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THE RISK MANAGER

A QUARTERLY NEWSLETTER BY LAWYERS MUTUAL INSURANCE COMPANY OF KENTUCKY

BIZARRE BILLING PRACTICE DEFEATS FIRM'S COLLECTION SUIT FOR $332,569

"14% of Bills Go Uncollected" Clio Legal Trends Report 2017

A Maryland law firm (OMNG) was engaged to represent Burley in the administration of an estate in 2002. The administration included the sale of real property. The firm billed Burley monthly during the first year of the representation. When Burley was unable to pay the fees, "the firm claims to have proposed a modification of the billing and payment terms of the representation in mid-2003. Under the alleged proposal, the firm would continue to provide Ms. Burley with legal services, but it would not issue new monthly billing statements, and payment would be deferred until the real property was sold." The firm had no documentation of Burley's agreement to this change, but continued to provide legal services from 2003 to 2012, carefully accounting for services rendered and hours worked. In all that time the firm did not bill Burley. In October 2012 the property was sold.

In February 2015 the firm sued Burley for unpaid legal fees and accrued interest for $332,569. Burley denied that she had ever agreed to the proposed change in billing and refused to pay. At trial the firm did not call the now former member of the firm who allegedly communicated the change in the fee agreement to Burley. The firm admitted in oral argument that the former member would testify that he had not communicated the billing change to Burley. The trial court ruled in favor of Burley.

The appellate court affirmed the trial court. It focused on the trial court's opinion as follows:

- The court was flabbergasted that a law firm would enter into an agreement to defer billing and payment for a decade without documenting it in any way. The absence of documentation confirmed the court's conclusion that the parties had never made such an agreement.

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RISK MANAGING THE DELICATE REPRESENTATION OF AN ABUSED CLIENT OR ONE WITH DIMINISHED CAPACITY

Statutory reporting requirements for reporting adult and child abuse, neglect, or exploitation place lawyers in the difficult position of determining how to preserve client confidentiality without violating the law when representing abused clients. KBA Ethics Opinion E-439 (9/16/2016) provides guidance for this issue by addressing these questions:

- What should an attorney do when the attorney has reason to believe that an elderly or special needs client is or has been abused, neglected, or exploited?
- What should an attorney do when the attorney has reason to believe that a client is or has abused, neglected, or exploited a person to whom the client owes a fiduciary duty?

The majority of KBA E-439 deals with the Kentucky statutes requiring reporting of abuse. This analysis is thorough, but does not lend itself to an abstract in newsletter format. The Committee concluded that:

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BIZARRE BILLING PRACTICES

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- [T]he court said that it was "absolutely unreasonable" for the firm to do $275,000 of work without informing the client on a periodic basis of what it had done and how much she owed. The court also said that it would have been inequitable to impose liability on Ms. Burley in view of the firm's failure to memorialize the alleged agreement and its failure to keep her informed about what it had done and how much she owed.

The appellate court summed up its affirmation of the trial court's opinion in this paragraph:

- Because OMNG did not send periodic statements detailing the specific work that it had done, who had done the work, what rates it had charged for the work, and how much debt the client had incurred, the court reasoned that Ms. Burley was precluded from making a reasonable assessment about whether she wanted to continue with the representation, instruct the firm to do less work, object to the amount of work or the amount of the charges, or exercise her right to engage different counsel. We see no basis to second-guess the circuit court's conclusion that the firm could not reasonably rely on Ms. Burley's silence or acquiescence in its work when the firm failed to provide her with the information necessary to evaluate the work and to register any pertinent objection to the services performed or the proposed charges. *(O'Malley v. Burley, 2017 BL 148106, Md. Ct. Spec. App., No. 31, 5/2/17, unreported.)*

BILLING REQUIRES RISK MANAGEMENT TOO

An unusual case like *O'Malley* demonstrates how a seemingly routine business function like billing can be risky. When billing goes bad and a firm decides to sue for fees, the risk of a counter-suit for malpractice is further increased. This prompts us to offer our risk management advice for smart billing and avoiding costly and time-consuming efforts to get paid.

