crowdfunding ethics opinions in this article. For this reason, we believe that our risk management advice on crowdfunding is acceptable in Kentucky. Just to be sure, however, we recommend calling the KBA Ethics Hotline for confirmation of any crowdfunding program you want to use.

"GROWING OLD IS LIKE BEING INCREASINGLY PENALIZED FOR A CRIME YOU HAVEN'T COMMITTED." *Anthony Powell*

SCAMS: EVEN MEGA LAW FIRMS CAN BE VICTIMS OF REAL ESTATE SETTLEMENT FRAUD.

The global law firm, Dentons Canada LLP, got stung for over $2.52 million by failing to thoroughly verify payout instructions for the partial repayment of a mortgage held by Timbercreek Mortgage Servicing Inc. While the transfer was pending, Denton received email purporting to be from Timbercreek advising that its account was being audited and directed the money be sent to an international account in Hong Kong, held by a third-party called Yiguangnian Trade Co. Ltd. Denton attempted to verify the instructions by leaving a voicemail at Timbercreek and asking for letters of authorization from Timbercreek and Yiguangnian.

Denton was never called back, but did receive authorization letters that appeared legitimate indicating they were from Timbercreek and Yiguangnian. Denton then transferred the $2.52 million to the Hong Kong account. Several weeks later Timbercreek contacted Denton asking what happened to their money. At that point Denton realized it had been scammed.

Troy Crawford, Managing Counsel for LM Title Agency, LLC, a wholly owned subsidiary of Lawyers Mutual of North Carolina, developed the following checklists for North Carolina lawyers based on his experience working with real estate closing scam claims. We think Kentucky lawyers can also benefit from Mr. Crawford's work:

PAYOUT DIRECTIVES

1. Do not include unnecessary parties in communications involving wires. In particular, do NOT include Realtors and mortgage brokers, as they are the parties specifically targeted by criminal organizations and the most likely to be compromised. In [*one*] case, a hacker was monitoring the seller's Realtor and sprang into action when receiving the [*lawyer's*] directive. Worse yet, the fraudster now has a legitimate copy of this law firm's document and may now target the firm in future deals.

   Demand a physical 'wet ink' copy of the notarized directive. In [*one*] case, a .pdf version of the directive was sent, and it was impossible to detect the forgeries. ….
2. Ideally, the directive will be signed in the presence of a firm employee. This is the only method that does not require telephone or in-person verification.
3. When not possible, directives should ideally be received with other closing documents (deed, lien waiver, etc.) While not a sure indicia of fraud, a stand-alone directive should be considered a red flag.
4. All directives not signed in the physical presence of a firm employee require telephonic confirmation, using a previously verified number obtained from a source not in the chain of wiring communications. The call should be initiated by the law office, as fraudsters are now proactive in calling first. Email verification is useless, as a compromised email account is the very cause of these frauds.

FAXES

1. Faxes should not be assumed any safer or more secure than email. A quick Google search under the term 'fax spoofing' reveals how easy it is to send spoofed faxes for free from any mobile device.
2. More secured versions of fax services should be used. Both stored pages and the data, which is transmitted, should be encrypted and only sent using secured email.
3. The fax account should be regularly monitored to verify faxes are only being forwarded to the correct designated email account.
4. As with email accounts, proper password security procedures should be followed, including making sure passwords are significantly complicated and changed frequently. Passwords should not be shared among different users or between different accounts or services accessed by the same user. For real estate practitioners, passwords should be in compliance with the ALTA Best Practices.
5. When it is not possible to verify the validity of the payoff account information, we encourage all attorneys to either overnight or hand deliver payoffs. This is especially the case if the payoff account is different than previously used for the same lender.
6. All attorneys should consider cyber, crime insurance and/or other insurance policies, which cover social engineering fraud. Working with an agent experienced with law firms is key to getting appropriate coverage and value.

