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THE RISK MANAGER

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Ruth H. Baxter Appointed New President of Lawyers Mutual Insurance Company Of Kentucky

We are pleased to announce that Lawyers Mutual's Board of Directors has chosen Ruth H. Baxter as its new President. Ruth is no stranger to Lawyers Mutual. She has been on its Board since 1995, and a working member of its Underwriting Committee, Marketing Committee and Executive Committee.

Ruth has been and is a very active member of the Kentucky Bar Association. She served in its House of Delegates, on its Attorney's Advertising Commission, its Task Force on Lawyer Advertising, and was an instructor in the New Lawyer Program. Currently she is the KBA's representative to the E-Filing Initiative and a member of the KBA Ethics Committee. In 1998, she received the Justice Thomas B. Spain Award for Outstanding Service in Continuing Legal Education and in 2000 was honored with the Kentucky Bar Service Award. She currently serves on the Kentucky Supreme Court Rules Committee and is on the Judicial Nominating Commission for the 15th Judicial Circuit. She is the Master Commissioner for that same circuit.

Ruth is involved in her home community of Carroll County not only in its legal venues, but also to the benefit of the library, arts community, education, and the economic development of the Carrollton area. Carroll County presented her with its Outstanding Leader Award in 2002, which followed its Chamber of Commerce 1995 Community Service Award.

We are pleased that Ruth will be providing Lawyers Mutual with her knowledge and expertise in her new position and look forward to her continuing service.

21 Since 1987

"The shortest recorded period of time lies between the minute you put some money away for a rainy day and the unexpected arrival of rain."

Jane Bryant Quinn

Avoiding Malpractice When a Party to a Suit Dies

By LawReader Senior Editor Stan Billingsley

Editor's Note: This article is one of a series that LawReader.com has agreed to provide for Lawyers Mutual's newsletter as a bar service. LawReader.com provides Internet legal research service specializing in Kentucky law. For more about LawReader go to www.LawReader.com.

The Kentucky Court of Appeals in *Frank v. Estate of Enderle* (253 S.W.3d 570, (Ky. App., 2008)) confirmed the dismissal of a civil lawsuit because of the failure of the plaintiff's attorney to revive the suit. The suit had been automatically abated upon the death of the defendant as required by Kentucky Civil Rule of

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Procedure 25.01, Death. The requirement to revive a suit is equally applicable when the plaintiff dies. The malpractice implications for an attorney who allows a dismissal to occur for failure to revive are obvious.

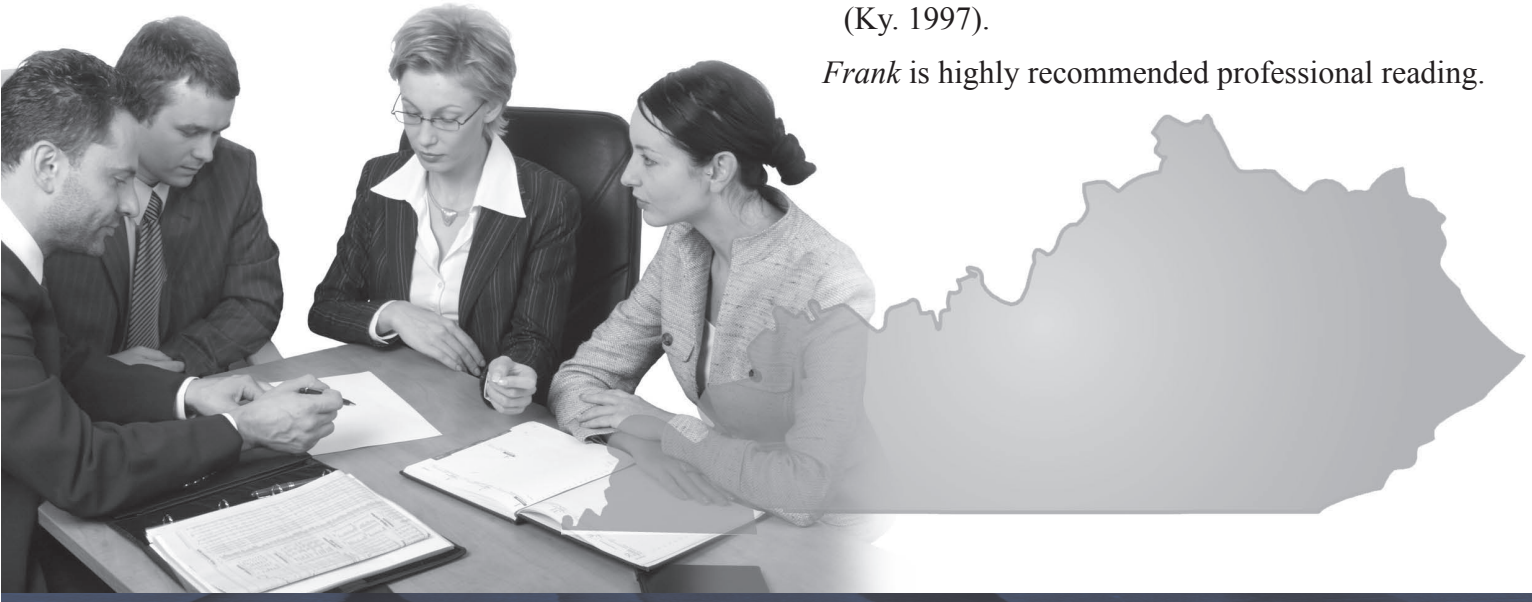
In *Frank* the Court of Appeals explained that:

