The Lawyers' Lawyer Newsletter

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Recent Developments in Risk Management **March 2019** | Volume 24 | Issue 1

This latest edition of The Lawyers' Lawyer Newsletter discusses a situation where a company was defrauded out of nearly $5 Million after an employee in their finance department initiated a wire transfer that was purportedly authorized by the company president but was in fact requested by a fraudulent actor posing as the president. In recent months, numerous law firms, including some of our clients, have received similar fraudulent wire requests. As a matter of sound risk management, law firms should implement a policy that no wire can be initiated without confirming phone calls or in person discussions with both the requesting party and the authorized recipient. As a backstop, law firms should purchase appropriate crime and cyber insurance to cover fraudulent wire transfers and any other computer fraud schemes including "social engineering". Please contact us if you would like to discuss these or any other insurance products for law firms.

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Insurance Coverage – Computer Fraud – E-Mail "Spoofing"

***Medidata Sols., Inc. v. Fed. Ins. Co.*, 729 Fed. Appx. 117 (2d Cir. 2018), 2018 U.S. App. Lexis 18376, 2018 WL 3339245**

Risk Management Issue: Is e-mail "spoofing" covered under the computer fraud provision in an insurance policy?

The Opinion: On September 16, 2014, an employee in Medidata Sols., Inc.'s finance department received an email purportedly sent from Medidata's president stating that Medidata was close to finalizing an acquisition, and that an attorney named Michael Meyer would contact the employee. The email advised the employee that the acquisition was strictly confidential and instructed her to devote her full attention to Meyer's demands. On that same day, the employee received a phone call from a man who held himself out to be Meyer and demanded that the employee process a wire transfer for him. The employee explained that she needed an email from Medidata's president requesting the wire transfer and approval from Medidata's Vice President and Director of Revenue.

Thereafter, the employee, the Vice President and the Director of Revenue received a group email purportedly sent from Medidata's president stating: "I'm currently undergoing a financial operation in which I need you to process and approve a payment on my behalf. I already spoke with Alicia, she will file the wire and I would need you two to sign off." The email contained the president of Medidata's email address in the "From" field and a picture next to his name. In response, the employee initiated a wire transfer for $4,770,226.00, which the Vice President and Director of Revenue approved. The money was then wired to a bank account that was provided by Meyer. Medidata later realized that the company had been defrauded when Medidata's president was asked about the transfer and he indicated that he had not requested the transfer.

Medidata submitted a claim for the loss under its insurance policy issued by the Defendant Federal Insurance Company ("Federal"). The policy included a Computer Fraud Coverage provision, which covered "direct loss of Money, Securities or Property sustained by an Organization resulting from Computer Fraud committed by a Third Party." The policy defined "Computer Fraud" as "the unlawful taking or the fraudulently induced transfer of Money, Securities or Property resulting from a Computer Violation." In turn, "Computer Violation" included both "the fraudulent: (a) entry of Data into . . . a Computer System; [and] (b) change to Data elements or program logic of a Computer System."

Despite this language, Federal denied coverage of the claim. Thereafter, Medidata filed a coverage action against Federal in the United States District Court for the Southern District of New York. The trial court ultimately concluded that the losses were covered under the policy and granted Medidata's motion for summary judgment.

On appeal, the Second Circuit rejected Federal's argument that the spoofing attack was not covered and affirmed the lower court's ruling. In particular, the Court held that "the spoofing code enabled the fraudsters to send messages that inaccurately appeared, in all respects, to come from a high-ranking member of Medidata's organization. Thus the attack represented a fraudulent entry of data into the computer system, as the spoofing code was introduced into the email system. The attack also made a change to a data element, as the email system's appearance was altered by the spoofing code to misleadingly indicate the sender." *Id*. at 118-119. The Court further concluded that spoofing attack "clearly amounted to a violation of the integrity of the computer system through deceitful and dishonest access, since the fraudsters were able to alter the appearance of their emails so as to falsely indicate that the emails were sent by a high-ranking member of the company." On this basis, the Court concluded that Medidata's losses were covered by the terms of the computer fraud provision. *Id.* at 118.