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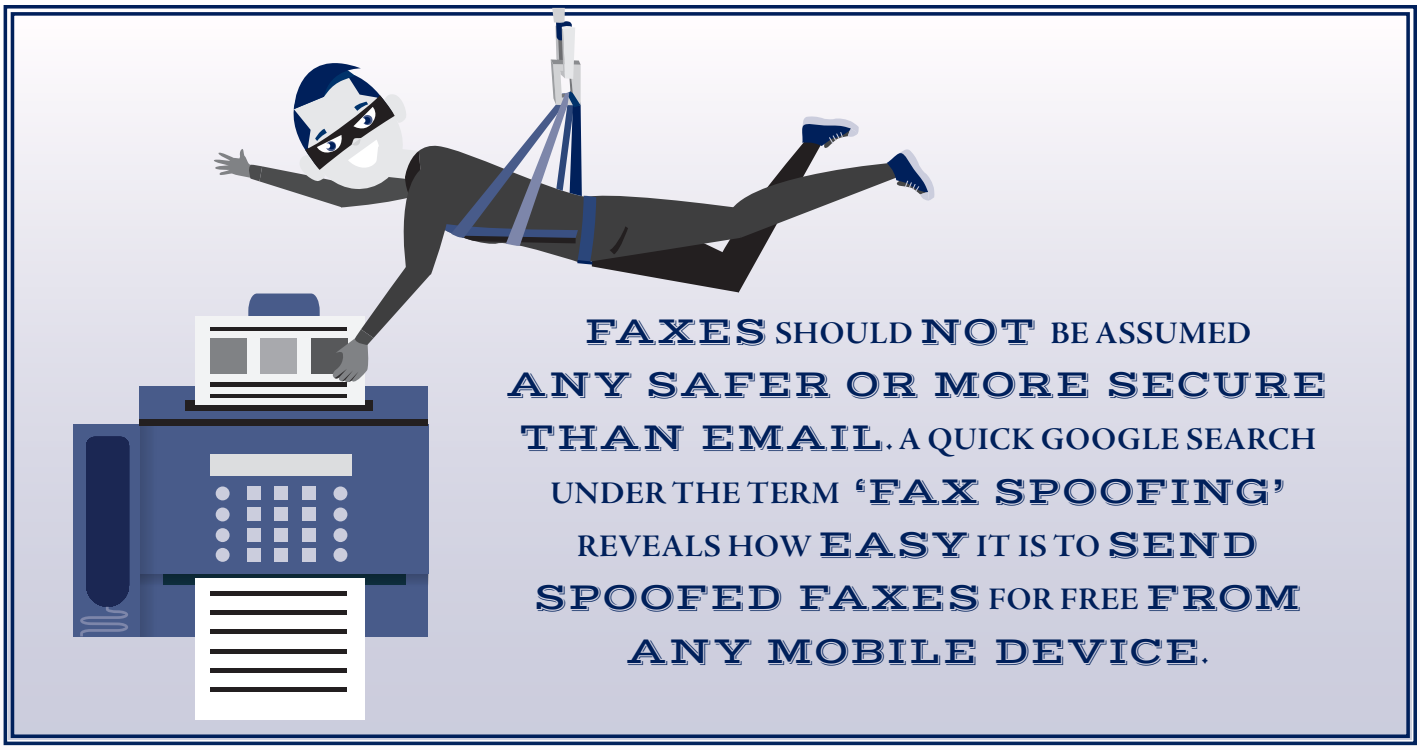
"LIFE IS LIKE A DOG-SLED TEAM. IF YOU AIN'T THE LEAD DOG, THE SCENERY NEVER CHANGES." *Lewis Gizzard*

SCAMS



FAXES SHOULD NOT BE ASSUMED ANY SAFER OR MORE SECURE THAN EMAIL. A QUICK GOOGLE SEARCH UNDER THE TERM **'FAX SPOOFING'** REVEALS HOW **EASY** IT IS TO **SEND SPOOFED FAXES** FOR FREE **FROM ANY MOBILE DEVICE.**

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We published the following checklist in 2015 (citing Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2015-3: *Lawyers Who Fall Victim to Internet Scams* (April 2015)). We think now is a good time to offer it again.