> When a party to litigation pending in a Kentucky court dies, the action is abated, unless and until the action is revived by substituting the decedent's representative. As specified in CR 25.01(1), [i]f a party dies during the pendency of an action and the claim is not thereby extinguished, the court, within the period allowed by law, may order substitution of the proper parties. *(Editor's note: CR 25.01(2) lists parties to whom abatement does not apply.)*
>
> ….
>
> CR 25.01 must be read in tandem with KRS 395.278 which directs the "application to revive an action . . . shall be made within one (1) year after the death of a deceased party." Because KRS 395.278 is "a statute of limitation, rather than a statute relating to pleading, practice or procedure, and the time limit within this section is mandatory and not discretionary, "neither a court nor a party may extend the one-year statute of limitations…. Thus, if within one year of a litigant's death an action is not revived against the administrator of a decedent's estate and the administrator substituted as the real party in interest, then the suit must be dismissed.

The following Kentucky authority dealing with this issue embellishes the teaching of *Frank*:

- *Hammons v. Tremco Inc.,* 887 S.W.2d 336 (Ky. 09/01/1994) held that "dismissal is not discretionary with the court...." *Snyder v. Snyder,* Ky. App., 769 S.W.2d 70 (1989).
- The mere appointment of a personal representative by the District Court does not toll the statute of limitations. The personal representative must take the additional step of filing a motion for substitution in order to effect a revival of the action. *New Farmers Nat. Bank v. Thomas,* 411 S.W.2d 672 (Ky., 1967)
- "Upon the death of Louise Williams the cause of action survived to her personal representative. It was not necessary to bring a new suit. The same suit could be prosecuted in the name of the personal representative if he revived it in … time…. Once a limitation begins running the intervening infancy or other disability or another interested party does not stop the running of the limitation." *(emphasis added) Elkhorn Land & Co. v. Wallace,* 232 Ky. 741, 24 S.W. 2d 560; 34 Am.Jur. 160, Limitation of Actions, sec. 199.
- An attorney may not withhold news of his client's death from the opposing party or the court, in the hope of allowing the statute of limitations to run before revival. *Harris v. Jackson,* 2004-SC-000121-DG (Ky. 5/18/2006) citing *Kentucky Bar Association v. Geisler,* 938 S.W.2d 578, 580 (Ky. 1997).

Frank is highly recommended professional reading.



"The ability to express an idea is well nigh as important as the idea itself."

Bernard Baruch

Ineffective Assistance of Criminal Defense Counsel – *Is There a Duty to Advise Foreign Nationals of Their Right to Consult with Their Country's Consular Mission?*

With ever more foreign nationals living in Kentucky, it becomes of increasing importance to keep up with international law to avoid malpractice – especially as it applies to foreign nationals accused of crimes in this country. A current issue is whether it is ineffective assistance of counsel to fail to advise foreign national clients of their rights under Article 36 of the Vienna Convention on Consular Relations. This article and implementing federal regulations require that foreign nationals arrested in the U.S. be promptly advised of their right to consult with their country's consular mission.

> ***Good risk management requires that you know what you are doing and practice in a way to prevent both meritorious as well as frivolous claims – both can be costly.***

Osagiede v. United States (7th Cir., No. 07-1131, 9/9/08) is an informative recent case dealing with this issue. Space limitations preclude a full review of the decision here. In short, the 7th Circuit ruled that an ineffectiveness claim based on defense counsel's failure to advise a foreign national client of consular consultation rights is a justiciable claim warranting an evidentiary hearing. The Court reviewed Article 36 in detail, applied the *Strickland* two-pronged ineffectiveness test to the facts, and considered contrary authority to include the 6th Circuit case of *United States v. Emuegbunam*, 268 F.3d 377, 386-95 (6th Cir. 2001).