LETTER OF ENGAGEMENT

The first risk management action to take with every new matter is the preparation of a comprehensive letter of engagement including fee terms and conditions. A fee agreement at a minimum should:

- Clearly identify the client or clients represented – it is absolutely necessary to establish whose interest a lawyer represents.
- Specify the scope of the representation – what the lawyer is supposed to do for the client and what is excluded from the representation.
- Explain the basis for fee charges to include whether a retainer is required and charges for costs and expenses. This explanation should include consideration of other fee types that may be more advantageous to the client.

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AVOID COMMON BILLING MISTAKES:

OVER-QUALIFIED PERSONNEL FOR THE WORK

BILLING FOR **SEVERAL LAWYERS** REVIEWING OR PREPARING TO DISCUSS THE FILE OR ATTENDING A MEETING WHEN **ONE** WOULD HAVE BEEN **ADEQUATE**

"**NEVER ASCRIBE** TO AN **OPPONENT MOTIVES MEANER** THAN YOUR OWN." *J.M. Barrie*

BIZARRE BILLING PRACTICES

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- Explain the firm's billing procedures to include:
  - The client's responsibilities for fee payment.
  - How often the client will be billed.
  - When payment is expected to be made.
  - The firm's options when fees and costs are not paid timely.
  - Whether interest will be charged for late fee payment.
  - What fees are due if the client discharges the lawyer before completion of the representation. *

* ABA/BNA Lawyers' Manual on Professional Conduct, Fees, *Fee Agreements*, §41:101 *et seq.* The Manual provides a thorough treatment of fee agreement issues and is the place to start in researching fees

BILLING MISTAKES

The second risk management action is to avoid common billing mistakes. Such as these:

- The bill is as big as the client's file – looks like over-practicing the matter.
- Client gets a large bill that is the first thing the client has heard from the lawyer since the initial interview.
- Secret identities – no names and no billing rates for the work done.
- Over-qualified personnel for the work or conversely, charging lawyer rates for administrative work.
- Too many meetings, telephone calls, and research hours – looks like over-practicing the matter.
- Billing for several lawyers reviewing or preparing to discuss the file – looks like over-practicing the matter.
- Billing for several lawyers attending a meeting when one would have been adequate – looks like over-practicing the matter.
- Billing for "soft costs" without the client's prior agreement and general overhead costs (heat, air conditioning, etc.).
- Itemized bills with generic terms such as "phone call" or "meeting" with no substantive information.
- All telephone calls take exactly .3 hours; all dollar amounts are nice round numbers or end in five; and inserted along with all the routine itemized expenses is a charge for expert witness fees of several thousand dollars.
- Billing for billing – this adds insult to injury.
- A too-quick billing reduction if client complains strongly implies that the lawyer must be overcharging.
- Billing out of cycle with the client's preference.**

**This list is a composite of articles by Amy Stevens (Wall Street Journal), Larry Bodine (Lawyers Weekly USA), and Jay Foonberg (Lawyers Weekly USA) listing their 10 favorite "Billing Bloopers." and some of Lawyers Mutual's own.

GOOD BILLING PRACTICES

Always bill in a way that is fair, understandable to the client, and consistent with good business practices. The single best billing practice is to bill early and bill often. Whatever billing cycle you are using, stick to it religiously. There are a number of good checklists on smart billing. Automation is key to billing success. Almost all of it is based on good client communications. Howard L. Murdock in his article *Better Communication Increases the Likelihood That Bills Will Be Paid* emphasizes this point by developing 12 ways lawyers can improve their chances of getting paid by proper billing:

1. Improve client communications - at the outset explain the entire billing process.
2. Prepare a client for the total cost of legal services being provided.
3. Prepare written fee letters outlining the specific terms of an engagement.
4. Use retainer arrangements, especially when a client's ability to pay is in question.
5. Identify for the client the people being assigned to work on a matter.
6. Use the billing process to communicate details of the work performed.
7. Reach an agreement about what time and costs will be charged to a client and what will not be charged.
8. Discuss billing formats and what information will make invoices easier for the client to process.
9. Provide a budget, as a matter of firm policy, on all matters in excess of a specified amount.
10. Schedule periodic meetings with clients to discuss ways to improve service.
11. Review invoices to ensure that they contain no mistakes.