RED FLAGS THAT MAY ALERT AN ATTORNEY TO AN INTERNET SCAM

Any one or more of these common "red flags" indicating a scam should arouse a lawyer's suspicion:

- The email sender is based abroad.
- The email sender does not provide a referral source. (If the email sender is asked how he found the firm, he may respond that it was through an online search. If prospective clients rarely approach the recipient attorney based on an Internet search, this should be an immediate red flag.)
- The initial email does not identify the law firm or recipient attorney by name, instead using a salutation such as "Dear barrister/solicitor/counselor."
- The email uses awkward phrasing or poor grammar, suggesting that is was written by someone with poor English or was converted into English via a translation tool.
- The email is sent to "undisclosed recipients," suggesting that it is directed to multiple recipients. (Alternatively, the attorney recipient may be blind copied on the email.)
- The email requests assistance on a legal matter in an area of law the recipient attorney does not practice.
- The email is vague in other respects, such as stating that the sender has a matter in the attorney's "jurisdiction," rather than specifying the jurisdiction itself.
- The email sender suggests that for this particular matter the attorney accept a contingency fee arrangement, even though that might not be customary for the attorney's practice.
- The email sender is quick to sign a retainer agreement, without negotiating over the attorney's fee (since the fee is illusory anyway).
- The email sender assures the attorney that the matter will resolve quickly.
- The counterparty, if there is one, will also likely respond quickly, settling the dispute or closing the deal with little or no negotiation.

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"IT IS **EASY** TO **WRITE A CHECK** IF YOU HAVE ENOUGH **MONEY IN THE BANK**, AND **WRITING** COMES **MORE EASILY** IF YOU HAVE **SOMETHING TO SAY.**" *Sholem Asch*

THE RISK OF LEVERAGING YOUR PRACTICE WITH PART-TIME LAWYERS AND OFFICE SHARING.

One advantage that large law firms have over sole practitioners and small firms is the flexibility within the existing firm to take on new business without adding lawyers or staff. Solo practitioners and smaller law firms often have the problem of a surge in business that requires more lawyers than the firm has. The question then is how to leverage firm productivity without permanently increasing the size of the firm. The answer often is part-time lawyers and office sharing agreements. While these arrangements can work well, they carry an increased risk of the firm finding itself with a malpractice claim by a client it did not know it had – a lawyer's worst nightmare. This article reports on a recent case illustrating the risks and provides a recapitulation of our risk management advice for part-time lawyers, office sharing, contract lawyers, and Of Counsel.

PART-TIME LAWYER EXPOSES FIRM TO A MALPRACTICE CLAIM

Indy Auto Man, LLC v. Keown & Kratz, LLC, 2018 BL 40220, Ind. Ct. App., No. 18A-PL-1154, 11/1/18

An Indiana two-partner firm, after finding it necessary to refer too many prospective clients to other lawyers, decided to engage Stohler, a sole practitioner, part-time. Stohler was to work on cases for the firm, but would also represent his own clients in his separate solo practice.

Indy Auto Man (IAM), a used car dealer, retained Stohler to represent it in two cases. In both cases Stohler filed his appearance using firm letterhead. He used the firm's address and his firm email address as contact information. Stohler's relationship with firm did not work out. He disappeared. It was later learned that he had accepted an in-house position.

Stohler's abandonment of IMA resulted in missing the time limitations for responding to discovery. This led to a default judgment in one of the cases of $60,000. IAM filed a malpractice claim against Stohler and the firm. The firm moved for summary judgment arguing that as a matter of law it did not owe IAM a duty of care. The trial court granted the motion.

On appeal the Indiana Court of Appeals reviewed the facts to determine whether the firm assumed a duty of care by giving Stohler the apparent authority to engage the firm to represent IAM. The Court noted these undisputed facts:

- The Firm provided Stohler with rent-free office space and allowed him to use the Firm's mailing address.
- The Firm provided Stohler with business cards and letterhead.
- The Firm provided Stohler with an email address, though he never activated it.
- Stohler used the Firm's contact information when filing appearances in the two IAM cases.
- The Firm added Stohler to its legal malpractice insurance policy. The Firm believes that was only intended to cover Stohler's work for the Firm's clients, but there is no written evidence supporting that belief.
- IAM sought to retain an attorney with the backing of a firm and selected Stohler, in part, because it believed that he was in such a situation.