We urge criminal defense counsel to read *Osagiede*. Good risk management requires that you know what you are doing and practice in a way to prevent both meritorious as well as frivolous claims – both can be costly. Even if you disagree with *Osagiede's* holding (see *Commonwealth v. Padilla,* 253 S.W.3d 482 (Ky., 2008)), the percentage approach is to promptly advise a foreign national client of consular consultation rights. This should prevent claims, and best of all is a more thorough representation of your client.

Competence – Advising Small Business Service-Disabled Veterans on Federal Contracting Preferences

Kentucky has two major military installations within its borders and thousands of veterans among its citizens. Unfortunately a number of these veterans were disabled while in service. These service-disabled veterans often go on with their lives by establishing small businesses near federal military and civilian facilities and other locations in the state. Lawyers providing business advice to these veterans must be familiar with the federal laws* that assist them in entering the federal marketplace and giving them a competitive advantage in federal contracting.

Lieutenant Commander Theron R. Korsak's article "The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace" offers a comprehensive treatment of this important benefit (July 2008 • The Army Lawyer • DA Pam 27-50-422). The article:

- includes a summary of the laws intended to assist service-disabled veteran-owned small businesses;
- focuses on socio-economic programs and eligibility requirements;

continued

"There are moments when everything goes well; don't be frightened, it won't last."

Anonymous

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- reviews common procedural issues affecting service-disabled veteran-owned businesses;
- discusses policy conflicts that may impact contract awards to a service-disabled veteran-owned small business;
- summarizes the role that federal agencies, quasi-government organizations, and industries play to meet the goal for federal agencies to annually award at least 3% of all procurement dollars to small business concerns owned and operated by service-disabled veterans;
- concludes with recommendations to increase contract awards to service-disabled veteran-owned small businesses.

This article is recommended for all Kentucky lawyers advising service-disabled veterans. It is readily available by Googling The Army Lawyer and going to the July 2008 issue.

**Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233; Veterans Benefit Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662 (codified at 15 U.S.C. § 657f); Veterans Benefit, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461 120 Stat. 3403.*

Avoid Malpractice Claims and Third Party Liability by Knowing How to Resolve Disputed Claims for Client Trust Account Funds and Allegations of Improper Disbursement of Funds

There are an increasing number of case and ethics opinions from other jurisdictions concerning disputes over disbursement of funds and funds held in client trust accounts – perhaps another indication of difficult economic times. In Kentucky the rule is clear that if a dispute arises between lawyer and client over disbursement of client funds, the disputed amount must be left in the client trust account until the dispute is resolved. See Kentucky Rule of Professional Conduct 1.15 and KBA Ethics Opinion 292 (1985). These disputes usually concern fees and, if not satisfactorily resolved, often lead to a malpractice claim.

Claims by third parties for funds held in client trust accounts or for improper disbursement of funds present a much more difficult problem for lawyers. Recent questions considered are:

- ***Do you always have to follow the client's instructions on fund disbursement?***

  The North Carolina Ethics Committee considered the hypothetical situation concerning a lawyer who represented the corporate buyer of residential property. After closing the lawyer deposited the check for the purchase price in his client trust account and recorded the deed. Immediately upon returning to the office the lawyer was instructed by the buyer not to disburse the funds because the buyer had just learned that the property was not suitable for its purposes. The seller demanded the funds.

  The Ethics Committee opined that "Normally, a client's decision not to proceed with a transaction must be honored by the lawyer and, if necessary, the lawyer must restore the *status quo ante* by returning documents, property, or funds to the appropriate parties to the transaction…. However, a closing lawyer must also comply with the conditions placed upon the delivery of the deed by the seller absent fraud. If the seller delivered the executed deed to the lawyer upon the condition that the deed would only be recorded if the purchase price was paid, the lawyer has fiduciary responsibilities to the seller even if the seller is not the lawyer's client. …. Because title has passed to the buyer, the lawyer must satisfy the conditions of the transfer of the property by disbursing the sale proceeds. The lawyer must notify the buyer and the buyer can then take appropriate legal action to seek to have the sale rescinded." (North Carolina Ethics Op. 2008-7, 7/18/08)

- ***Can you be liable for a client's medical bills even though another lawyer disbursed the funds from a settlement?***

  The Wyoming Supreme Court considered the

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"If everything seems to be going well, you have obviously overlooked something."
Steven Wright

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situation when a lawyer and his client signed a release of medical records and consent-to-lien form provided by a medical provider. This gave the lawyer authorization to pay outstanding medical bills from the proceeds of claims for the client's injuries. A second lawyer joined in the personal injury action and settled it distributing the proceeds to the client, a member of his family, and his lawyers. The client did not pay the medical providers who promptly sued the lawyer that had signed the consent-to-lien form.

