

It's Baaaack !!!

"The Appearance of Impropriety"

In two recent decisions the Kentucky Supreme Court has made it clear that the "appearance of impropriety" standard will be used to evaluate Kentucky lawyer compliance with professional responsibility requirements. The most recent decision, *Lovell v. Winchester, Ky.*, 941 S.W.2d 466 (1997), concerned a motion to disqualify opposing counsel for a conflict of interest. Opposing counsel had an initial consultation with the moving party about the matter, but declined representation. Opposing counsel later accepted the other side of the matter. When a motion was made to disqualify him for a conflict of interest, he argued that he recalled nothing about the consultation. In requiring disqualification the Court explained its position on the appearance of impropriety standard:

"Even though the comment to [Model] Rule 1.9 specifically rejects the "appearance of impropriety" standard in favor of a fact-based test applied to determine whether the lawyer's duty of loyalty and confidentiality to a former client will likely be compromised by the subsequent representation, the appearance of impropriety is still a useful guide for ethical decisions. The Arkansas Supreme Court found that although the language of Canon 9 regarding avoiding even the appearance of impropriety was not adopted as part of the Arkansas rules of professional conduct, lawyers still must avoid the appearance of impropriety because such is an integral component of professional responsibility, *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990).

In *First American Carriers, Inc.*, a law firm was disqualified even though no confidential information was obtained and the contacts were minimal. In *American Insurance Association v. Kentucky Bar Association*, 917 S.W.2d 568 (1996), this Court stressed that the mere appearance of impropriety is just as egregious as any actual or real conflict. *Id* at 573.

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."

Lovell is well worth reading for the Court's discussion of how a person on the basis of an initial consultation and notwithstanding the declination of the representation can become a "client" under KRE 503(a)(1); and its discussion of how the lawyer/client relationship can arise from the conduct of the parties. The following paragraph is particularly instructive:

"Consultation with a lawyer may ripen into a lawyer/client relationship that precludes the lawyer from later undertaking a representation adverse to the individual who consulted him. The lawyer/client relationship can arise not only by contract but also from the conduct of the parties. Courts have found that the relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation.

Such a belief is based on the conduct of the parties. The key element in making such a determination is whether confidential information has been disclosed to the lawyer."

Do your client intake procedures protect you from getting into the fix the lawyer found himself in *Lovell*?

- Do you use a new client interview checklist to document initial interviews?
- Are you careful to obtain only the minimum amount of information necessary to conduct a conflict of interest check before going into detail with a prospective client?
- Are you relying on memory, rolodex, and office appointment calendars as your conflict check system or do you employ automated conflict check systems?
- Do you use letters of nonengagement for declined representations?
- Do you use closing letters for completed representations to return client property and documents, and to make it clear that the representation is over?

Lovell is just the last in a series of Supreme Court decisions that teach the Kentucky Bar that less than strict adherence to professional responsibility standards will not be condoned. The public will be protected and clients get the benefit of any doubt.

WEIGHTY MAIL

Editor's note: This article is a modification of two articles published by Beverly Michaelis in the Oregon Professional Liability Fund newsletter "In Brief" and appears here with permission.

An Oregon law firm recently learned the hard way about a new postal regulation affecting stamped mail weighing more than 16 ounces. The firm placed such a package in the postal collection box in their building, only to have it returned by the post office. The problem wasn't with the postage or how the package was prepared. The mail was rejected because it wasn't handed directly to a window clerk at the post office or a mail carrier. This new "hand delivered" requirement for certain mail is in response to the threat of letter bombs. Postal News Release No. 87 provides this guidance:

The changes, effective August 16 [1996], affect packages mailed to international or domestic addresses deposited in mail collection boxes, such as street mail boxes, lobby and apartment drop boxes/receptacles, even rural customer mailboxes. Customers will have to bring to post offices for entry with retail clerks:

- *Domestic mail bearing stamps and weighing 16 ounces and over, and*
- *All international mail or military APO/FPO mail weighing 16 ounces and over and which in some cases may also require a customs declaration form...*

Packages returned to senders will have an accompanying explanation advising them in the future to deposit this mail at the post office. Previously applied postage may be used when the item is re-mailed at a Post office.

From a malpractice standpoint, the hazard is obvious: an unknowing practitioner places a deadline-sensitive package in the mail, only to have it returned after the deadline has passed. The solution? Inform staff of the regulation, use a postal scale and follow the hand-delivery rule when it applies. One option is to break your mail up into smaller packages, each weighing less than a pound.

Never wait until the last minute to file or submit anything that is deadline sensitive. And don't get lulled into thinking that messenger services are the fail-safe answer. Given Murphy's Law and a short deadline something can and will go wrong.

In light of this rule:

- All stamped mail weighing 16 ounces or more must be brought in person to a post office for processing by a clerk. The "weigh-in" may be done by your local carrier, who will likely guesstimate the weight. If your stamped package is anywhere close to 16 ounces - bring it in to the post office and don't risk the "return to sender."
- All metered or stamped international or military APO/FPO mail weighing 16 ounces or more must be brought in person to a post office for processing by a clerk.
- Metered domestic mail weighing 16 ounces or more may be placed in a collection box, drop box, or similar receptacle. Delivery to the post office for processing by a retail clerk is not necessary at this time. (Difference in treatment from stamped mail is because metered mail is traceable.)
- Express mail is not affected by these mailing requirements.
- If you have any questions about the "hand delivery" regulation call the US Postal Service at 1-800-ASK-USPS. Be alert for additional Postal Service security requirements for depositing weighty mail.