The Court concluded that:

> At the very least, there is a question of fact as to whether IAM had a reasonable belief that Stohler was "Acting as the firm's agent based on the Firm's manifestations. It is clear that this evidence must be weighed and evaluated by a trier of fact. ….The judgment of the trial court is reversed and remanded for further proceedings.

This case is an object lesson on how not to employ a part-time lawyer. We recommend it for your risk management professional reading

THE *DE FACTO* LAW PARTNERSHIP

There are numerous KBA ethics opinions governing shared offices. The significant risk management consideration is expressed in E-418:

> If the lawyer relationships and client information systems found in an office-sharing arrangement resemble those found in firms, the lawyers will be deemed members of a firm for the purpose of applying the Rules of Professional Conduct.

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"OPPORTUNITY IS MISSED BY MOST PEOPLE BECAUSE IT IS DRESSED IN OVERALLS AND LOOKS LIKE WORK." *Thomas Alva Edison*

LEVERAGING

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KBA ethics opinions uniformly require accurate and clear communication of firm names and that there be no misleading of the public that a shared office is a single firm. [*See generally*, KBA E-219, 259, 299, 302, 311, 338, 396,406, 417, and 418.] Once misleading of the public is found, malpractice liability attaches to all lawyers in the shared office.

MANAGING THE RISK

Lawyers Mutual's risk management article, *Sharing Offices: The Ethical, Risk Management, and Practical Considerations*, is a comprehensive review of:

- With whom may lawyers share offices?
- With whom should lawyers share offices?
- What professional responsibility rules are paramount in shared office arrangements?
- What are the shared office vicarious malpractice liability risks?

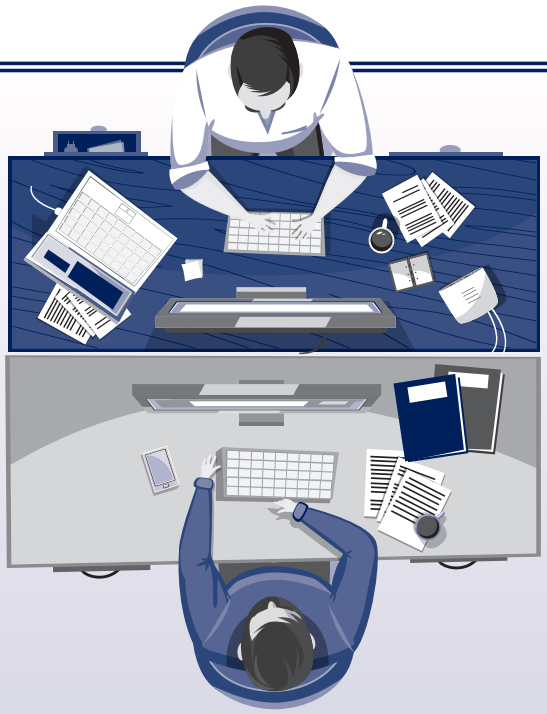
The article concludes with risk management guidelines for evaluating office sharing arrangements along with a sample office-share agreement that offers ideas on how to structure a workable relationship. The article includes the following risk management advice for avoiding the appearance of a *de facto* law firm:

- **Office Signs:**

  Exterior – Building marquees, building directories, and office entrance door signs must clearly indicate the relationship among the lawyers practicing in the office. Insert a line between the names of separate practices. Include descriptive language as appropriate; *e.g.*, add "Sole Practitioner" after the name of those lawyers practicing alone.

  Interior – Place on individual lawyer office doors signs that indicate that the lawyer's practice is separate from others in the office.

- **Documents and Advertising:** Business cards, letterhead, and pleadings should indicate only the lawyers practicing together in the shared office. Telephone listings, yellow page ads, brochures, and other advertising should be done in the name of the separate practices – never jointly.
- **Office Layout:** Organize office space to separate practices to the maximum extent feasible. Lawyers should have private offices and workspace for their staff and individually owned equipment. Use interior walls, screens, and cubicles to indicate separate office practices.
- **Common Receptionists:** Common receptionists must be trained on how to answer the telephone in a way that avoids giving the impression of a partnership and how to answer questions about who employs them. The best procedure is for each practice to have a separate telephone number. If a common telephone number is used, the receptionist should answer with a recitation of the number only or the generic phrase "law offices."