The Court concluded that the client had assigned his interest in the proceeds from the personal injury action to the medical provider and that by signing the form the lawyer became an obligor who was required to honor the assignment by paying the client's medical bills. The Court did not address whether the lawyer could proceed against the client or other lawyer. (*Winship v. Gem City Bone & Joint, P.C.,* 185 P.3d 1252 (Wy., 2008)

- ***Does client confidentiality trump a fiduciary obligation to disburse funds to a third party?***

  A California ethics opinion considered the situation when a lawyer settled the client's case for $150,000 and then learned that the client had a former lawyer who was entitled to a portion of the lawyer fees as a lienholder. The client in a handwritten statement authorized $50,000 in lawyer fees, but prohibited payment of any fee to the former lawyer or the disclosure of the amount of the settlement to him.

  The Committee opined that notwithstanding client confidentiality requirements "An attorney cannot follow a client's direction not to pay a lienholder from settlement proceeds because to do so would be a breach of the attorney's fiduciary duty to the lienholder." The attorney should not, however, when dividing the fee tell the former attorney of the client's instructions because this is privileged confidential information. (State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2008-175)

We conclude with this useful guidance on the difficult problem of third party claims from a recent Ohio ethics opinion that is overall consistent with Kentucky's requirements. It is offered here for the purpose of alerting you to the issues. Further research for specific situations is required.

- When there is no dispute as to funds in a lawyer's possession, the lawyer's ethical duty … is to promptly notify and deliver the funds to which a client or third person is entitled.
- When a lawyer knows there is a dispute between a client and a third person who has a lawful claim under applicable law to the funds in the lawyer's possession, the lawyer's ethical duty … is to notify both the client and the third person and to hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer is unclear whether a third person has a lawful claim and the client is disputing the third person's claim, the lawyer's ethical duty is to notify both the client and the third person and hold the disputed funds in a trust account until the dispute is resolved. The lawyer must promptly deliver all portions of funds that are not disputed.
- When a lawyer knows a third person's claim is not a lawful claim, a lawyer's ethical duty is to notify the client and to promptly deliver the funds to the client.

The opinion includes these examples of lawful claims of third parties to whom a lawyer holding funds has a fiduciary obligation:

- a valid statutory subrogation right as to the specific funds in the lawyer's possession.
- a valid judgment lien or other order of a court regarding the specific funds in the lawyer's possession.
- a written agreement signed by a client promising payment or authorizing the lawyer to make payment to the medical provider from the proceeds of a settlement or judgment. These agreements are known by various names, such as assignments, security agreements, or a doctor's lien.

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"If you are going through hell, keep going."
Winston Churchill

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Malpractice Avoidance Update
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"Spilling your guts is just as charming as it sounds."

Fran Lebowitz

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DEL O'ROARK

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Avoid Malpractice Claims and Third Party Liability by Knowing How to Resolve Disputed Claims for Client Trust Account Funds and Allegations of Improper Disbursement of Funds

- a letter from a lawyer to a medical provider promising to uphold the client's agreement to pay the medical provider for services from proceeds of a settlement or judgment. These letters are known as letters of protection. These letters in essence promise to honor an assignment made by a client, or as sometimes stated are said to honor a doctor's lien.
- a written agreement between an insured individual and a health-benefits provider, entered into prior to the payment of medical benefits, to reimburse the health benefits provider for any amount recovered through settlement or satisfaction of judgment upon claims arising from a third party's act.
- a secured claim by a creditor that is specific to the funds in a lawyer's possession. It is not a lawyer's responsibility to pay general unsecured creditors of a client, including judgment creditors who have not attached or garnisheed the funds. (Ohio Sup. Ct. Bd. Of Comm. On Grievances and Discipline Opinion 2007-7, 12/7/07)

It is recommended that when in any doubt about your obligation to disburse funds that you call the KBA Ethics Hotline -- that could save you money and avoid a malpractice claim.