Furthermore, the Court rejected Federal's argument that Medidata did not sustain a "direct loss" as a result of the spoofing attack, within the meaning of the policy. Specifically, the Court concluded that "[t]he chain of events was initiated by the spoofed emails, and unfolded rapidly following their receipt. While it is true that the Medidata employees themselves had to take action to effectuate the transfer, we do not see their actions as sufficient to sever the causal relationship between the spoofing attack and the losses incurred. The employees were acting, they believed, at the behest of a high-ranking member of Medidata." *Id.* at 119.

Accordingly, the Court affirmed the entry of summary judgment in favor of Medidata.

Risk Management Solution: This case highlights the need for all organizations, including law firms, to establish fraud prevention policies, such as dual authentication of all instructions to transfer funds. Before wiring money to anyone, always verify – by phone call, not email – the authority to make the payment and the destination of the funds. To supplement fraud prevention policies, it is equally important to have insurance with limits sufficient to make good a reasonable range of losses that could occur. To ensure access to that protection, it's vital to understand that the language in your policy covers and does not cover. Firm policies and procedures to prevent computer fraud should be designed with the language of the firm's insurance policy in mind.

Filing Deadlines – Jurisdictional Motions – Failure to Timely File

***Peraino v. County of Winnebago,* 2018 IL App (2d) 170368**

Risk Management Issues: All attorneys work on deadlines, but waiting until the last minute to e-file with the court is inherently risky. Attorneys must establish and utilize reliable systems to meet litigation deadlines and avoid last-minute filings.

The Case: Plaintiff filed suit against the County of Winnebago (Illinois) for injuries sustained in a motorcycle crash allegedly caused by a defective roadway. The County successfully moved for summary judgment, but Plaintiff filed a motion to reconsider the decision. Unfortunately, the motion was filed at 12:03am, three minutes after the expiration of the deadline to appeal or move to reconsider. The following day, Plaintiff filed a motion for leave to file the reconsideration motion *nunc pro tunc.* In support of its motion, Plaintiff alleged that the Court's e-filing website would not upload the motion to reconsider when first attempted at 11:55pm on the filing deadline date, and as a result the motion was not considered accepted or filed until the day after the deadline.

The trial court denied Plaintiff's motion to file the motion to reconsider *nunc pro tunc*, and Plaintiff appealed, but failed to file the notice of appeal within 30 days after the entry of final judgment. In dismissing Plaintiff's appeal, the Appellate Court stated:

> [a]lthough the parties have not raised the issue of jurisdiction, we have an obligation to independently consider our jurisdiction and dismiss the appeal if jurisdiction is lacking. It is a jurisdictional and mandatory requirement that a notice of appeal be timely filed with the filing requirements set forth by supreme court rules. [internal quotes and citations omitted.]

As a result, Plaintiff not only lost his chance to have the trial court reconsider its grant of summary judgment, but also his chance to have the Appellate Court review that ruling.

While the Court of Appeals recognized the harsh outcome of its decision, the Court pointed out with respect to the failure timely to file in the lower court, that Plaintiff's counsel had 30 days to file the motion to reconsider. Had Plaintiff required additional time, an extension to the 30 day deadline could have been sought in the same time frame. Instead, Plaintiff's counsel waited until mere minutes before the deadline to attempt to electronically file the motion to reconsider, and as a result, missed the deadline, which ultimately left the Court powerless to do anything other than dismiss the motion.

Risk Management Solution: Deadlines matter. This decision emphasizes the importance of being aware of deadlines and highlights the need for attorneys to utilize calendaring and time-management systems to ensure compliance with deadlines, and avoid last-minute filings. Even when deadlines are properly calendared, counsel and law firm support staff should always give themselves ample time to allow for technical difficulties that may arise on an e-filing deadline.