ORGANIZE OFFICE SPACE TO **SEPARATE PRACTICES** TO THE MAXIMUM EXTENT FEASIBLE. LAWYERS SHOULD HAVE **PRIVATE OFFICES** AND **WORKSPACE** FOR THEIR STAFF AND **INDIVIDUALLY OWNED EQUIPMENT.**

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"EGOTISM IS THE ANESTHETIC THAT DULLS THE PAIN OF STUPIDITY." *Frank Leahy*

LEVERAGING

CONTINUED FROM PAGE 9

- **Letters of engagement:** Require that all lawyers use a letter of engagement that includes a paragraph explaining the shared office arrangement and exactly whose services are being retained. If there is common staff, describe their duties in the letter of engagement making it clear that client confidentiality is protected. If appropriate, use the letter of engagement to get client consent for use of common staff on their matter.
- **Referrals:** Make referrals to other lawyers in the shared office carefully. Be sure the client understands any further involvement the referring lawyer has in the matter. Some lawyers give referred clients several names of lawyers, both inside and outside the shared office, or a lawyer referral service telephone number to avoid any confusion on relationships.
- **Lawyer Office Demeanor:** Do not be too casual in the office with other lawyers in the presence of clients and visitors thereby giving the impression that there is a close professional association. Knock before entering another lawyer's office and do not discuss business with another lawyer in front of clients or visitors.
- **Staff:** All office-share lawyers are ultimately responsible for training their staff and common staff on client confidentiality and other professional responsibility requirements. Sharing legal secretaries and paralegals with access to client confidential information should be avoided. Temporary employees must be thoroughly instructed on office-share procedures before working even a short time in the office.
- **Files and Office Procedures:** Filing systems must be separate – complete non-access. General bank accounts and client trust accounts cannot be combined. Office procedures should be established for mail handling, telephone messages, answering machine playback, and fax receipt that protect confidentiality.
- **Office Machines:** Shared telephone systems, fax machines, answering machines, scanners, and copiers should be located and operated on a basis that protects client information from inadvertent disclosure. Computer systems should not be networked in the office. Each practice should use a stand-alone computer system with password security and controlled access. If an office system is networked to be eligible for volume licensing on software and upgrades, firewalls and password security measures must be used to make absolutely certain files cannot be accessed by unauthorized persons.
- **Conflict of Interest Check System:** Each practice should maintain its own conflict of interest check system. Check

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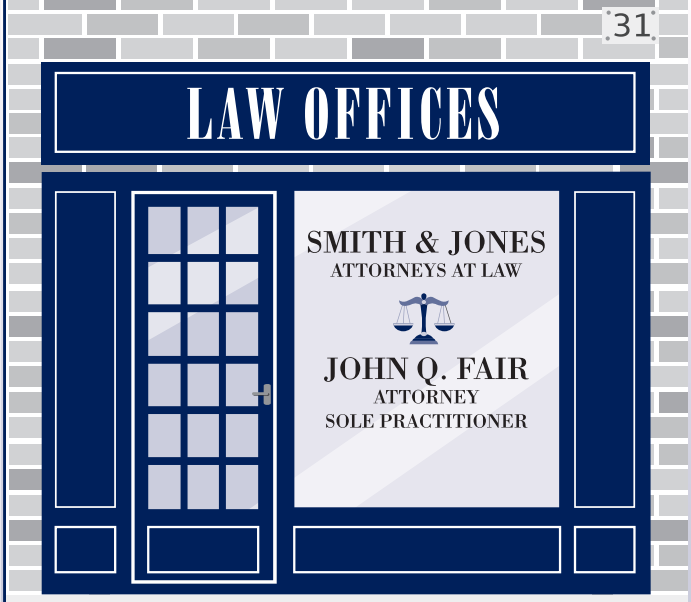