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"READING IS A MEANS OF THINKING WITH ANOTHER PERSON'S MIND; IT FORCES YOU TO STRETCH YOUR OWN." *Charles Scribner Jr.*

DELICATE REPRESENTATION

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> In the opinion of the Committee, Kentucky's mandatory reporting requirements would not be construed by the Kentucky Supreme Court to require that an attorney reveal confidential client information in order to make a report of abuse, neglect or exploitation to or by the attorney's client.

E-439 is a must read for Kentucky lawyers. In addition to addressing statutory reporting requirements the opinion offers helpful guidance on applying Kentucky Rule of Professional Conduct (KRPC) SCR3.130 (1.14) *Client with Diminished Capacity*.

MANAGING THE RISK

Risk management of clients who are elderly, appear to have diminished capacity, or are minors require the recognition of the enhanced professional responsibility duties lawyers owe these vulnerable clients. In these representations a lawyer often needs to go much further than in other similar representations to assure that the client is protected from family, friends, business people, and scammers. What follows is a gloss of our risk management advice from prior articles on representations involving diminished capacity.

- **Involvement of family members:** Family members may become involved in the representation of a client with diminished capacity in three ways. First, the client may ask for family members to participate in the matter. Second, a lawyer may consult family members in taking protective action. The third way in which family members can become involved in a representation is by paying the lawyer's fees. See KRPC 5.4(c). Rule 1.14, Comment (3) provides helpful guidance for managing family member involvement.
- **Letter of engagement (LOE):** Always use a letter of engagement in diminished capacity client representations that clearly identifies who the client is, the scope of the engagement, the fee agreement, and any special instructions. In the scope paragraph cover specifically what will be done and what will not be done for the client. An example of a special instruction is client consent to reveal confidential information. It will usually be necessary to modify the language of a standard LOE to an easy to read/easy to understand format tailored to the ability of the client to comprehend.

ALWAYS USE A LETTER OF ENGAGEMENT IN DIMINISHED CAPACITY CLIENT REPRESENTATIONS THAT CLEARLY IDENTIFIES WHO THE CLIENT IS, THE SCOPE OF THE ENGAGEMENT, THE FEE AGREEMENT, AND ANY SPECIAL INSTRUCTIONS.

- **Minors:** In *Branham v. Stewart* (307 S.W. 3d 94 (2010) the Kentucky Supreme Court held "that an attorney pursuing a claim on behalf of a minor does have an attorney-client relationship with the minor. And that relationship means that the attorney owes professional duties to the minor, who is the real party in interest." Lawyers must take care not to let the influence of other interested parties to override the professional duties owed to minors.
- **Fee Agreement:** Do all that can be done in the LOE to avoid fee issues. Ask for a substantial "evergreen" retainer at the inception of the representation. Charge a fixed fee collected in advance, if that is feasible. Keep in mind that withdrawing from representing a diminished capacity client is problematic. Withdrawing and suing the client for fees carries a great risk of both a malpractice claim and a bar complaint – a losing proposition for a lawyer when the adversary is client with diminished capacity that the lawyer has dropped.