Additionally, it is vitally important for attorneys to remain familiar with a court's e-filing processes and procedures in order to reduce the risk of filing errors. This decision is an example of the broader trend of courts rejecting excuses from attorneys relating to e-filing mistakes. It is imperative that litigators, whose practice is heavily driven by deadlines, create and utilize dependable systems to meet court deadlines and remain accustomed to each jurisdiction's e-filing rules and requirements.

Unauthorized Practice – Providing Services to Out-of-State Clients – Associating with Non-Lawyers and/or Out-of-State Lawyers

***Ohio State Bar Assn v. Klosk,* Slip Opinion No. 2018-Ohio-4864 (December 11, 2018); *Indiana Supreme Court Disciplinary Commission,* Opinion 2-18 (December 2018); *New York State Bar Association,* Committee on Professional Ethics, Opinion No. 1160 (January 2, 2019)**

Risk Management Issue: Most lawyers engage in interstate, cross-border activities in the course of practicing law many times every day. When might those activities constitute the unauthorized practice of law? What ethical issues are implicated when a lawyer provides legal services to out-of-state clients or when a lawyer affiliates with a non-member of the bar in the solicitation and/or provision of legal services?

The Case and Opinions: *Ohio State Bar Assn v. Klosk,* Slip Opinion No. 2018-Ohio-4864 (December 11, 2018)

A California attorney and his law firm provided consumer debt reduction counseling, assistance and related services to their clients. In 2010, the firm was retained by an Ohio debtor to negotiate a debt reduction. The California attorney emailed the Ohio counsel of one of the creditors, and identified himself as representing the debtor. Neither the California lawyer nor any member of his firm was admitted to practice law in Ohio.

The Ohio State Bar Association sued, and the Ohio Supreme Court granted summary judgment against the California lawyer and his firm, finding that even though the lawyer's only activity was to send emails into the state, he had engaged in the unauthorized practice of law in Ohio in violation of Ohio licensing requirements. Under Ohio law, the unauthorized practice of law includes the rendition of legal services for another and misrepresentation of authority to practice law in Ohio by someone not actually admitted or certified to do so. It specifically extends to any attempt by a non-attorney to resolve a collection claim between debtors and creditors. As a result, the California lawyer and his firm were enjoined from further engaging in the offending conduct and ordered to pay a civil penalty in the sum of $2,000.

Comment: Notably, the Court failed to take note that Ohio has adopted a version of Rule of Professional Conduct 5.5 that explicitly permits the temporary practice of law if the activity relates to the out of state lawyer's practice in his home jurisdiction. Had they done so, it is hard to see how they could have reached the same result.

Indiana Supreme Court Disciplinary Commission, Opinion 2-18 (December 2018)

In a non-binding advisory opinion, the Indiana Supreme Court Disciplinary Commission questioned the ethics, and utility, of what are known as "license rental" arrangements. As described by the Commission, the arrangement involves non-lawyer companies or out-of-state law firms entering into agreements with in-state firms to direct cases to the local lawyers. The out-of-state firms then perform the bulk of the work as well as retain the bulk of the fees. The Commission characterized this as an agreement to "rent" an Indiana lawyer's license, permitting the out-of-state firm to advertise and provide legal services to Indiana clients without having to comply with the state's temporary admission rules.

The Commission opined that an Indiana lawyer who either accepts work from a non-lawyer company which sells legal services to clients or who serves as local counsel for an out-of-state firm which does most of the legal work for and retains most of the fees from clients would be violating the proscriptions against a lawyer facilitating the practice of law in Indiana by unlicensed individuals and abdicating his or her responsibility to maintain professional independence, particularly where the out-of-state firm dictates legal objectives and strategy. In addition, the Commission warned that the arrangement may contravene state professional responsibility standards against splitting fees with non-lawyers and assisting in the commission of ethical violations. It could also breach the rules requiring full communication and disclosure to the client of the fee-sharing arrangements and the limited scope of the Indiana lawyer's representation.