BUILDING **MARQUEES**, BUILDING **DIRECTORIES**, AND OFFICE **ENTRANCE DOOR SIGNS** MUST **CLEARLY INDICATE** THE **RELATIONSHIP** AMONG THE LAWYERS PRACTICING IN THE OFFICE. ...ADD **"SOLE PRACTITIONER"** AFTER THE **NAME** OF THOSE **LAWYERS PRACTICING ALONE.**

"**UNSOLICITED ADVICE** IS THE **JUNK MAIL** OF **LIFE.**" *Bern Williams*

SCAMS

CONTINUED FROM PAGE 7

- The email sender insists that his funds must be wired to a foreign bank account as soon as the check has cleared. (The sender often claims that there is an emergency requiring the immediate release of the funds.)
- The email sender or counterparty sends a supposed closing payment or settlement check within a few days. The check is typically a certified check or a cashier's check, often from a bank located outside of the attorney's jurisdiction.

DUTIES OF A LAWYER WHO SUSPECTS OR LEARNS THAT HE IS THE TARGET OF AN INTERNET SCAM

- An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney.
- However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.
- In addition, because Internet-based trust account scams may harm other firm clients, a lawyer who receives a request for representation via the Internet has a duty to conduct a reasonable investigation to ascertain whether the person is a legitimate prospective client before accepting the representation.
- A lawyer who discovers he has been defrauded in a manner that results in harm to other clients of the law firm, such as the loss of client funds due to an escrow account scam, must promptly notify the harmed clients

The Denton scam is now in court for a determination whether cyber insurance covers this kind of scam. For more details see *Dentons Canada LLP v. Trisura Guarantee Insurance Company*, Superior Court of Justice – Ontario, 2018 ONSC 7311, Court File No.: CV-18-595822, Date 20181211.

LEVERAGING

CONTINUED FROM PAGE 10

for conflicts with other lawyers at the time the office-share is started and thereafter for all new clients and matters. The surest way to avoid disqualification motions for office-share lawyers is to agree not to represent adverse interests. Exceptions to this agreement should be made only with the consent of both clients.

We recommend lawyers in or considering an office sharing arrangement read *Sharing Offices: The Ethical, Risk Management, and Practical Considerations* by going to lmick.com, click on Resources, click on Risk Manager by Subject, click on Sharing Offices, and select the article. Two other ways firms leverage practice by are using contract lawyers and Of Counsel. For our analysis and risk management advice on these arrangements go to lmick.com, click on Resources, click on Risk Manager by Subject, click on Contract Lawyers, and select the article *Barrister in a Box, Contract Lawyers in Kentucky*; and in the Subject index click on *Of Counsel*, select the article Of Counsel.

FAREWELL

It has been my privilege for 29 years to write for and edit Lawyers Mutual's *Risk Manager* newsletter. Its purpose is to provide the KBA risk management advice on lawyer malpractice and professional responsibility. Along with our CLE programs and our sponsorship of numerous KBA and local bar programs, the Newsletter serves to honor Lawyers Mutual's commitment to the KBA to inform, educate, and support Kentucky lawyers in their daily practice of law. It is now time for me to pass on the Newsletter to the next generation. In closing, I thank Lawyers Mutual's Board of Directors and staff for their long-standing strong support.

– DEL O'ROARK

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DEL O'ROARK
Newsletter Editor

"MY BIGGEST PROBLEM WITH MODERNITY MAY LIE IN THE GROWING SEPARATION OF THE ETHICAL AND THE LEGAL." *Nassim Nicholas Taleb*

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ANNOUNCEMENT

The Annual Policyholders' Meeting of Lawyers Mutual Insurance Company of Kentucky is scheduled for 8:00 am, Wednesday, June 12, in the Brown Room, Galt House, 140 N Fourth St., Louisville, KY. Included in the items of business are the election of a class of the Board of Directors and a report on Company operations. Proxy materials will be mailed to policyholders prior to the meeting. The annual financials may be downloaded from the Web site **LMICK.com**. We urge all policyholders to return their proxies and to attend the meeting.

WEDNESDAY, JUNE 12, 2019
8:00 A.M.
BROWN ROOM
GALT HOUSE
140 N FOURTH ST.
LOUISVILLE, KY