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"HE THAT **USES MANY WORDS** FOR EXPLAINING ANY SUBJECT, DOTH, LIKE THE CUTTLEFISH, **HIDE HIMSELF** FOR THE MOST PART **IN HIS OWN INK.**" *John Ray*

DELICATE REPRESENTATION

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- **Conflicts of Interest and Prohibited Transactions:** The risk of a conflict of interest in representing clients with diminished capacity is high when compared to other representations. It is beyond the scope of this article to do more than flag the primary danger areas. They are intergenerational conflicts that typically center on preservation of assets; spousal conflicts in estate planning and divorce matters; and fiduciary conflicts when a lawyer represents a fiduciary or is a fiduciary. KRPC 1.8, *Conflicts of Interest: Prohibited Transactions*, includes three rules that have extra sensitivity when representing diminished capacity clients:
  1. 1.8(a) concerns entering into a business transaction with a client. It contains strict disclosure requirements prior to consummating the transaction.
  2. 1.8(b) concerns using information relating to representation of a client to the disadvantage of the client.
  3. 1.8(c) prohibits a lawyer from preparing an instrument giving the lawyer a substantial gift under most circumstances.
- **Withdrawal:** A lawyer's fiduciary duty of loyalty when representing a client with diminished capacity requires that the lawyer not consider withdrawing except under the most extreme cases of a breakdown in the relationship. ABA Formal Opinion 96-404 offers this helpful analysis of the issue:

  > [W]hile withdrawal in these circumstances solves the lawyer's dilemma; it may leave the impaired client without help at a time when the client needs it most. The particular circumstances may also be such that the lawyer cannot withdraw without prejudice to the client. For instance, the client's incompetence may develop in the middle of a pending matter and substitute counsel may not able to represent the client effectively due to the inability to discuss the matter with the client. Thus, without concluding that a lawyer with an incompetent client may never withdraw, the Committee believes the better course of action, and the one most likely to be consistent with Rule 1.16(b)[Declining or Terminating Representation], will often be for the lawyer to stay with the representation and seek appropriate protective action on behalf of the client. *(footnotes omitted)*

- **Discharge:** Clients with diminished capacity may discharge their lawyer. The main ethics consideration for a discharged lawyer is covered in Comment (6) to KRPC 1.16, Declining or Terminating Representation:

  > If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

- **Document the file:** Meticulously document the file. It is always prudent to follow up with a letter after a difficult issue consultation with a client that includes what was discussed, advice given, and the client's decision or instructions. With diminished capacity clients consider going one step further and sending a letter after every consultation tailored to the client's ability to understand. At a minimum document for the file every consultation with the client.
- **Make a comprehensive review of the matter just before filing suit:** It is always difficult to withdraw from representation of a diminished capacity client, but even more so once a suit is filed. Just prior to filing suit carefully review the situation to resolve any issues such as whether the client's condition has progressed to the point that a guardian ad litem should be appointed, whether the relationship has deteriorated to the point that the lawyer cannot adequately represent the client, and any shortfall in the payment of agreed fees.
- **Don't forget to check for substantive law requirements applicable to the representation.**
- **Use the KBA Ethics Hotline:** Many of the decisions necessary to adequately represent a diminished capacity client involve close ethical questions. The KBA Ethics Hotline is a readily available source of sound advice for Kentucky lawyers and especially suitable for ethics questions concerning clients with diminished capacity.

For a comprehensive review of Rule 1.14 read *the Bench & Bar* article *The Delicate Ethical Requirements of Representing a Person With Diminished Capacity* available on Lawyers Mutual's website. Go to LMICK.com, click on **Resources**, click on Bench & Bar Articles, go to year 2010, and select the article.

"NEVER MISTAKE **KNOWLEDGE FOR WISDOM**. ONE HELPS YOU **MAKE A LIVING** AND THE OTHER HELPS YOU **MAKE A LIFE**." *Sandra Carey*

Q: WHAT'S IN A CLIENT'S NAME? A: *CONFIDENTIALITY!*

Lawyers for their own purposes sometimes reveal a client's name in marketing programs, as references for prospective clients, and in articles or presentations. This raises the ethics question whether this violates Kentucky Rule of Professional Conduct 1.6, Confidentiality of Information.

The only Kentucky authority we found on the issue of revealing client names is KBA Ethics Opinion E-253 (9/81). That opinion was issued following now superseded ethics rules and is of little value. The opinion showed concern for keeping client names confidential, but did permit their release under certain circumstances. Since that time many states have moved to much stricter guidance than E-253. Wisconsin's recent Formal Ethics Opinion EF-17-02 (4/4/17) offers what we think is the best risk management advice for protecting client names. What follows are the key points of the opinion edited to conform to Kentucky's professional responsibility rules:

- The ethical duty of confidentiality protects all information relating to the representation of the client, whatever its source, including the identity of the client.
- Rule 1.6 prohibits the disclosure of an identity unless the client gives informed consent to the disclosure, the disclosure is impliedly authorized in order to carry out representation, or the disclosure falls within certain stated exceptions in the Rule.
- Rule 1.6 operates automatically and protects information even if the client has not requested that the information be held in confidence or does not consider it confidential.
- Rule 1.6 protects information irrespective of whether that information is privileged, or if the lawyer believes that disclosure would be "harmless."
  - Do not confuse the ethics duty of confidentiality with the lawyer-client privilege, a rule of evidence, or discovery procedures, rules of civil procedure. These rules do not control what information a lawyer may ethically reveal under the rules of professional conduct.
- Rule 1.6 protects information that is known to others or may be available from public sources.
- This duty of confidentiality extends to information relating to the representation of former clients as well by virtue of Rule 1.9(c)(2), that prohibits lawyers from revealing information relating to the representation of former clients except as permitted or required by the Rules.
- The duty of confidentiality continues beyond the death of the client.

The best risk management is to always obtain client consent to use the client's name when it is to be used it for the lawyer's own purposes and is not related to the client's representation.

THE BEST RISK MANAGEMENT IS TO **ALWAYS OBTAIN CLIENT CONSENT** TO USE THE CLIENT'S NAME WHEN IT IS TO BE USED IT FOR THE LAWYER'S OWN PURPOSES AND IS **NOT RELATED** TO THE **CLIENT'S REPRESENTATION**.

"**A FLAW** IN HUMAN CHARACTER IS THAT **EVERYBODY** WANTS TO **BUILD** AND **NOBODY** WANTS TO DO **MAINTENANCE**." *Kurt Vonnegut*

IMPAIRED LAWYERS:

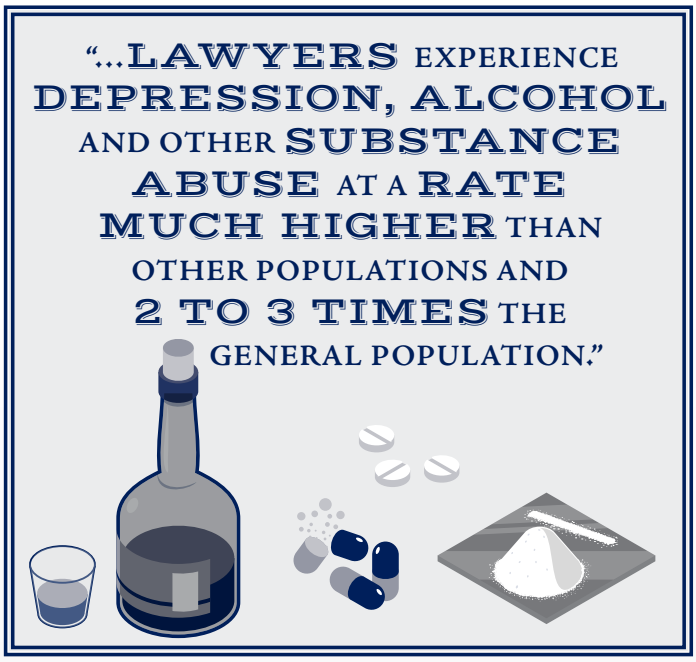
Do Partners, Managers, and Supervisory Attorneys Have an Affirmative Duty to Take Precautionary Measures Before a Lawyer's Impairment Results in Serious Misconduct or a Material Risk to Clients or the Public?

While there is considerable guidance available on a law firm's duty to deal with an impaired lawyer after the impairment is discovered, there currently is little on whether firms have a proactive duty as well to anticipate impaired lawyer problems. Recently the Virginia State Bar Ethics Committee issued a opinion addressing this question (*LEO 1886 - Duty of Partners and Supervisory Lawyers in a Law Firm When Another Lawyer in the Firm Suffers From Significant Impairment (12/15/2016)*).

The opinion begins with a chilling review of the scope of the impairment problem in Virginia. Studies show "that lawyers experience depression, alcohol and other substance abuse at a rate much higher than other populations and 2 to 3 times the general population. The incidence of alcohol abuse is higher among lawyers aged 30 or less." The Ethics Committee then stressed the increasing problem of aging in the legal profession leading to cognitive impairment.

Relying on Virginia's Professional Responsibility Rule 5.1, Responsibilities of Partners and Supervisory Lawyers, the Committee concluded that a firm is required to have in place preventative measures or procedures to ensure that all lawyers, not just impaired ones, comply with the Rules of Professional Conduct. "[To] protect its clients, the firm should have an enforceable policy that would require … the impaired lawyer [to] seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers for an evaluation and assessment of his or her condition and referral to appropriate medical or mental health care professionals for treatment and therapy."

We offer this information for Kentucky lawyers to consider in reviewing their compliance with Kentucky's Professional Responsibility Rule 5.1 that is identical to Virginia's. Should you have proactive policies that anticipate future impairment problems by some members of the firm? To assist you in reviewing firm policy on impaired lawyers, we recommend you read the following three articles available on Lawyers Mutual's website. Go to LMICK.com, click on **Resources**, click on **Risk Manager By Subject**, go to Impaired Lawyers, and select an article:



- The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates
- Age Related Cognitive Impairment *(includes this article and The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates)*
- Risk Managing the Aging of the Legal Profession

Additionally, the ABA/BNA Lawyers' Manual on Professional Conduct offers an up-to-date review of "Impairment" at pages 101:3301-3312 that is quite good.

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DEL O'ROARK
Newsletter Editor

This newsletter is a periodic publication of Lawyers Mutual Insurance Co. of Kentucky. The contents are intended for general information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. It is not the intent of this newsletter to establish an attorney's standard of due care for a particular situation. Rather, it is our intent to advise our insureds to act in a manner which may be well above the standard of due care in order to avoid claims having merit as well as those without merit.

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"NEVER SWALLOW ANYTHING WHOLE." *Alfred North Whitehead*

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BIZARRE BILLING

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12. Send regular reminders for invoices that remain unpaid.

Anthony E. Davis, a highly regarded risk management expert, in his article *How to Better Manage the Billing Process**** offers the following advice on how to eliminate billing fraud, avoid fee disputes, and get paid:

- Establish strict policies regarding accuracy in timekeeping and recording of time. Do not require minimum hours to be billed to clients. To do so encourages bill padding.
- Enforce frequent time reporting – preferably daily.
- Monitor the billing process with internal audits and independent review of all expenses either claimed by a lawyer or billed to a client.
- Send bills that, in addition to reflecting charges, demonstrate the progress made in the client's matter during the billing period.
- Avoid billing for overhead items. Only bill or have the client pay directly out-of-pocket third-party expenses.
- Send a cover letter with a bill that includes:
  1. A thank you for past payments.
  2. A simple "plain English" summary of how the work performed as described in the bill advanced the client's interest toward the desired outcome.
  3. An explanation of the activities planned for the next month and how these advance the client's interest toward the desired outcome.
  4. An invitation for the client to call with any questions regarding the bill.

****Lawyer to Lawyer*, Ed. XIX, 9/2002, Chubb & Son.