Comment: This opinion is neither definitive nor does it provide helpful guidance. It does, however, reflect a continuing pattern of turf protection by state bars that runs completely counter to the way law is actually practiced.

New York State Bar Association, Committee on Professional Ethics, Opinion No. 1160 (January 2, 2019)

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A lawyer recently admitted to the New York bar sought to associate another lawyer in his practice who, while a resident of and admitted to practice in the federal courts located in the state, was not admitted to practice before New York courts. The New York lawyer believed the out-of-state lawyer capable of generating business and so intended to list him in his letterhead but duly disclose that the lawyer was admitted only in jurisdictions other than New York. The New York lawyer anticipated that the out of state lawyer would attend initial client meetings and share in the collected fees but not perform any of the legal work.

The New York State Bar Committee on Professional Ethics characterized the question to be whether "an out-of-state lawyer may set up shop in New York for purposes of rainmaking and fee-sharing based solely upon admission to federal courts located in New York."

The Committee acknowledged that New York's Rules allowed local firms to include and share fees with lawyers not admitted to practice in New York, so long as the jurisdictional limitations on their practice were fully disclosed and the fee sharing was strictly a function of the rendition of legal services within the jurisdiction. Beyond those circumstances, New York has never approved of a pure referral arrangement between a local lawyer and an out-of-state lawyer in exchange for a portion of the fees.

The Committee also considered Rule 5.5 and *In re Peterson*, 163 B.R. 665 (Bktcy. Ct., D. Conn, 1994). In *Peterson*, the Bankruptcy Court held that a lawyer not licensed to practice in Connecticut engaged in the unauthorized practice of law when he maintained a Connecticut law office, had stationery identifying him as an attorney-at-law and listing the Connecticut office as his office, met with clients in the state, provided legal services by telephone from his Connecticut office on bankruptcy matters, and prepared pleadings for filing in bankruptcy court in the same office.

Nevertheless, the Committee effectively washed its hands of the issue and left the New York lawyer to fend for himself. By characterizing the presented query as a purely legal question of "statutory interpretation… beyond our purview," the Committee concluded that it would "leave to the inquirer' the task of "resolv[ing] the import of *Peterson* and like cases on the proposed arrangement, with the caution that were *Peterson* to control, then the inquirer would run afoul of Rule 5.5(b)." Without committing itself, the Committee further cautioned that the arrangement may be improper solicitation of clients and improper maintenance of an office or other systematic and continuous presence in the state for the practice of law. The Committee equivocally concluded that the association with the out-of-state lawyer would be improper "***if*** the solicitation of clients, sharing of fees and any other services performed, would as a matter of law constitute the unauthorized practice of law."

Comment: Like the Indiana Opinion, this opinion is neither definitive nor does it provide helpful guidance. It does, however reflect the same kind of policy of turf protection by state bars that runs completely counter to the way law is actually practiced. Readers interested in a full discussion about the scope of this problem across the country may be interested in an article, co-authored by Hinshaw & Culbertson LLP *Lawyers for the Profession*® practice group partner Anthony Davis: James W. Jones, Anthony E. Davis, Simon Chester and Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, The Georgetown Journal of Legal Ethics, Vol. 30:125, 2017. In addition to describing the state of UPL enforcement in the US, the article suggests a simple solution intended to sweep away state protectionism, in the form of a suggested federal statute that would require states to recognize lawyers in good standing in their states of admission whose practice involves interstate commerce.

Risk Management Solutions: Because, as evidenced by the foregoing trifecta of developments in this area, the precise contours of what amounts to the practice of law varies widely from one jurisdiction to the next, this issue can pose a trap for lawyers. It is thus imperative for lawyers with out-of-state clients or with multi-jurisdictional practices to check state regulations regarding the practice of law and any local requirements regarding the need for temporary admission when their practice takes them, in one way or another, into other states. Helpful in this context is a page on the ABA's website that lists and compares every state's rules regarding temporary practice out-of-state lawyers: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf